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Emerging Actors and Evolutionary Perspectives

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1 INTRODUCTION

Co-operation between Tax Administrations is by no means a new phenomenon, at the same time, it centrality to the current international tax policy debate cannot be overestimated.

In this regard, the most striking feature of the current state of affairs is the "carsic" nature of this phenomenon in relation to said agenda. Another possible metaphor to be drawn from natural sciences that similarly aptly depicts the current moment has been suggested by a very influential recent policy paper:[1] not unlike the fossil history of most species, when examined in retrospective, the history of cross-border administrative tax co-operation appears to be characterised by long periods of stasis, followed, as the current moment, by phases of rapid and intense change.

[1] See Grinberg I., *Beyond FATCA: An Evolutionary Moment for the International Tax System*, Georgetown Law Commons (2012), at 1.

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Such a dynamic context, however, may also be prone to a chaotic environment which may generate difficulties in weighting and properly understanding the relevant initiatives and weighting the available alternatives against each other.

In this regard, this thesis has attempted at identifying the core, structural elements of the emerging trends to be witnessed in the area of administrative co-operation by developing an agenda for research which tries to go beyond the current fragmentation mirrored by this area emergence of apparently conflicting models.

In order to ensure an adequate focus to this study, the area of enquiry has been limited to information-based administrative co-operation, in relation to which some key issued, as listed hereinafter have been identified and addressed.

The starting point has been to determine why and to what extent most tax systems are nowadays increasingly dependent on foreign-sourced items of information. Research questions in this area concern the likelihood to reduce such a dependency (while nonetheless sticking to the currently mainstream worldwide taxation principle)and the possibility to rely on unilateral measures the existing extraterritorial “tax information gap”.

As it will pointed out in the first Part of this work, there would seem to be no viable alternative to the engaging in administrative co-operation in tax matters. This study then addresses the phenomenon of administrative co-operation introducing some stipulative definitions aimed at clarifying the different phenomena that can be mirrored in this specific area of international tax law and policy. In particular, an interdisciplinary approach combining a legal-historical perspective, an economic perspective and an international relations perspective has been adopted in order to investigate the inner dynamics of administrative co-operation in tax matters in relation to the issue of its synallagmatic dimension, inherent (lack) of reciprocity rationale and monitoring mechanisms.

Based on such a theoretical background, attention is focused on the most visible outcome of the current prominence attributed to exchange of information, namely the emergence and consolidation of the so called international standard(s) of transparency and exchange of information. In particular, this thesis aims at circumscribing the underlying determinants of said “international standard” and to underline possible inhherent inconsistencies and shortcomings. A further area of enquiry embraces an assessment of the work carried out by the body which has been entrusted with monitoring the effective implementation of the standards, namely the OECD-sponsored Global Forum on Transparency and Exchange of Information in Tax Matters.

Even once agreed that the “international standards” may act as a common denominator, there are however many instances where more advanced forms of administrative co-operation, currently not mandated by the said standard, can be observed. Areas of enquiries in this regard concern the room and the most suitable

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approach to promote other forms of exchange of information such as automatic exchange of information and spontaneous exchange of information and forms of enhanced co-operation such as tax examinations abroad and simultaneous tax examinations. A parallel line of enquiry concerns the institutional design underlying these form of co-operation that have been proven to go “beyond” the international standards. Among the research questions taken into consideration in this specific regard the following could be highlighted: is it advisable that the international standard be included in an ad hoc multilateral legal instruments or are there inherent benefits to the currently prevailing bilateral pattern? Can bilateralism and multilateralism be reconciled (e.g. under the form of the multilateralisation of a network of bilateral agreements, the integration of regional blocks or the possibility to combine a multilateral treaty with flexible bilateral protocols)?

In this regard, specific attention has been devoted to the experience of “administrative integration” which can be mirrored at an European level. Key aspects of the EU initiatives in this area, often very topical, have then been singled out in their light of their relevance to the global debate on administrative co-operation and as a valuable contribution to the global governance of transnational taxation.

Once ascertained the need to “go beyond” the international standard, it can easily be realised that many of the forms of co-operation thereby involved would need a very capillary implementation, that Tax Administrations may not be in a position to fulfill, especially in a cross-border dimensions; this study then points out at the involvement of the forms of international business most likely to handle great amounts of tax information, namely financial intermediaries, to be co-opted in the process of fulfilling the international transparency agenda. In this regard, this thesis argues that such a policy option is already a reality, with seeds to be found in experiences such as the US Qualified Intermediary System and the European Savings Directive and with prospective embodiments to be found in policy options such as the so-called “Rubik Agreements” promoted by Switzerland and the US Foreign Account Tax Compliance Act. In this regard, however, it can be observed that while there would seem to be no doubt concerning the involvement of international financial intermediaries into the transparency agenda, the modes in which such an involved should be concretised are subject to debate, as well exemplified by the dichotomy between the “Rubik system”, based on anonymous withholding and the “FATCA system” based on automatic exchange of information.

From a methodological perspective, each of the above described macro-areas covered by this thesis (which have been arranged in six different Parts, each composed of two or more Chapters) is ideally parted in:

- a“de iure condito” analysis, firstly concerned with a recollection and systematization of the existing legal framework (meant in the broadest possible

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meaning, as the increasing relevance of soft law in this area cannot be underestimated), with an emphasis of the evolutionary trends perceivable therein based on a diachronic legal-historical exam. The current systematised framework is then analysed, where appropriate, also through the filter of the existing economic literature (both theoretical and empirical) on the subject as well asthrough analytical tools and conceptual categories derived from international relations theory, an approach already largely experimented in general public international law but otherwise far less common in international tax law;

- a “de iure condendo” tax policy analysis aimed at setting forth proposals to tackle perceived current inconsistencies. In such sections, already existing models that appear particularly desirable are singled out or, alternatively, original solutions or solutions set forth by other authors in more topical studies are set forth. Tax policy proposals are then tested in the light of the perceived juridical inconsistencies of the “status quo” or of other competing models as well as under the prism of economic analysis and international relations theory.

Some final words should be devoted in this introduction to the rules of citation deployed in this work, where the editorial guidelines adopted in the publications licensed by the International Bureau of Fiscal Documentation have been adopted. For further accessibility abbreviations, including abbreviations of journals and other bibliographic references, have not been used even in the case of multiple citations of the same work. Finally, the author would like to remark that, as anticipated, the area of administrative co-operation is experience an acute evolutionary phase with multiple initiatives at the international, supranational and national level across different jurisdictions and institutions. In this regards, this thesis adopted as a temporal point of reference January 15th 2013.

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2 PART 1: TRANSPARENCY IN THE DOMESTIC AND CROSS –BORDER CONTEXT AND THE FOREIGN TAX INFORMATION GAP

2.1 Information and Tax Capacity. Some Introductory Remarks

Fiscal sociological perspectives suggest that state capacity depends on tax capacity: information is the key to the effective enforcement of taxation, as of other regulation.[2] Thus, it should not come as a surprise that the ability to obtain information has been essential to the extraction of revenues that produced the success of the "tax state"[3]. Although the informational needs of mass tax systems have been further expanded along with the phenomenon of economic globalisation, the key factor in their sustainability is most likely twofold and can be traced, on the one hand to the co-operation between the administrations responsible for ensuring a steady flow of revenue to said tax States and corporations and, on the other hand, on the development, not least enabled by recent bureaucratic and technological developments, of a significant capacity for said administrations to gather and process information in a meaningful way: "success stories" to be pointed out in this regard can be found in "mass" employee withholding system on the one hand andin the attribution of tax information numbers, computerised data - matching utilising information from corporations and banks.

Besides such an ex ante approach, national tax systems were expanded so as to grant very wide information gathering powers to Tax Administrations, empowering Tax Administrations to demand information from taxpayers, or third parties (such as banks, employers or contractors) about their own or others' income, assets and financial transactions.[4]

The informational needs of Tax Administrations have increased pari passu along with the increasing internationalisation of economic activities especially in all cases where jurisdictions adopted a worldwide taxation approach: namely States define their tax jurisdiction in an extraterritorial way, by taxing worldwide income of residents and domestic source income of non-residents, whereas their powers to investigate and to

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[2] See International Business Taxation as a Study in the Internationalization of Business Regulation, London, Weidenfeld and Nicolson, 1992, at 257.

[3] Hood C., *The 'Tax State' in the Information Age,* Paul T.V., Ikenberry G., Hall J. (Eds) The Nation-State in Question, Princeton, Princeton University Press, 2003, 213; J. Schumpeter, The Crisis of the Tax State (1918).

[4] A reasonably updated, although prior to the entry into force of Directive 2011/16/EU, and extensive survey is to be found in and Seer R., Gabert I., *Mutual Assistance and Information Exchange*, Amsterdam, IBFD, 2010

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recover taxes stop at their borders. Although administrative co-operation is not limited to exchange of information but may encompass, in particular, assistance in recovery. In this regard, it is intuitive to remark that it is much more difficult for Tax Authorities to obtain the information needed to administer the concerned tax system when income, dealings, assets or taxpayers are across borders. Since the '70s, increased mobility of investment, tax residence and labour, and a growing number of what used to be defined as "non-cooperative" jurisdictions has exacerbated the problem.

This work is largely concerned with the ways a variety of actors, originally States, then, as it will be analysed in greater detail further in this work, networking administrations and, more recently, global financial institutions, acting more or less knowingly as cross-border tax intermediaries, have been instrumental in addressing these issues.

The present Part of this work is however specifically concerned with tracing the contours of the aforementioned informational needs in face of an increasingly globalised pattern of economic transactions and which are the means available to States and administrations to satisfy such needs by intervening on leverages that are entirely in their prerogative and that do not depend on co-operative efforts with other jurisdictions.

On the one hand, the present Part of this thesis introduces distinctions and definitions relevant for the subsequent developments of this study, while, on the other hand, it explores possible alternatives to international administrative co-operation in the purview of the gathering of tax information. Finally, it stresses the relevance of the standard of "transparency" as a cornerstone for the whole system, either when investigated in its possible (although admittedly limited scope) of unilateral action or in the currently prevailing paradigm of administrative co-operation.

2.2 General Taxonomy of the Informational Needs of Tax Administrations

Although the information that Tax Authorities need to keep the income tax running smoothly defies easy categorisation[5], it is possible to articulate the information gathering activity of Tax Administrations, that ought to be understood within the context of a much broader phenomenon typical of any administration[6], in two main phases.

On the one hand, it could be argued that Tax Administrations are engaged in an activity which could be defined as "observation"; on the other hand, and possibly more intuitively, Tax Administrations are involved in "investigation" activities.

[5] Dean S., *The Incomplete Global Market for Tax Information*, 49 Boston College Law Review 2008, at 614
[6] See, in this regard, Levi F., *L'attività conoscitiva della Pubblica Amministrazione*, Torino, Giappichelli, 1967

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Observation relies on ex ante information reporting requirements to make it possible for Authorities to spot non-compliance without taking any affirmative measures to collect information about specific taxpayers or their activities.

While ex ante information acquisition techniques provide authorities with a great breadth of information, they are clearly not a substitute for ex post information acquisition techniques. Namely, by focusing on a specific taxpayer or transaction, perhaps identified as particularly critical through observation, Tax Authorities can use their investigatory powers to assemble a picture of a taxpayer's behavior with the depth necessary to prove and, if necessary, prosecute taxpayer non-compliance.

Observation serves two interrelated purposes, on the one hand, it is instrumental in affirmatively discouraging noncompliance, on the other hand it directly enable Tax Authorities to detect and identify non-compliance. Observation is however entirely reliant on cross-checking as, when third-party information capable of verifying that reported by taxpayers is not available from employers, financial institutions, or other intermediaries, self-reporting becomes far less reliable: namely, if taxpayers believe that the government has been notified that they have received payments that almost certainly represent items of taxable income, taxpayers have little to gain by failing to report those amounts but whereas a taxpayer is confident that there would be no room for such cross-checking, incentives to full compliance with reporting obligations drop in a dramatic fashion.[7]

As a result, by encouraging compliance, ex ante information reporting requirements not only help authorities to correct taxpayer omissions but also limit the need to make such corrections.[8]

Mere observation would not however seem sufficient to prevent pathological situations of omitted and underreporting and even less so sophisticated behaviours put into place in particular by corporate taxpayers, such as aggressive tax planning. Observation then needs to be supplemented by *ex post* acquisition of information in the form of investigation. Unlike observation, which is directly tied to the implementation mechanisms of advanced mass tax systems, investigations operate on an *ad hoc* basis, typically on the grounds of a risk-based approach aimed at identifying the most sensitive categories of taxpayers. At the same time, when the background observation system is robust enough, it cannot be excluded that verification can be carried out in a more sophisticated fashion as a direct result of critical outcomes deriving from cross-checking activity conducted at the observation level.

[7] Empirical observations have not failed to confirm such an intuitive conclusion. In particular, results of a survey on US taxpayers suggest that when third-party information reporting is unavailable income reporting compliance falls from above ninety percent to below fifty percent. See Lederman L, *Statutory Speed Bumps: The Role Third Parties Play in Tax Compliance*, 60 Stanford Law Review (2007), at 698.

[8] Ibidem

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Under many respects, the above exposed dichotomy between observation and investigation can be seen as a theoretical rather than a practical construct, due to the circumstance that these two activities constitute the extreme poles of a continuum. Namely, in some jurisdictions where the demographic and organisational structuring of the fold of taxpayers presents some peculiar features and where the Tax Administration is endowed with relative capacity, the distinction between observation and investigation is blurred to the benefit of hybrid approaches, epitomised in peculiar experiences such as, the so-called horizontal tax monitoring[9] and the establishment of a programme of "enhanced tax relationships".[10]

Nonetheless, the earlier exposed binary taxonomy centered on the distinct, although not mutually exclusive, phases of observation and investigation encompass is of particular relevance when transposed in the cross-border dimension of the information gathering activity of Tax Administrations. Namely, with reference to observation, the information sought after for cross-checking purposes may lie outside of the territorial boundaries within which Tax Administrations are ordinarily confined; similarly, the carrying out of investigations in relation to taxpayers holding cross-border activity may likely require the gathering of specific items of extraterritorial information.

It is well known that the tax systems of most developed economies nowadays have adopted the so-called worldwide taxation principle.[11] In this regard, information gathering activities may, as a matter of fact, incorporate items of extraterritorial tax information even in relation to tax obligations that have a purely domestic dimension.

Such a factual circumstance generates a need for extraterritorial tax information; as this information is not however as easily in the prerogative of Tax Administrations as information retrievable within the borders of the same State, such a need has also originated an increasing expansion of what could be defined as "exterritorial information gap",[12] whose proportions are increasingly magnified along with the increasing prevalence of cross-border economic activity.

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[9] This experience has been particularly developed in the Netherlands. For an updated description and analysis see Van der Heel Van Dijk L., Pheiffer M., *A Tailor-Made Approach to Fiscal Supervision*, 66 Bulletin for International Taxation 10 (2012), at 578.

[10] See in this regard, J Freedman, G.Loomer and J.Vella, Analysing the enhanced relationship between corporate taxpayers and revenue authorities: a UK case study, Lynne Oats (Ed), Taxation. A Fieldwork Research Handbook, Oxford, Routledge, 2012.

[11] For an updated survey on current policy issues on the topic of worldwide (residence-based) taxation, see Fleming J Peroni J. R.J., Shay S.E., *Perspectives on the Worldwide Vs. Territorial Taxation Debate*, Tax Notes International, 1 (2010), at 75

[12] The neologism is derived from the expression "international tax gap", which has been used to refer to the difference between the expected revenue that should be generated by foreign taxable income and the actual tax reported and recovered by cross-border inclined taxpayers. See Avi Yonah R., Guttentag J., *Closing the International Tax Gap*, Sawicky M. (Ed.), Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration, Washington, EPI, 2005, at 99.

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In the following sections of the present Part of this thesis , the possible room for an autonomous filling of said informational gap, that is, based on unilateral approaches, is investigated from both a theoretical and an implementation perspective.

2.3 Domestic Statutory Mechanisms for the Gathering of Extraterritorial Tax Information

2.3.1 Voluntary Disclosure Initiatives

Several countries are currently operating voluntary compliance programmes. Such rules or programmes provide an opportunity to facilitate compliance in a timely and cost effective manner, saving costly and contentious audits, litigation and criminal proceedings. Voluntary compliance initiatives must walk a fine line between providing sufficient incentives for those engaged in non-compliance to come forward and not rewarding or encouraging such conduct.

Under a voluntary disclosure programme, eligible taxpayers would have to report omitted taxes in return of reduced penalties or reduced likelihood of prosecution upon detection of their tax evading behaviours: in this regard, voluntary disclosure programmes typically involve a form of tax amnesty.[13]

The aims of an offshore voluntary compliance programme are usually to deliver cost-efficient improvements in short-term tax revenues as well as to improve longer-term tax compliance. Sometimes a programme also aims at encouraging the repatriation of capital invested abroad.

The terms of the programme usually involve a limited-time offer by the government to a specified group of taxpayers to settle undisclosed or unpaid tax liabilities for a previous period in return of defined concessions over civil or criminal penalties. In some cases there are also concessions over the amount of tax and/or interest payable or over the period of back years for which unpaid tax will be demanded.

In a number of cases, in particular those where assets were hidden abroad by a parent or grandparent, the taxpayer may not be in position to provide complete records. While much will depend on the facts in each individual case, guidance could include both examples and statements of principle.

Taxpayers have concerns that a disclosure will give rise to further investigation of their affairs either as an immediate response to the disclosure or that it will affect their risk profile and thus future compliance monitoring and audits. Many Tax Authorities will

[13] See Lederman L., *The Use of Voluntary Disclosure Initiatives in the Battle Against Off-Shore Tax Evasion*, Indiana University Maurer School of Law Research Paper 200 (2012), at 2.

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already have internal guidance and procedures that stipulate how different degrees and types of non-compliance impact on further compliance monitoring.

2.3.2 Unilateral Gathering of Extraterritorial Tax Information

Tax Authorities rely primarily on informal means of collecting information including voluntary disclosure as discussed in the above Paragraph. On the other hand, officials regard the use of formal compulsory procedures as a last resort.

In this regard, there is no clear consensus concerning how far it is permissible for official enquiries to be pursued abroad unilaterally. Provided that such inquiries involve no compulsion or breach of local laws,[14] they may be considered acceptable. Some States consider that a State official is not barred from making in another State the same inquiries as any private person could make, although some jurisdictions, such as Switzerland, contend that foreign officials may not exercise any acts ex officio within their own territory without a previous permission.[15]

Some Tax Administrations, such as the Internal Revenue Service, publish guides for internal purposes explaining the type of information publicly available in each Country and differentiates between Countries where voluntary and public information may be freely sought and those where such inquiries are not in the prerogative of an IRS agent without prior permission from the relevant local State Officials.[16]

Officials may also pursue their inquiries by requesting information from persons within their own territory even if that same information is located abroad or held in a foreign entity. Powers to require production of such information have commonly been enacted, in particular to facilitate the enforcement of provisions against international avoidance, such as transfer pricing rules or laws taxing income sheltered in foreign intermediary companies or trusts.

Some Tax Administrations, such as the US International Revenue Service also make extensive use of informants and take the view that there are no restrictions on the development of offshore informants. In this regard, the IRS is known to co-operate with criminal law enforcement agencies focusing on money-laundering. Some of these joint

[14] As it will addressed in the final part of this thesis, such a characteristics would not seem to be shared by the new programme initiated by the United States under the “Foreign Accounts Tax Compliance Act” (FATCA).

[15] Akehurst M., *Jurisdiction in International Law*, XLVI British Yearbook of International Law 3 (1972), at 147.

[16] IRS, Sources of Information from Abroad, Doc. 6743. A summary is retrievable at the following website: http://www.irs.gov/irm/part4/irm_04-060-001.html

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enforcement activities have also reportedly involved undercover operations, including the obtainment of evidence concerning bank clients in off-shore jurisdictions.[17]

Such a practice also involved rather questionable “tax intelligence” operations, in some cases involving irregular acquisition of items of information.[18] For instance, as far back as 1972, an IRS informant developed a close relationship with a Bahamian banker, which included arranging a date for him during a visit to Miami; while the Bahamian banker was absent, the informant entered his hotel room and copied a list of bank clients from his briefcase.[19]

This and other similar later approaches are very close to some episodes that took place in recent years in Europe, even though in the latter cases, it appears that it was a matter of whistleblowers (in other instances defined as “unfaithful employees”) employed at financial institutions in various off-shore jurisdictions that proceeded to spontaneously download data concerning bank accounts held by non-residents and transmit such information to the Tax Authorities of the State of residence of the investors.

The two more widely reported episodes in this regard have involved the Liechtenstein based LGT bank and the Geneva Branch of the HSBC.[20] In both cases an employee competent with regard to the information system of the respective banks offered to sell copies of various lists of clients (in the range of thousands and thousands of names) holding bank accounts at the respective financial institutions to the tax administrations of Germany and France.

Not unlike the more far dating US experiences, the episodes gave way to a stream of case law, inquiring the possibility of using the stolen data as a valid ground for the issuing of tax assessments. In Italy, the matter has so far been solved in the negative, so that tax assessments issued on the basis on the aforementioned data have been declared void[21] due to their being at variance with the Taxpayers’ Bill of Rights,

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[17] Picciotto S., *International Business Taxation as a Study in the Internationalization of Business Regulation*, London, Weidenfeld and Nicolson, 1992, at 262.

[18] At the same, although the conduct described in the following Paragraph was deeply criticised as a “flagrantly illegal search”, the evidence thereby gathered was nonetheless considered admissible by the Supreme Court as the theft of documentation had been carried out by a third party and, consequently, it did not entail a violation of the defendant’s constitutional rights. See Payner Vs. US 1980, reported by Picciotto, ibidem.

[19] Reported by Crinion G.P., *Information Gathering on Tax Evasion in Tax Haven Countries*, 20 International Lawyer (1986), at 1209.

[20] The cases have received vast coverage, especially on Italian legal journals, due to the circumstance that the French and German Tax Administration had spontaneously forwarded lists containing the names of Italian residents to the Italian Tax Authorities. See in particular, Bernasconi P., *Berlin vs. Vaduz - Effetti fiscali del trafugamento di informazioni dal Liechtenstein a favore delle autorità fiscali di paesi dell‘Unione Europea*, Diritto del commercio nternazionale (2008), at 259.

[21] See Commissione Tributaria Provinciale di Mantova, sent. n. 137 del 27 maggio 2010 and Commissione Tributaria Provinciale di Milano, sent. n. 367 del 15 dicembre 2009 in relation to the LGT case. See Commissione Tributaria Provinciale di Como, sent. n. 188 del 15 novembre 2011 in relation to the HSBC case.

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and in particular with the provision establishing an obligation of attaching to the tax assessment any document referred to in the motivation of the same assessment.[22]

The conclusions reached by Tax Courts in relation to the same information have however been different. In relation to the list of clients of the Geneva Branch of HSBC, French case law has offered different answers to the possibility of using such a list to validly motivate tax assessment; namely, the Court of Appeal of Paris[23] has decided in the negative and the Court of Appeal of Chambéry[24] has pronounced itself in the affirmative. In Germany, the Bundesverfassungsgericht[25] has decided that the list of clients stolen from the LGT bank and sold by an employee of the same bank to the German Tax Authorities can validly constitute the ground of a legitimate tax assessment.

The parallel decisions reached by different national courts in relation to an analogous factual pattern constitute an interesting example from the point of view of comparative case law. At the same time, regardless of the different conclusions thereby reached, it seems to this author that the main pitfall of the above described tax intelligence operations is to be found in the circumstance that the elements of proof so acquired would need to be further verified and in this regard, some form of co-operation by the host State would nonetheless be needed lest the resulting procedure potentially be in breach of Art. 6 of the European Convention on Human Rights which establishes a right to fair trial.[26] In particular, such a right might be endangered when a taxpayer is condemned on the sole basis of elements of proof whose acquisition might not have been legitimate and against whose use the defendant has filed a complaint.[27]

2.4 The Role of Comity

A parallel area of inquiry would concern the willingness of States to provide information unilaterally, at least under specific circumstances, to other members of the international Community; a very interesting area of enquiry in this regard is offered by the judicial doctrine of “comity” which could serve as a term of reference for developing a framework to administrative assistance in tax matters in the absence of international

[22] Art. 7 of Law 27th July 2000, No. 212.

[23] Cour d’Appel de Paris, Pôle 5 – Chambre 7, Ordonnance du 8 Février 2011.

[24] Ordonnance du 22 Mars 2012.

[25] Bundesverfassungsgericht, Decision of 9th November 2010, No. 2101/09, retrievable at the following website: http://www.bundesverfassungsgericht.de/entscheidungen/rk20101109_2bvr210109.html.

[26] The possibility of extending the safeguards provided by the European Charter of Human Rights to specific domain of taxation has been the subject of some controversy, also due to alternate conclusions reached on the point by the European Court of Human Rights. The most comprehensive study to date on the interrelations between Human Rights and Taxation can possibly be found in Kofler G., Poiares Maduro M., Pistone P., *Human Rights and Taxation in Europe and in the World*, Amsterdam, IBFD, 2011.

[27] See , Bernasconi P., *Berlin vs. Vaduz - Effetti fiscali del trafugamento di informazioni dal Liechtenstein a favore delle autorità fiscali di paesi dell‘Unione Europea*, Diritto del commercio internazionale, 2008, 266, footnote No. 42.

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legal obligation. The notion of international comity is not a formal doctrine of international law; rather, it is based on a mutual respect among sovereign nations and demonstrated through "self-imposed limitations on the scope of extraterritorial assertions of authority."[28]

The basis for comity ultimately lies in the perception that a State should forbear from presenting the citizen of another sovereign with the alternative of violatingeither its laws (i.e., by refusing to obey a court order to present records) or the laws of the citizen's sovereign, which from a tax perspective, typically coincides with its State of tax residence. As such, even in the absence of a specific treaty encompassing administrative assistance, a generalised adherence to the rule of comity transposed in the realm of taxation would imply that States should not disregard the informational needs of other States as long as these needs are functional to the carrying out of the ordinary information gathering activities overseen by the respective Tax Administrations.

However, comity has typically been limited to the provision of judicial assistance, so that its application in the pre-contentious phase would be of limited import.

At the same time, when focusing attention on the contentious phase, the underlying legal instruments of assistance would feature some inherent shortcomings, resulting in outright inapplicability, when it comes to tax.

For instance, letters rogatory are the oldest established procedure for obtaining information in a foreign jurisdiction. Based on international comity, nations ordinarily grant the underlying requests absent unusual circumstances. Although letters rogatory can produce information, several drawbacks limit their value.

The foremost limitation from a tax information gathering perspective is that letters rogatory are typically a judicial procedure so that administrations are typically not entitled to file a letter rogatory outside cases that have undergone the adjudication phase.

Even under such a scenario, it can be observed that few specific procedures exist with respect to letters rogatory. [29]

While some nations require a formal request through diplomatic channels, others do not. Even when the letter can be directly sent from the domestic court to the foreign court, the procedure still takes time. To discover the correct procedures requires litigants to expend not only extensive time but also money, a second drawback to the procedure.

Third, the letter itself must be simple enough to be understood but sufficiently complete to convince a foreign judge to act.

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[28] Maier H.G., *Jurisdictional Rules in Customary International Law*, Meessen K. (Ed.), Extraterritorial Jurisdiction In Theory And Practice, London, Kluwer Law Internationale, 1996, at 64.

[29] See Todd Jones C., *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 Northwestern Journal of International Law and Business (1991-1992), at 454.

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For these reasons, letters rogatory are often used as a last resort when evidence cannot otherwise be compelled, especially in the case of bank records protected by foreign law.

It can be remarked that the Hague Evidence Convention has, for some nations, supplanted the use of letters rogatory. However, most nations interpret the Hague Convention as not applying to criminal, government fiscal, or administrative matters, “as well as other cases in which the government is the plaintiff”.[30]

For the above reasons it can be observed that the doctrine of comity, as ordinarily understood and applied in the international legal order does not appear as a suitable framework of reference to address the informational needs of Tax Administrations.

In conclusion, neither unilateral approaches relying on domestic legislation or autonomous extraterritorial action nor spontaneous compliance with foreign requests typically ensured in other areas of international law by comity can enable Tax Administrations to gather the much needed extraterritorial tax information.

In this regard, the only viable policy alternative would seem to rely on resorting to forms of administrative co-operation between Tax Administrations, whose dynamics are investigated in relation to the institutional and legal framework of reference, the underlying standards and rules and the concerned actors in the following Parts of this thesis.

In any case, information based administrative co-operation postulates that information relevant for tax purposes not only be exchanged but also be available and in the prerogative of the same administration that may be called to engage in co-operation in the form of exchange of information and other enhanced exercises of assistance.

In this regard, the last and following Chapter of the first Part of the present study is devoted to a critical recollection of the international standards of transparency as developed within the context of the Global Forum for transparency and exchange of information in tax matters·

2.5 The Emerging Paradigm of Transparency

2.5.1 Source and Scope of the Notion of Transparency

The reference to “exchange of information for tax purposes” which constitutes part of the official denomination of the Global Forum and which can be detected in all its works may give raise to some interpretative doubts when it comes to implementation issues and to understanding which of the many standards of information shall be

[30] Ibidem.

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awarded precedence; at the same time, even on a mere intuitive level, the expression is definitely familiar as it is still possible to trace it back to the earliest work of the OECD and, even further, to the works of the Committee of Technical Experts on Double Taxation and Tax Evasion of the League of Nations .

On the contrary, the genesis other word constituting the dyad under which the Global Forum operates, namely the notion of "transparency" is far more recent and, to some extent, more obscure and, quite surprisingly, cannot apparently be traced to most of the policy documents the same Global Forum indicate as the source of the international standards.

The word "transparency" is not deployed to date in the OECD Model Convention and no reference thereto has been introduced even in the Commentary to Art. 26. The expression "transparency" is also not be found in the 2002 OECD Model T.I.E.A., although the latter is to be seen as the outcome of the direct forerunner of the current Global Forum. Similarly, Art. 26 of the UN Model Convention and the related Commentary nowhere mention "transparency". Likewise, the word "transparency" is also absent from the Reports issued by the Joint Ad Hoc Group on Accounts devoted to the definition of agreed standards in the availability and reliability of information (and in particular, accounting information).

In order to trace the introduction of the word "transparency" in the international tax cooperation debate, we then need to refer to statements and declarations having a preponderantly political nature. In particular, the emergence of the dyad "transparency and exchange of information for tax purposes" can be traced back to the statements issued upon the meeting of Finance Ministers and Central Bank Governors issued at the 2004 Berlin meeting of the G20, where it was affirmed that: "The G20 therefore strongly support the efforts of the OECD Global Forum on Taxation to promote high standards of transparency and exchange of information for tax purposes and to provide a cooperative forum in which all countries can work towards the establishment of a level playing field based on these standards."

Ever since, references to transparency started being incorporated in the "Level Playing Field" reports which have started being published on an annual basis by the Global Forum in 2006.

In these documents, no general definition of transparency is provided nor its constituting elements are listed. It reiterated, on the other hand, that "transparency and effective information exchange are closely linked concepts" and that "lack of transparency prevents effective exchange of information".

Nonetheless, "transparency" never seems to be addressed on a stand-alone basis but it is always paired with exchange of information and in a functional link to the latter. The only instances where transparency is addressed separately is in connection

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to the implementation of customer due diligence requirements in pursuance of Financial Action Task Force (FATF) standards .

It would then seem that transparency should be seen as the first moment of a broader administrative cooperation framework and should cover in particular those items that in the Terms of Reference drawn for peer reviews, which will be examined in the following section, are defined as “availability of information” and “appropriate access” thereto.

2.5.2 The Paradygm Set forth by the Global Forum

Although obligations concerning the keeping of records and documents is typically regulated by domestic laws with requirements that vary widely from Country to Country, the recent activity of the Global Forum on Transparency and Exchange of Information has put emphasis on the exstence of minimum transparency requirements across jurisdictions. These requirements are investigated in the following Paragraphs as they epitomise a possible developing common core in an area that is also notable as it is not limited to a tax policy agenda but rather stems from broader initiatives involving areas such as ownership and accounting disclosure and anti-money laundering regulations.

2.5.2.1 Availability of Information

A first element of the international standard of transparency (Element A.1) elaborated by the Global Forum concerns the availability of ownership and identity information, the key aspects are found in the availability of ownership information for competent Authorities, including the identification of holders of bearer shares, the identification of partners in partnerships and the identification of settlers, trustees and beneficiaries of trusts, founders and members of foundations. It is also expressly foreseen, as a separate element, that jurisdictions should have in place effective enforcement provisions to ensure the availability of information, one possibility among others being sufficiently strong compulsory powers. With regard to the territorial scope of application of such powers, it should extend to potentially covered all the relevant entities, defined as those that are formed under the laws of the jurisdiction or with a sufficient nexus to it, including tax residence.

A further element of the international standard (Element A.2) concerns the reliability of accounting records for all relevant entities and arrangements, whose key aspects are found in the suitability of accounting records to correctly explain all

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transactions, to enable that the financial position of an entity can be correctly determined at any time and to allow for the preparation of financial statements. Another relevant aspect in this respect is that the supporting documentation (such as invoices and contracts) be kept and made available so that details concerning the sums of money received and expended, the sales and purchases carried out, the assets and liabilities of the relevant entity or arrangement can easily be traced. It results from peer reviews that a best practice in this area is to be found when accounting documentations fulfilling the aforementioned requisites be kept for at least five years.

A third element (Element A.3) concerns the availability of banking information for all account holders, the key aspect is found in the circumstance that banking information includes all records pertaining to the accounts as well as to related financial and transactional information.

From a legal perspective, a fundamental distinction that may be applied in order to (re)-aggregate the different terms of reference used in the peer reviews is the following:

- "public Information" (information which is immediately retrievable by anyone. This kind of information has great procedural relevance as public information is not subject to proof per se);
- information made publicly available;
- information that could be made publicly available.

2.5.2.2 Access to Information by Tax Authorities

Besides availability of information, which is an agenda sporting policy concerns common to other areas of regulation, as it is mirrored by the non-tax source of most of the above reported requirements, the international standard elaborated by the Global Forum is also concerned with the more strictly tax-geared criterion of access to information by Tax Authorities.

In this regard, the key requirement (Element B.1) is centered on the ability for competent Authorities to have the power to obtain and provide information that is the subject of a request from any person within their territorial jurisdiction, the key aspects are found in the following:

- the power to obtain and provide information held by banks, other financial institutions and any person acting in an agency or fiduciary capacity;
- the power to obtain and provide accounting records for all relevant entities and arrangements;

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- the determination to use all information gathering measures to obtain the information requested, even if the absence of a domestic tax interest;
- the applicability of effective enforcement provisions to compel the production of information;
- the determination not to turn down a request of information based on secrecy provisions.

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3 PART 2: ADMINISTRATIVE CO-OPERATION IN TAX MATTERS. AN EVOLVING POLICY AND LEGAL FRAMEWORK

3.1 Sovereignty, Territoriality and Administrative Assistance in Tax Matters

Based on an international law custom[31], it would appear that States have no chance *per se* of carrying out assessments or collection of taxes in a foreign jurisdiction[32]. The only kind of co-operation and assistance which is admissible within this setting is that allowed by the “host State” and carried out along with or by the Tax Authorities of the latter. However, in the past, the majority approach to the subject has been to deny even this form of assistance in accordance with the widespread principle stating that one State would not enforce the tax laws of another[33].

National Courts have subsequently been instrumental in the setting of this principle[34], both in a common law and in a civil law environment. This applies also to the record of Italian Court decisions; for instance, in 1932 the Court of Appeal of the City of Genoa denied the validity of the claim of the Greek Consulate against a Greek citizen with reference to the avoidance of inheritance taxes carried out by the latter by transferring goods into the Italian national territory[35]. The claim of the Greek Tax Administration was rejected on the grounds that, otherwise, the former would have been in such a position to carry out a function bound by national sovereignty such as that to levy and to collect taxes without its own territory. As a direct consequence, recognition of taxes assessed abroad has often been denied in national court proceedings[36].

While the above conclusions are still topical, in many Countries, in relation to assistance in the area of the recovery of tax claims, such a scepticism appears somewhat outdated when considering the great surge in the number of international

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[31] For a general international law assessment of the issue, reference can be made, inter alia although with a preference to this author due to their express mentioning of international tax law perspectives, to Mann F.A., *The Doctrine of Jurisdiction in International Law*, Recueil des Cours 111 , 1964, at 9 and, in more recent scholarship, to Jeffery R.J., *The Impact of State Sovereignty on Global Trade and International Taxation*, at 118.

[32] Mann F.A., The Doctrine of Jurisdiction in International Law, Recueil des Cours 111 , 1964, at 129.

[33] This also came to be known as the “Mansfield Rule” (or “Revenue Rule”), formulated back in the Eighteenth Century: “One State does not take into consideration the fiscal laws of another”. This proposition was expressed for the first time by a British Lord, Lord Mansfield, with reference to international trade law cases such as *Boucher v. Lawson* and *Holman v. Johnson*.

[34] Persano F., *La cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria*, Torino, Giappichelli, 2006, at 22.

[35] Genoa Court of Appeal, decision of 14th January 1932, Lambertini c. Mavroudis, reported by Sereni E., *Sulla probabilità innanzi all’autorità giudiziaria italiana di azioni nascenti da rapporti in cui è parte uno Stato straniero*, *Riv. dir. int.* , 1932, at 434.

[36] For a common law approach to both subjects see, *inter alia*, *Re Delhi Electric Supply and Traction Co. LTd* of 1955, in the *All England Law Reports*, 1955, p.292-308.

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legal instruments regulating administrative assistance in tax matters in relation to audit and assessment activities, often under the form of exchange of information.

It seems then worthy to enquire whether the consolidating body of standards in the area of exchange of tax information may find a backing in international law. In this regard, it could be observed that along with an approach denying any international law custom supporting administrative assistance among States in the field of taxation, there are also some interpreters advocating that even though there is no custom compelling mutual assistance, the lack of an explicit prohibition is enough to set a new custom encompassing such a practice. In this respect, the aversion of States to co-operate in cross-border tax-matters would not be grounded on any specific principle of international law, but rather on domestic law policies. More specifically, the reasons opposing to international mutual assistance in the field of taxation would be based on practical difficulties[37]. As anticipated, however, many of these practical difficulties relate only to assistances in areas such as the collection of tax claims. Moreover, as a response to the objection that, by trying to assess or to collect taxes abroad, even with the consent of the "Target State", the principle of national sovereignty is violated, it has been argued that, by this kind of claims, the Applicant State is simply trying to safeguard a credit by prosecuting a debtor who has its residence or domicile in another State[38]. In this respect, there would be no breach of sovereignty as the Applicant State is subjected to the decisions of the Applied State. Each State is then free to determine how to concretely co-ordinate its actions with that of other States, either by acting on behalf of the latter or, less likely, letting the latter act in its own place.

Following the steps of a globalised economic environment, States seem to have left behind the early cautions in carrying out co-operation in the field of taxation. Nonetheless, some restraints to the practice of international co-operation in the field of taxation are still there to be remarked. Moreover, most of the attempts in this respect seem to have followed a trend common to other aspects of international tax law and have been carried out resorting to bilateral legal instruments; however, the very nature of problems such as international tax fraud and tax evasion would be best dealt with by adopting a multilateral approach.

It has already been underlined how mutual assistance, particularly when it takes the form of information exchange, is the best suited tool to combat international tax fraud and tax evasion and the consequent erosion of tax bases.

The *status quo* of exchange of information is one of predominance of the bilateral approach to the subject. This situation, along with the drawbacks that have

[37] Mann F.A., *The Doctrine of Jurisdiction in International Law Revisited after Twenty Years*, in *Recueil des Cours*, 1984-III, at 134.

[38] Persano F., *La cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria*, Torino, Giappichelli, 2006, at 23.

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earlier been cited, allow Contracting States to act with a remarkable flexibility, which could result in a wider output of consultation processes. If Contracting States know that they are not to abide to any superior authority or benchmark and that they can oppose limitations to the actual exchange of information at any time, they will likely embark more freely on this kind of actions. In this respect, current practices in the field of information exchange have the main advantage of being flexible.

At the same time, some major practical restraints still threaten a more widespread application of information exchange. Exchange of information, despite the great benefits which have arisen from information technology, still is a burdensome and time-consuming process. Tax Authorities of the Applied State have to deal with documentation written in a foreign language in accordance with different regulations and different procedures. This problem is particularly soaring in developing Countries, which are often unable to provide efficient assistance. Such an asymmetry can lead to serious consequences and even a decisional paralysis, since a “reciprocity clause”[39] is often incorporated in the various legal instruments dealing with information exchange.

Along with practical problems, mutual assistance can also give rise to political problems, administrative problems and problems of equity[40].

From a taxpayers’ standpoint, exchange of information in tax matters may be seen as a possible threat to their rights to confidentiality and, more broadly, as an unsettling scenario. In this respect, a more thorough safeguard of the taxpayers’ position should be high on the agenda of Tax Administrations when negotiating or revising information exchange clauses and agreements.

All the aforementioned issues, and especially the interaction between the horizontal dimension, that is, the relationships between States, and the vertical dimension, that is, the relationship between States and taxpayers, constitute in the view of this author the main challenge open to the consolidation and worldwide implementation of the new standards of administrative co-operation in tax matters.

3.2 Defining Moments in the History of Administrative Co-Operation in Tax Matters

3.2.1 Historical Origins of the Current Framework for Administrative Assistance in Tax Matters

As it has been acutely pointed out, “legal history is a story which cannot be begun at the beginning”[41], thus, the historical origin of administrative assistance in tax

[39] This aspect will be more thoroughly analysed in the following Part of this work. For a quick reference see Para. 11-13 of the OECD Commentary on Art. 26 concerning the exchange of information.

[40] U.N., *Coopération Internationale en matière fiscale. Rapport du Groupe spécial d’experts de la coopération internationale en matière fiscale sur les travaux de sa deuxième réunion*, New York, 1984, at 13.

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matters under the form of exchange of information cannot, in all likelihood, be traced to a single international agreement.

What can however be concluded even upon a first enquiry is that administrative assistance in tax matters appears having a long history and, quite surprisingly, even longer that of the currently predominating treaties dealing with the prevention of international double taxation.

Namely, documentary evidence suggest that the first bilateral tax treaty concerned information exchange. Literal archetypes in this respect can be found in the treaties concluded by Belgium with its neighbouring Countries, France[42], the Netherlands[43] and Luxembourg[44]: all these treaties[45] were, quite surprisingly, already based on what could be defined with a partial anachronism as a "regional model" developed by the Authorities responsible for the application of registration and stamp duties and chiefly involved the exchange of documents and of information in order to ensure the correct application of these duties in relation to cross-border transactions.[46] Even though this study is not directly concerned with assistance in collection, it is interesting to remark that those treaties already included provisions dealing with assistance in the collection of tax claims.

From a policy perspective, it is also worth underlying that the treaties under scrutiny pre-date the emergence of the income tax as the backbone of mass fiscal systems and were developed almost a century ahead the emergence of an emphasis on worldwide taxation as a tool to ensure the proper application of the ability to pay principle.[47] Views according to which administrative assistance in tax matters is

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[41] Plucknett T., *A Concise History of the Common Law* , London and Boston, Little, Brown and Co., 1956, at 3.

[42] Concluded on 12th August 1843.

[43] Concluded on 24th May 1845.

[44] Concluded on 11th October 1845.

[45] The texts of the cited treaties are all contained in a United Nations publications, namely the Third Volume of the "International Tax Agreements: World Guide to International Tax Agreements 1843–1951". The presentation of treaties follows their chronological order, thus it appear that the 1843 Treaty between Belgium and France constitutes the first recorded example of a tax treaty. The United Nations publication is extremely comprehensive but has the limit of covering treaties that exclusively dealt with taxation. It cannot be excluded that other general commercial treaties concluded before 1843 also included provisions dealing with tax issues. For further references on possible supplementary sources of documentation in relation to these treaties see S. Jogarajan, Prelude to the International Tax Treaty network: 1815-1914 Early Tax Treaties and the Conditions for Action (2011) 31(4) Oxford Journal of Legal Studies 687, footnote No. 38.

[46] For further insights on early Belgian treaty policy with its neighbours in relation to administrative co-operation, reference can be made to Richelle I., Traversa E., *National Report: Belgium*, presented at the conference "The History of Double Taxation Conventions", Rust (Austria) 4 – 7 July 2008.

[47] From an economic perspective, the desiderability of a residence-based taxation principle as the cornerstone of international tax policy rests on the Diamond and Mirrlees theorem on the desirability of production efficiency according to which, under certain conditions, any Pareto-efficient tax structure has the feature that it leaves production decisions undistorted. This means, for instance, that capital earns the same pre-tax rate of return in every jurisdiction (since otherwise it would be possible to increase global output by moving capital from where its marginal return is low to where it is high). Unlike the source principle, the residence principle is consistent with global production efficiency, because the tax system does not discriminate between capital according to where it is located. See Diamond P., Mirrlees J. A. *Optimal Taxation and Public Production II: Tax Rules*, 61American Economic Review (1971), at 261.

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somewhat of a by-product of the latter policy orientations would then seem to be contradicted by historical evidence.

In any case, efforts in administrative assistance in tax matters exemplified by the earlier cited treaties appeared however to having been limited to their original scope without giving rise to any circulation of this treaty model among other European States.

It was only in 1907 that another treaty dealing with administrative assistance was concluded, this time between France and Great Britain.[48] The treaty was concerned with the prevention of fraud in connection with succession duties and required administrators from both States to provide their counterparts with information regarding the deceased person's successors and details of the deceased person's movable property upon the death[49] of one of the subjects of the other Contracting State domiciled in the same State.[50]

A further boost to the conclusion of administrative assistance treaty was given by the political fragmentation of the Austro-Hungarian Empire upon the end of the World War I; namely the creation of new States and borders as the result of this process resulted in a tension with the existing economic links between the former regions of the Empire. Such a situation provided the context for the emergence of a very dense net of cross-border economic relationship whose tax consequences the newly created States felt the need to regulate. As a result, it is possible to mention the treaties between Austria and Czechoslovakia of 12th July 2006 and between Austria and Hungary of 25th June 1928, which both adopted a combined approach to judicial and administrative mutual assistance in the area of taxes.

A very interesting example originated from the above described historical legacy is the treaty of 6th April 1922 between Italy and the succession States to Austria – Hungary which, despite not having exerted remarkable relevance on subsequent treaties constitutes a first and almost unique example of multilateral tax treaty. A first characteristic of interest of this treaty from an historical perspective is that the same treaty constitutes possibly the very first example of a "general tax treaty", that is, of a treaty that encompasses provisions concerning the prevention of international double

[48] Agreement Between France and Great Britain for the Prevention of Frauds in Connection with Succession Duties, concluded on 15th November 1907

[49] Thus, adopting a partial anachronism, it could be argued that the Treaty endorsed a form of automatic exchange of information.

[50] This early treaty also appears remarkable because it apparently defines the scope of application of the treaty by virtue of the citizenship of the deceased person, thus suggesting that the prevalence of the concept of "tax residence" developed only later, while maintaining its prominence in the tax treaty policy of some Countries, such as the United States. Even more interestingly, the treaty seems to be concerned with the notion of "domicile" of a person as a pre-requisite for giving way to administrative assistance: basically, the British authorities would have been subject to the obligation to file the relevant information to the French Authorities only in relation to French subjects that had established their domicile in the United Kingdom.

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taxation[51] while at the same time incorporating clauses dealing with administrative assistance in the purview of the pursuit of broader objectives between the parties, such as the tackling of international tax evasion.

These earliest exercises in co-operation were however somewhat isolated examples, limited to regional co-operation and, while constituting a very fascinating historical archetype do not appear to having borne much influence on the current architecture of the current system of administrative co-operation relations between States, which, over the course of the last decades of the XX Century was also characterised by an emphasis on administrative co-operation in the area of income taxation.[52]

Thus, it can be said that the origins of said system can be found in the earliest examples of the original source of many of the prevalent patterns of the current international recommendations in the area of international tax policy, that is, the work of the League of Nations Committee of Experts.[53] While the influence of the work of the Committee of Experts in relation to the drafting of a model treaty for the prevention of double taxation[54] is somewhat of a common place and constitutes an undisputed milestone[55], the work of the same Committee in the specific area of administrative co-operation through the drafting of a Bilateral Convention on Administrative Assistance in Matters of Taxation has proven less influential in shaping the international tax policy priorities of the second half of the XX Century but its topicality to the current debate on the modes and means of administrative tax co-operation and the fight against international tax evasion is stunning.

The 1927 Model Convention adopted, as the other model conventions elaborated by the Committee of Experts, a bilateral structure. It is arduous to determine why, also with respect to issues that would have encountered a general interest in the international community, such as administrative assistance for the prevention of

[51] The treaty also appears extremely advance in this specific regard as it is arranged along different categories of income, not unlike the one adopted in the later models developed by the Committee of Experts appointed by the League of Nations.

[52] This does not apply to other regional exercises of administrative co-operation, such as the European experience in the area of regionally harmonised taxes, as it is the case for administrative co-operation in the area of valued added taxation within the European Union.

[53] In 1921 the Financial Committee of the League of Nations, following up to the International Financial Conference held in 1920 in Brussels, attributed a mandate to a Committee of Experts (composed by Professor Bruins from the Netherlands, Professor Einaudi from Italy, Professor Seligman from the United States and Sir Stamp from the United Kingdom) to elaborate a report on the problems of international double taxation and international tax evasion. Between 1923 and 1927, the Committee of Experts elaborated four draft model bilateral conventions, accompanied by commentaries. The four drafts were the Bilateral Convention for the Prevention of Double Taxation, the Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties, the Bilateral Convention on Administrative Assistance in Matters of Taxation, and the Bilateral Convention on Judicial Assistance in the Collection of Taxes. The Financial Committee of the League of Nation then approved the work of the Committee of Experts in 1928.

[54] Reference is made to the Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion of 1928.

[55] Reuven Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 Texas Law Review , (1996), at 1306

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international tax evasion, the Committee of Experts did not adopt a multilateral approach. The same Committee of Experts excluded the possibility of a "collective convention" in relation to the prevention of double taxation, as, in this matter, the fiscal systems of the various Countries were found to be "so fundamentally different" that it seemed "practically impossible" to draft such a convention.[56]

At the same time, at least in relation to the 1928 Draft Treaty on Mutual Administrative Assistance in Taxation, the bilateral structure is not accompanied by a modular drafting technique that would have enabled the hypothetical Contracting States to opt in or opt out different provisions in relation to the specific needs of respective tax system as well as the capacity of the respective tax administration. The rationale for such a bilateral approach also in the area of administrative assistance could then be explained as result of a certain path dependence in the work of the Committee of Experts of the administrative assistance and anti-tax evasion agenda from double taxation agenda.[57]

Such a path dependence was likely not accidental, as it can reported that the very idea of administrative co-operation between Tax Administrations met with some criticism in the beginning, especially by the business constituency, if it is true that in 1922 the representatives of the International Chamber of Commerce condemned "all proposals attacking the freedom of exchange markets or the secrecy of banking operations"[58]. As a result, the same Commentary to the Draft Treaty on Mutual Administrative Assistance in Taxation appears almost preoccupied to reinstate on multiple occasions that the combating of international tax evasion is pursued for the sake of general good and that it should by no means be interpreted as "an extension beyond national frontiers of an organised system of fiscal inquisition" or, even worst, "(…) an organised plan of attack on the taxpayer".[59]

In any case, what differentiated the 1928 Model Convention on Administrative Assistance from information exchange clauses included in later tax treaties was that it dealt exclusively with issues of administrative tax co-operation, not unlike the more recent tax information exchange agreements and that it foresaw not only exchange of information upon request but also, in relation to some specific items, exchange of information on an automatic basis. In particular, the draft listed six categories in respect to which extraterritorial tax information was to be provided:

- immovable property;
- mortgages;

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[56] See the 1927 Report, at 8
[57] Such a conclusion appears to be hinted also by S.Dean, *The Incomplete Global Market for Tax Information*, at 640; see in particular footnote 25
[58] Reported by Picciotto S. , I*nternational Business Taxation as a Study in the Internationalization of Business Regulation*, London, Weidenfeld and Nicolson, 1992, at 251.
[59] Ibidem

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- industrial, agricultural, and commercial undertakings;
- earned income and directors fees;
- transferable securities; and
- estates.

Each Country was expressly granted the right to refuse to provide information when supplying that information would have been "contrary to public policy" or would require procedures in contrast with the domestic law of the requested State. The treaty established channels of communication between relevant administrative authorities to give effect to the provisions and create measures to implement the convention. Somewhat in contrast to the more recent theoretical policy developments in this area, the Draft made clear that administrative assistance had to be provided without any remuneration.

Even though the draft administrative assistance treaty never became a canonical model officially endorsed by an international organisation and adopted by Countries in their treaty practice, its indirect influence is testified by agreements concluded in the '30s that dealt exclusively with administrative assistance or devote to the latter a significant body of provisions. Examples in this regard can be found in the Partnership and Good Neighbourhood Agreement concluded by Italy and the Republic of San Marino in 1939[60], where a specific set of provisions dealt with mutual assistance in the field of notifications, tax assessments and recovery of tax claims in relation to taxes of every kind.[61]

Another prominent example of treaty which encompassed extensive provisions in the area of administrative assistance, is the 1939 treaty between the United States and Sweden.[62]

In particular, Art. 16 of the concerned treaty laid down some very specific obligations implying an automatic exchange of information covering the names and addresses of the recipients of dividends, interest, royalties, pensions, annuities or other fixed or determinable annual or periodical income, showing the amount of such income with respect to each recipient as well as, to the extent possible, the underlying assets.

Nonetheless, despite some relevant examples, it can be observed that the developments in the area of administrative assistance did not go on par with the steadily

[60] Convenzione di amicizia e buon vicinato tra Italia e San Marino, signed on March 31st 939.
[61] In particular, Article 36 and 37 of the Agreement.
[62] It is interesting to remark that the United States adopted a skeptical view in relation to international co-operation in tax matters, even with regard to the prevention of international double taxation. A declaration rendered by the Secretary of Treasury Andrew W. Mellon in 1930, reported by Picciotto S., *International Business Taxation as a Study in the Internationalization of Business Regulation*, London, Weidenfeld and Nicolson, 1992 , at 251, effectively depicts the US orientation towards this practice. It is then unsurprising that the treaty with Sweden signed in 1939 qualifies, along with the treaty signed with France in the same year, as the first fully fledged US tax treaty.

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enlarging net of double taxation treaties concluded in the interwar period[63]. In particular, a Study commissioned by the League of Nations in 1937 and co-ordinated by Mitchell B. Carroll reported that only ten of the bilateral double taxation treaties concluded at that point in time included provisions dealing with administrative assistance[64]. The number of administrative assistance treaties was also very reduced, totalling fifteen.[65]

In the '40s, the League of Nations followed up on its earlier work by issuing two sets of model tax treaties just a few years apart. In 1943, the League published the so-called Mexico drafts and shortly thereafter published the 1946 London drafts. Both the Mexico and the London drafts included both a model double tax treaty and a model treaty focused on administrative assistance where, unlike the 1928 drafts, the areas of administrative assistance and judicial enforcement were dealt jointly under a single model instrument titled "Model Bilateral Convention for the Establishment of Reciprocal Administrative Assistance for the Assessment and Collection of Taxes on Income, Property, Estates and Successions".

The London Draft differed from the original 1928 Draft under many respects. For instance, the grounds for refusing assistance were also extended. In particular, a reciprocity based criterion for defining the scope of assistance was introduced so that the requesting State could not request information it could not retrieved based on its domestic law. Moreover, a State could also turn down a request which would involve a violation of commercial secrets or which concerned its own nationals or which, in its opinion, would compromise its security or sovereign rights. The London also introduced the confidentiality standard that is still prevalent in current general tax treaties and tax information exchange agreements, according to which, the recipient State should treat the received information with the same degree of confidentiality as would apply in the supplying State.

The Mexico and London Drafts featured some remarkable differences between each other, especially in relation to the scope and application of exchange of information on a routine basis. Namely, while the Mexico Draft foresaw the transmission of readily available information in the same areas prescribed by the 1927 draft as non-discretionary, it did not explicitly mention automatic exchange of information, a concept that was by contrast expressly revived in the subsequent London Draft.

On the other hand, it is interesting to remark that, even though administrative assistance started out in relation to indirect taxes, such as registration tax, both the 1928 Draft and the subsequent Mexico and London Drafts limited the scope of

[63] By means of comparison, based on the documentation included in the earlier cited Third Volume of the "International Tax Agreements: World Guide to International Tax Agreements 1843–1951, it is possible to retrieve that by 1939 more than sixty double taxation conventions had been concluded.
[64] Reported by Sol Picciotto, *International Business Taxation as a Study in the Internationalization of Business Regulation*, London, Weidenfeld and Nicolson, 1992 , at 251
[65] Ibidem

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application of administrative assistance to the taxes covered by the treaty, namely income and inheritance taxes.

3.2.2 The Emergence of the Status Quo

In the aftermath of World War II, the legacy of the Committee of Experts of the League of Nations was carried on by the Organisation for European Economic Co-Operation (OEEC) and by its successor, the Organisation for Economic Co-Operation and Development (OECD). In particular, in 1956, the OEEC Council set up a Fiscal Committee[66] which acted as the forerunner to the Fiscal Affairs Committee of the OECD which in 1963 published a Draft Convention for the Avoidance of Double Taxation With Respect to Taxes on Income and Capital. The Draft Convention, baptised as "Model Convention" upon its first update in 1977, subsequently served, and still serves, as the main "template" for the conclusion of tax treaties. In addition to the OECD Model, other alternative models, although heavily influenced by the former, developed in the post-war period. In this regard, the United Nations revived its Fiscal Committee through a Committee of Experts on International Cooperation in Tax Matters which developed an Income and Capital Model Convention chiefly geared towards developing Countries.

Unlike the models developed by the League of Nations, the new OECD Model Convention qualified from the beginning as a "general" or "comprehensive" model tax convention, that is, a model convention including not only "distributive rules" but also other "special provisions"[67].

As it has acutely been observed, the combination of distributive rules concerned with the elimination of international double taxation and of administrative rules, proved a "mixed blessing"[68] in the purview of the further empowerment of Tax Administrations in accessing and retrieving extraterritorial tax information. Namely, on the one hand, in the light of the proliferation of double taxation treaties, abandoning the approach centered upon the conclusion of separate administrative assistance treaties in favour of a comprehensive treaty furthered the spreading of such an administrative assistance network.[69]

At the same time, the relegation of information exchange to a supporting role, diluted and limited the impact of the information exchange requirements. This conclusion is not only merely based on quantitative considerations, that might be drawn from the almost obvious observation that compressing exchange of information in a

[66] Resolution of the OEEC Council of March 1956.

[67] The expression is borrowed by the same OECD Model Convention and defines the treaty provisions that are concerned with the administration of the treaty provisions and, in particular, the mutual agreement procedure and the exchange of information provision.

[68] Dean S., *The Incomplete Global Market for Tax Information*, 49 Boston College Law Review (2008), at 621.

[69] Ibidem

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single provision instead of a dedicated treaty would result in a less precise legal reference but, rather, on the broader question of which purpose exchange of information should serve and, in broader terms, which purposes tax treaties should fulfil. Namely, while the pre-war model treaties referred both to the prevention of double taxation as well as to the tackling of international tax evasion, the model tax convention elaborated by the OECD in 1963 only referred to the former in its title. Even nowadays, there is no specific reference to the prevention of international tax evasion neither in the OECD Model nor in the related Commentary[70] even though the original reference to the "avoidance of double taxation" included in the title has been eliminated since 1998 in favour of a more general wording.[71]

Although a narrow interpretation of Art. 26 such to foresee that exchange of information could only serve the purpose of ensuring the application of the convention, hereby chiefly meant as an instrument of international law aimed at preventing international double taxation, was never held by the OECD even in relation to the 1963 version of the Model Convention and was only propagated by Switzerland by means of an explicit reservation, it should be underlined that, unlike the pre-war models developed by the League of Nation, the prevention of international tax evasion as a threat of general concern is never hinted to in the Commentary to Art. 26 of the OECD Model and lest in the same model provision.

On the contrary, the same model provision states as the purpose of the exchange of information clause the administration and enforcement of the domestic tax laws of the Contracting States. While such a broad wording certainly allows each State to safeguard its financial interests, it can clearly be noticed that any effort to treat international tax evasion from an international regulatory perspective as a concern of general interest to be pursued beyond the boundaries of the domestic legislation of the single Contracting States is absent. This remark is directly linked to the absence of a general definition of tax evasion at the international level.[72] Such a conclusion is even truer when taking into consideration other possible stated purposes of exchange of information in tax matters, such as the monitoring of tax avoidance or even international tax arbitrage, that may not directly have an immediate perceivable revenue effect on a single State but that generate revenue losses on an aggregate level and should thus be addressed in a global regulatory perspective.

[70] Conversely, a specific reference to the prevention of international tax evasion is contained in the UN Model.
[71] "Convention with Respect to Taxes on Income and on Capital" instead of "Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital".
[72] Nonetheless, tax evasion is a phenomenon that eventually impacts the fisc of at least one of the Contracting States, thus, as long as no double criminality requirement is posed as a pre-condition to the providing of assistance, as it used to be the case for Switzerland which only agreed to provide assistance in relation to conducts that would have been punishable under the laws of both Contracting States and, at the same time, did not consider tax evasion a punishable offense unless it featured the characteristics proper of a tax fraud., defined as the deliberate reduction or an attempt of reduction in the amount of taxes paid achieved by resorting to false, falsified or inaccurate documentation. See Art. 186 of the Federal Law on Federal Direct Taxes of 14th December 1990.

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However, even though greater co-operation can be registered, also in this case in a bottom up dynamics, between Tax Administrations, especially through the development of information sharing platforms, a broader picture is apparently missing. In particular, it is possible to perceive a global regulatory gap in the definition of somewhat liquid concepts such as international tax avoidance, international tax arbitrage and aggressive tax planning.

Even though focus has been placed on the lack of international shared definitions of these concepts,in the view of this author it would be not less urgent to define whether the current instruments of exchange of information as provided in tax treaties are the more suitable tools to deal with these issues.[73]

The contents of the provision dealing with exchange of information contained in the various model conventions changed remarkably over the course of the last five decades. Although it should be acknowledged that the UN Model adopted some very innovative stances in this regard, it is hard to deny that the OECD played a leading role in setting the agenda of the tax policy debate also in this area, even though other organisations or some States may have developed in the meanwhile alternative approaches to the subject.

When depicting the history of administrative assistance in tax matters, there are probably two milestones that, in good and in bad should be highlighted, as they contributed, with different degrees of success over time, to what could be defined as a revival of the League of Nationals models of “stand alone” administrative assistance agreement: the 1988 Convention on Mutual Administrative Assistance developed by the OECD in conjunction with the Council of Europe (Strasbourg Convention) and the 2002 Model Tax Information Exchange Agreement.

The 1988 Strasbourg Convention established a comprehensive and multilateral legal basis for the carrying out of information exchange paired with assistance in the collection of taxes, thus showing a direct continuity of the original work of the League of Nations which seemed to having been discontinued in the aftermath of World War II and following the transfer of trendsetting prerogatives in the area of international tax policy to the OECD. It is interesting to remark that, unlike the work of the OECD in the area of the elimination of international double taxation, which itself mirrored an intense dialogue and co-operation between the Organisation and international business constituencies but, at the same time, not unlike the ostracism met by the League of Nations in relation to its administrative assistance project, the joint effort of the OECD and of the Council of Europe was opposed by bodies such as the Business and Industry Advisory Committee of the OECD and the Taxation Commission of the International Chamber of Commerce

[73] In this regard, forms of information sharing platforms such as the one set forth by the J.I.T.S.I.C., which will specifically be addressed under Part 4 of this thesis.

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and it was also welcomed by criticism in the economic media.[74] The main criticism moved to the Strasbourg Conventions was that it would have provided Tax Administrations with a strengthening of their audit prerogatives and information gathering powers while, at the same time, the conventional text was found lacking in the area of guarantees for taxpayers and in not providing for a platform for ensuring more effective double taxation relief in case of disagreement by Contracting States, for instance by introducing arbitration mechanisms.[75]

The Strasbourg Convention, despite its profound importance on a policy level as an attempt to pursue administrative co-operation within a multilateral perspective[76] and to reinstate forms of administrative assistance such as automatic exchange of information that were already been proposed by the League of Nations but subsequently went off radars, had very little practical impact as very few Countries signed it[77] and most of them did so by including reservations that somewhat deflated the very convention of its innovative import.[78]

Initiatives in the area of administrative co-operation languished, or at least remained static, in the following decade, until the establishment of the harmful tax competition project.[79] In particular, with the Ministerial Communiqué of May 1996 and the G-7 Summits in 1996 and 1997, the OECD received a mandate to identify and report on harmful tax practices and to develop measures to counter the distorting effects of harmful tax competition.[80]

It can be observed that while the original harmful tax competition agenda focused on a plurality of policy issues, such as minimum tax rates and ring fencing, no consensus was reached on these issues, also due to the skepticism of the US

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[74] Picciotto S., International Business Taxation as a Study in the Internationalization of Business Regulation, London, Weidenfeld and Nicolson, 1992 256

[75] See BIAC (Business and Industry Advisory Committee), Comments on Draft OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, 1985

[76] Whose enduring legacy is testified by the recent amending protocol developed in 2010, the subsequent surge in the number of signatory States and its vigorous endorsement by the Global Forum on Transparency and Exchange of Information for Tax Purposes as a tool to secure a swifter dissemination of the international standards.

[77] For instance, at the onset, not only traditional banking centres, such as Switzerland and Luxembourg but also traditional "high tax Countries" such as Australia, Germany and the UK, announced that they would not sign the Convention or do so with major reservation, as it was the case for France and the United States. Anedoctal evidence suggests that the reason behind such orientations was in many cases caused by the domestic opposition to the new Convention expressed by local business constituencies. See Picciotto S., International Business Taxation as a Study in the Internationalization of Business Regulation, London, Weidenfeld and Nicolson, 1992, at 256.

[78] For instance, the United States discarded assistance in tax claims and limited adoption to the sole section dealing with exchange of information. Belgium acceded to the Convention in 1992 with a reservation concerning access to information held by banks, which was deemed as a threat to its banking secrecy regulation.

[79] Sharman J., *Havens in a Storm*, Ithaca, Cornell University Press, 2006; Webb M. C., *Defining the Boundaries of Legitimate State Practices:Norms, Transnational Actors and the OECD's Project on Harmful Tax Competition* (2004) 11 Review of International Political Economy 4, 787. An exhaustive survey of the harmful tax competition project and subsequent developments is in the series of articles by D. Spencer in (2010) 21(6) *International Taxation*

[80] See OECD, Harmful Tax Competition – An Emerging Global Issue (1998), Para. 1.

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Administration[81] while some room for compromise was found in relation to the enhancement of exchange of information, although with limited regard to exchange of information upon request.[82]

The original OECD Report focused on two issues. Firstly, it identified "tax havens" as jurisdictions with no or nominal income taxes and at least one of three following characteristics:

- lack of effective exchange of information;
- lack of transparency; and
- lack of substantial activities by taxpayers.

Secondly, it identified "preferential regimes" as regimes offering:

- no or low effective tax rate; and
- at least one of the following: ring fencing, lack of transparency, and lack of effective exchange of information.

Subsequently, in mid-2000, the OECD published a list of thirty-five offshore jurisdictions that it planned to include in a subsequent list of “uncooperative tax havens” unless the countries agreed to remove “the harmful features of preferential regimes” by April 2003, and fully eliminated taxpayers' benefits under such regimes by December 2005. In this latter document the OECD defined a “tax haven” as a country with:

- no or nominal taxation; and one or both of the following:
- ineffective tax information exchange with other countries;
- a lack of transparency in its tax or regulatory regime, including excessive bank or beneficial ownership secrecy.

Many Countries did not want to appear on either the OECD's list of thirty-five offshore jurisdictions or its subsequent list of uncooperative tax havens. To avoid being included on the former, six jurisdictions, Bermuda, the Cayman Islands, Cyprus, Malta, Mauritius, and San Marino, gave the OECD signed commitment letters in April and May 2000, promising to provide effective tax information exchange by the specified deadlines.

In response, the OECD omitted these Countries from the list of thirty-five. To avoid appearing on the list of uncooperative tax havens, other countries provided similar commitment letters to the OECD later in 2000 and in 2001, and the OECD agreed to omit them from the updated list of uncooperative tax havens. Eventually, by 2002,

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[81] See McIntyre M.J., *Identifying the New International Standard for Effective Information Exchange*, Lang M. et aa. (Eds.), Tax Treaties: Building Bridges between Law and Economics, Amsterdam, 2010, at 497. Kudrle R.T., *The OECD’s Harmful Tax Competition Initiatives and the Tax Havens: From Bombshell to Damp Squib*, Global Economy Journal 1 (2008), at 8.

[82] M. Keen and J. E. Ligthart, *Information Sharing and International Taxation: A Primer,* 13 International Tax and Public Finance (2001), at 105.

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twenty-eight of the original thirty-five offshore jurisdictions identified by the OECD had committed to offering effective exchange of information.

These Countries had developed their choice within the context of an "inclusive" environment. In particular, an institutional platform accommodating representatives from the tax administrations of OECD Member States as well as from off-shore jurisdictions was constituted under the name of "Global Forum"[83]. Within the Global Forum, a specific Working Group[84] was entrusted with the task of developing a "stand-alone" administrative assistance international legal instrument extending exchange of information also to those countries reluctant to this practice , or in relation to which Art. 26 of the OECD Model Convention could not be applied, as they had not signed any double taxation convention.

The works were started back in 1998, exactly after the publication of the OECD Harmful Tax Competition Report and in 2002 the OECD Model Tax Information Exchanged Agreement was finally approved: it could be argued that it took four years before a compromise solution could be found. The original idea was to create a strictly bilateral system of exchange of information which could go beyond the original provisions of Art. 26, which, at the time, still consisted of only three chapters and embarked many more limitations than in its latest version. Such a system intended to be applied both to OECD Member Countries and to some "good-willing" low tax jurisdictions and its primary aim was to set a legal basis for information exchange even out of the scope of a double-taxation convention.

The licensing of the 2002 Model also implied a change in the scenario: from an almost barren land to a proliferation of legal instruments requiring exchange of information as the OECD Model T.I.E.A. was added to Art. 26 of the OECD Model Convention, to the Strasbourg Convention as well as to regional instruments[85] as a possible legal basis, even though all the above cited legal bases differed in scope and purpose. With specific reference to the OECD Model T.I.E.A., it could be argued how the original aim of information exchange and the new emphasis on harmful tax competition could interact with each other.

A second major issue consists in possible overlaps between the OECD Model T.I.E.A. and other legal instruments dealing with information exchange. This issue has however little practical meaning, as the Model T.I.E.A. has been introduced as an extensive measure, aimed at ensuring exchange of information even whereas double

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[83] The denomination of the Forum evolved over time. It could be said that the agenda in the area of exchange of information became predominant later on so that since 2009 the Global Forum has been renamed "Global Forum on Transparency and Exchange of Information for Tax Purposes".

[84] OECD Global Forum Working Group on Effective Exchange of Information. The off-shore jurisdictions represented in the Working Group were Aruba, Bermuda, Bahrain, Cayman Island, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino.

[85] Such as the Nordic Convention and the Directive on mutual administrative assistance (Directive 77/799/EEC) among EU Member States.

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taxation concerns are not present or are ignored. It is then unlikely that two Countries having already signed a double taxation convention will engage into a bilateral exchange of information agreement. Shall this happen, it is also quite unlikely that a conflict between the Convention and the Agreement might occur.

As it will further be analysed in Part 3 of this work, the OECD Model T.I.E.A. later became the primary source of the current international standard of transparency and exchange of information and the same Global Forum, now open to a much broader constituency, became the organ entrusted with monitoring the effective implementation of the standards by all jurisdictions. It could be said that the Global Forum gradually reached such a role. A very important intermediate step in this regard was the publication of yearly "Level Playing Field Reports"[86] in which different jurisdictions were subject to an annual assessment in relation to their legal and administrative framework aimed at ensuring exchange of information.

In 2005 a major update (almost a redrafting) of Art. 26 of the OECD Model Convention was published. The update chiefly consisted in making the new model provision included in the OECD Model Convention with the prescriptions of the OECD Model T.I.E.A. Further updates to the Model treaty and to the related Commentary took place in 2012.

As anticipated, in 2010 a thorough update of the 1988 text of the Strasbourg Convention was performed by means of the addition of a protocol. What seems particularly interesting in this regard is the great importance attributed to this new legal instrument by the OECD and the steady increase in the number of signatory States.

Besides the update and drafting of model legal instruments, the last five years have been characterised by the start of a peer review process overseeing the effective implementation of the main contents of the OECD Model T.I.E.A. and Art. 26 of the OECD Model which have been systematised in what has been defined as the "international tax standard"[87]

3.2.3 The Consolidation of the "International Tax Standard"

The OECD and OECD promoted *fora* have historically positioned themselves as the "market leader(s) in developing tax standards and guidelines"[88].

Despite such an alleged trendsetting role in many areas, at least in the previous decade, the OECD showed little interest in promoting a more effective and pervasive administrative cooperation between Tax Administrations, especially in the form of

[86] Retrievable on the OECD I-Library

[87] Originally, the international standard of transparency and exchange of information. The peer review process is analysed in detail in Part 3 of this work.

[88] OECD, *Current Tax Agenda* 2011, at 74

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exchange of information. Model provisions governing exchange of information, not unlike other general provisions of the OECD Model Convention as well as the related Commentary remained virtually unchanged for more than two decades.

Interest for the practice of information exchange raised only when lack thereof was individuated as one of the key drivers of harmful tax competition; as a result, new more pervasive rules were introduced in the OECD Model Convention and in its Commentary at the turn of the third millennium.

The end of the 20th Century also saw the attempt to create an inclusive platform for discussion aimed at tackling the phenomenon of “harmful tax competition”; a result, the Global Forum on Taxation was created, incorporating both OECD economies and non-member economies, in particular, offshore financial centers and other Countries traditionally labeled as tax havens.

The lack of effective exchange of information was individuated as one of the key components of harmful tax competition and the main stepping stone on the way to a level playing field between tax jurisdictions.

The Global Forum on Taxation was instrumental to the drafting of a new model treaty, the OECD Model Agreement on Exchange of Information on Tax Matters (hereinafter, OECD Model T.I.E.A.) aimed at ensuring that an agreement concerning at least information exchange be reached between OECD economies and the other members of the Global Forum as well as other jurisdictions normally cut off from mainstream tax treaty networks.

The substantive contents of the OECD Model T.I.E.A. represented a major leap forward *per se* with regard to the heightening of the standards of administrative tax cooperation aimed at contrasting taxpayers’ behaviours tantamount to (or amounting to) tax evasion achieved by leveraging on some common specific features of offshore jurisdictions. In particular, the standard of co-operation brought by the OECD Model T.I.E.A. was particularly notable in addressing the issue of banking and fiduciary secret, identifying them as non-suitable grounds for refusing a request for assistance; such a statement found no parallel in the already existing binding or non-binding legal instruments dealing with information exchange. On the other hand, since the very text of the OECD Model T.I.E.A. was the outcome of joint negotiations between OECD economies and the most “politically conscious” off-shore jurisdictions, some other limitations where set forth: for instance, while Contracting Parties were now meant to exchange information whereas “*foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by the Agreement*”[89] instead of whereas “*necessary*”[90], the OECD Model T.I.E.A. introduced in its Commentary the controversial notion of “fishing expedition” and the

[89] Art. 1, OECD Model T.I.E.A.
[90] As foreseen by the coeval version of Art. 26 of the OECD Model Agreement.

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prohibition thereof. Moreover, whereas the Commentary to Art. 26 of the OECD Model Convention tended at a plurality of forms of assistance, such as automatic and spontaneous exchange of information, the OECD Model T.I.E.A. only focused on exchange of information upon request.

Art. 26 of the OECD Model Convention and the related Commentary were then amended in a way consistent with the OECD Model T.I.E.A. thus setting forth the creation of a homogeneous exchange of information standard. Nonetheless, Countries of key relevance for the international financial industry, such as Austria, Switzerland and Belgium appointed reservations to the new amendments. Moreover, the OECD Model T.I.E.A. appeared as a fairly languishing model as only a limited number of OECD inspired tax information exchange agreements were signed. The limited engagement of most off-shore jurisdictions at the time was mirrored by the circumstance that the list of un-cooperative tax havens drafted in 2002 did not show a significant shrinking. On the other hand, some gradual progress was registered on the head of some non – OECD Member Countries and documented in the annual "Towards a Level Playing Field" Reports issued by the Global Forum since 2006.

At the beginning of 2009, despite a substantially renewed set of rules, the existence of a specific body such as the Global Forum on Taxation and the developments showed in some jurisdictions, it seemed that the new framework developed from 2002 onwards had been welcomed by everyone except its main addressees, i.e., the main off-shore financial centres.

According to the usual vulgate, the position[91] taken by G20 members in the midst of the soaring financial crisis and in the recent aftermath of some very high profile tax evasion cases, somehow catalysed a strong political will to the address the topic of a lack of co-operation by some jurisdictions.

The immediate developments following to the aforementioned stance were mirrored in the "Progress Reports" dividing jurisdictions in three categories:

- a "white list" of jurisdictions considered to have substantially implemented the OECD standard by having concluded at least twelve agreements compliant with said standard;

- a "grey list" of jurisdictions which had committed to the OECD standard but had not yet substantially implemented it;

[91] Said position is generally summarised in the following declaration rendered at the end of the April 2009 London Meeting of the G20: "*We are ready to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information.*"

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- a “black list” of jurisdictions not yet committed to the OECD standard.

The most visible outcome of such a process was that in a very short lapse of time, the number of tax information exchange agreements inspired by the OECD Model T.I.E.A. skyrocketed[92]. As a result, most jurisdictions to ascend to a higher status, to the extent that, nowadays, the so-called “black list” is empty and the grey list contains only two jurisdictions[93].

The more far reaching outcome of this process is however the emergence of a globally agreed standard of transparency and information exchange[94], that is, the systemic effect of the overall advancements registered by single jurisdictions. The international standard of transparency and information exchange constitute one of the pillars on which the level playing field currently in crystallization is posed.

However, the existence of a standard is not in itself a guarantee for its survival and propagation, especially when the emergence of the standard is based on mere commitment or on the reaching of a reasonably low threshold such as the conclusion of a circumscribed number of tax information exchange agreements. In this respect, what seems to really count is the long term commitment of all the parties involved and the actual implementation of the international standard.

The main problem the OECD and the Global Forum (in the meanwhile renamed as “Global Forum on Transparency and Exchange of Information for Tax Purposes”) were confronted with was then to introduce an effective system of monitoring which on the one hand could put jurisdictions to test with regard to the actual meeting of the international standard and on the other hand could foster further commitment and could allow jurisdictions to correct themselves immersed in a co-operative climate.

The solution was eventually individuated in the adoption of a “peer review” mechanism extended to all members of the Global Forum and open also to non-member jurisdictions. This section is in particular dedicated to outlining the mechanics of this process, addressing the potentially critical issues it may raise in a perspective of constructive criticism and, based on the belief that it is not always possible to separate an end from the means deployed to achieve it, tending at how the very process of peer reviewing could impact the actual landmark of administrative co-operation in tax matters and the way the related international standard is perceived and put into practice

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[92] The most impressive spree was observed between the G20 London Summit of 2 April 2009 and the 2010 G20 Summit held in Toronto on 26th June 2010. Between these two dates, 459 agreements were signed and the absolute numbers of concluded (regardless of whether in force or not) OECD2 compliant T.I.E.A.s passed from 65 in April 2009 to 524 in June 2010. As of June 2012, 820 T.I.E.A.s had been signed.

[93] In particular, Nauru and Niue.

[94] See OECD, *Promoting Transparency and Exchange of Information for Tax Purposes‘,* September 2010, retrievable on www.oecd.org/dataoecd/32/45/43757434.pdf

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3.3 An Institutional Analysis of Administrative Co-Operation in Tax Matters

3.3.1 Administrative Co-operation in Tax Matters as an International Regime

It has been remarked that the exchange of taxpayer – specific information between national Tax Authorities as the central issue in the discussion and formation of international tax policy.[95]

One of the foremost problems information exchange tries to address, that is, the countering of tax evasion and/or avoiding scheme achieved by the taxpayer by means of income and capital shifting to low tax Countries and a lack of reporting in the respective Country of residence is not new, but the concrete outcome of such practices has been dramatically amplified by the progressive fall of impediments to the international flow of the factors of production.

In such a context, the agenda of international administrative assistance can be pursued by high tax Countries in two alternative ways:

a) compulsion: The high tax Country tries to force the non – cooperative low tax Countries by waving the threat of retaliation (e.g., the adoption of domestic anti – avoidance measures that would render non – deductible expenses arising from transactions performed with residents of the non – cooperative Country. It has been remarked[96] that such an approach can be politically very costly and difficult to exercise against the most influential non – cooperative Countries (until the more recent developments, this has been, for instance, the case of Switzerland). The recent events that interested Liechtenstein and Germany and which implied the use by the latter of fraudulently subtracted information somewhat go beyond the scope of international tax law and fall within the realm of what could easily be pinpointed as "*tax intelligence*";

b) cooperation game: Administrative assistance is presented as a practice that, under some circumstances may be beneficial to all the parties involved. In this respect, it would not be inappropriate to refer to a market for tax information. In most cases, where the two cooperating Countries differ remarkably in size, it is easily conceivable that the synallagmatic dimension of tax cooperation may fade into a mere barter: the larger, presumably capital

[95] Keen M., Ligthart J.E., *Incentives and Information Exchange in International Taxation*, CenTER Discussion Paper, Tilburg University,2004, at 1.
[96] Ibidem

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exporting Country would be the one interested in gathering information; the smaller, typically semi – opaque Country would be willing to give up pieces of secrecy in favour of other kinds of benefits – reputational (e.g., admission in a "*white list*") or material (e.g., exclusion from the scope of application of unilateral anti – avoidance measures that may otherwise address non – cooperative Countries). Such a form of co-operation has also been defined in literature as a "*barter for tax information*"[97] and its sunk costs for both the requesting and the requested Country have been highlighted.[98]

The inherent pitfalls of a system of extraterritorial tax information acquisition with respect to information gathering measures directed to domestically available items of information have already been addressed in the first chapter of this thesis. For the purposes of this section, which aims at analysing administrative co-operation in tax matters as an example of an international regime it is sufficient to recall the main reasons why, even from a theoretical perspective, a unilateral system geared towards the gathering of extraterritorial tax information would fall short of its stated goals. Namely, given the costs of creating a comprehensive extraterritorial tax information acquisition regime would likely have fallen on a smaller group (the number of taxpayer engaging in cross – border activities) than that impacted by the costs of domestic information gathering measures (that, on the other end, affect the totality of taxpayers) and, at the same time, the deriving benefits would have been equally diffused, so that it does not seem unsound to assume that the efforts to collect extraterritorial tax information would be less successful than its domestic counterpart.[99]

The problem of the gathering of extraterritorial tax information can then be addressed only by resorting to an exercise of international tax co-operation. Besides the legal qualification of international co-operation in tax matters and how this exercise of interaction between States differs from less structured examples such as collaboration and mutual assistance,a valuable analytical tool in this regard can be offered by international relations theory, starting from the assumption that the current arrangements in the area of administrative co-operation in tax matters can be placed in the framework of what the internation relations theory defines as a regime,[100] that is, a

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[97] Dean S., *The Incomplete Global Market for Tax Information*, 49 Boston College Law Review (2008), at 605.

[98] See Dagan T., *The Costs of International Tax Cooperation*, Michigan Law and Economics Research Paper No. 02-2007, at 12.

[99] See Shaviro D., *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980's*, 139 University of Pennsylvania Law Review 1 (1990), at 7.

[100] It should be made clear that, in this instance, this author is not directly referring to the theory of the existence of "an international tax regime" as coined by Professor Avi Yonah. The more effective definition of this concept can probably be found in ID.,*The Structure of International Taxation: A Proposal for Simplification*, 74 Texas Law Review (1996), at 1303, where reference is made to, a network of harmonised bilateral tax treaties forming "a coherent international tax regime (…) that enjoys almost universal support". For a further introduction to this latter concept see also ID., *International Tax as International Law*, Cambridge, Cambridge University Press, 2007.

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set of explicit or implicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations.[101]

At the same time, when compared to "other areas of international relations", the area of "international tax relations"[102] features some peculiarities, even when referred to other areas of relevance for international economic governance. Namely, in contrast to other areas of international economic governance,States issue tax regulations chiefly forrevenue reasons,[103] rather than to remedy market failure.[104] In this way, States have adirect and unique interest in their role as tax regulators which remains unfettered regardless of the domestic or cross-border dimension of the phenomenon. Since many Countries are engaged in such taxing functions simultaneously, conflicts may arise with co-operation being required as a tool to resolve the conflict. The situation may become even more intricate when States lack a uniform agenda and have diverging interests, such as it used to be the case when the international community could be divided into "co-operative" jurisdictions, that could be defined as jurisdictions with a need for extraterritorial tax information coupled with the will to co-operate with other jurisdictions with a similar agenda and "non-co-operative jurisdictions", that is, Countries lacking such needs and such a willingness.

As countries form a regime, such as the administrative co-operation regime, they must integratetheir multiple roles. The states can be seen as actors pursuing an activity (in this specific case, the gathering and exchanging of tax information) and theinternational regime regulates[105] the activity so that it can take place more efficiently (e.g., reduced administrative burdens on parties, information sharing,or increased efficiency of cross border investment).

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[101] The definition of regime hereby provided is directly derived from that of the influential work of Professor Krasner. See, in particular, ID., *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 International Organisation (1982), at 186.

[102] A pioneering role in the transposition of international relations conceptual categories within the realm of international tax policy can be attributed to the studies of Professor Ring. See ID., *International Tax Relations: Theory and Implications*, 60 Tax Law Review (2007) at 83.

[103] Direct, as it is the case of substantive international tax rules or indirect, as it appears in relation to administrative tax rules.

[104] See Ring D., *International Tax Relations: Theory and Implications*, 60 Tax Law Review (2007) at 150. A different view is held by scholars who frame taxation and, in particular, corporate income taxation, also as a regulation tool. In this regard, reference can be made to Picciotto S., *International Business Taxation as a Study in the Internationalization of Business Regulation*, London, Weidenfeld and Nicolson, 1992 and Avi Yonah R., The Three Goals of Taxation, 60 Tax Law Review 1 (2006 – 2007), at 1.

[105] It is clear that on the one hand, international agreements providing for an obligation to provide administrative co-operation constitute binding law, specifying rights and obligations of the signatory governments; on the other hand, it is also apparent that, despite the role currently played by the Global Forum, there is no formalised supranational body in charge of enforcing these agrements as it might be the case whereas a "World Tax Organisation" be set up. For further insight concerning the alleged need and the possible institutional design of a "World Tax Organisation" see, among the most recent contributions to this policy debate, Sawyer A., *Developing a World Tax Organisation: The Way Forward*, London, Fiscal Publications, 2009 and Tanzi V., *Is There a Need for a World Tax Organization?*, Razin A., Sadka E. (Eds), The Economics of Globalization: Policy Perspectives from Public Economics, New York, Cambridge University Press, 2009, at 38 et seq.

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As it has been observed in relation to all co-operation regimes and not only with specific reference to the area of co-operation in tax matters, there are two pairs of matched problems that may obstruct international co-operation: on the one hand, the implementation of co-operative arrangements may be jeopardised by the lack of appropriate measures providing for monitoring and, where necessary, sanctioning systems, on the other hand, in order to be sustainable, co-operation needs to ensure the involved actors with a system allowing for a distribution of the benefits arising from co-operation as well as for proper information concerning the rules of the co-operative arrangements and the related dynamics.[106]

Any issue that is a candidate for an exercise of international co-operation undergoes the aforementioned four issues and the example of information based administrative co-operation in tax matters arguably makes no exception. This Paragraph is then chiefly devoted to analysing how the framework providing for administrative assistance in tax matters has coped over time with these four distinct requisites for ensuring that the resulting system be effectively and sustainably implemented. In this regard, there are four questions that can be set forth in order to investigate how the current framework for exchange of tax information deals with the above mentioned issues:

- How are the rules underlying the arrangement defined and how are the involved actors made aware of these rules?
- How are benefits arising arising from co-operation distributed among involved actors?
- Once arrangements to make the system sustainable have been agreed, what is the optimal way to monitor compliance?
- What is the optimal way to penalise defectors?

Although it cannot be denied that exchange of information in tax matters is a phenomenon from which an intricate web of interrelationships stems, involving State and non-State actors, such as taxpayers and, in more recent times, private institutions, in particular financial institutions, that effectively serve as "tax intermediaries",[107] this analysis will focus on a more traditional framework where emphasis is put on the relationships between States.

As a matter of fact, in instances where co-operation is heavily formalised by means of binding rules, as it is the case for co-operation in tax matters and, especially, for the very detail-oriented approach that has become prevalent in the realm of the

[106] See Morrow J.D., *Modeling the Forms of International Co-Operation: Distribution Versus Information*, 48 International Organization 3 (1994), at 387.

[107] The emerging role of non-State actors, other than taxpayers, possibly constitutes the greatest innovation in the patterns of cross-border gathering and exchange of tax information emerged in the more recent years. This phenomenon, that could be defined as the emerging role of cross-border "tax intermediaries" is analysed under Part 6 of this work.

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exchange of tax information, the question concerning the definition of the "rules of the game" should be reformulated to how should these "rules of the game" be defined and, in particular, whether arrangements can be found that would result in the most beneficial outcomes for the involved actors. Since each actor does not have perfect information on the value of each solution, all actors have a joint incentive to pool the information at their disposal to determine whether they can agree over the most preferable solution.[108]

When applying this conceptual schematisation to the problem of exchange of tax information, it might be argued that the main issue at stake is the identification of the most suitable legal instrument to act as a legal basis for the carrying out of administrative assistance: within a bilateral context, the choice ultimately encompasses either the conclusion of a general tax treaty, pairing provisions aimed at the prevention of international double taxation with provisions providing for exchange of information, or the conclusion of a "stand alone" tax information exchange agreement.

It seems clear that the choice between a comprehensive tax treaty and a T.I.E.A. is only in part left to the preferences of the contracting jurisdictions. General tax treatieschiefly pursue the objective of eliminating international double taxation and it seems quite intuitive that such an objective is not on the agenda when one or both of the concerned jurisdictions do not levy taxes that typically fall within the scope of application of double taxation conventions[109] or adopt a territorially bound tax jurisdiction. At the same time, a general tax treaty brings about a series of benefits even for low tax and no tax jurisdictions especially when they serve as a stepping stone for carrying out foreign direct investment in another high tax Country.[110] In these cases, the conclusion of a double tax treaty would be a blessing for the low tax Country. Impact on the involved high tax Country is less easily foreseeable; namely, assuming that the treaty is executed in good faith by both Parties, the high tax Country will be able to apply its own domestic laws and, presumably, also anti-abuse rules that challenge the use of conduit companies; on the other hand, by virtue of the conclusion of a general tax treaty, the low tax Country may request its removal from "black lists" or other similar devices developed by the legislation of the high tax Country to pinpoint jurisdictions that are more frequently used to set up vehicles enabling abuse so that the relative ability of the high tax Country to perform fiscal supervision would be undermined.

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[108] Morrow J.D., *Modeling the Forms of International Co-Operation: Distribution Versus Information*, 48 International Organization 3 (1994), at 399.

[109] Typically taxes on income and on capital.

[110] This is frequently the case whereas an insular Countries which however shows ties to a larger Country, often an emerging market, acts as a host for investment vehicles carrying out their activity in the target Country. A very meaningful example in this regard is that of Mauritius, which currently qualifies as the first investor in India, holding more than 40% of foreign held Indian undertakings. This phenomenon has been referred to by the Indian press as the "Mauritius route". See Government of India, Ministry of Commerce and Industry, December 2011 retrievable at the following website: http://commerce.nic.in

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Thus, even though, at the onset, tax information exchange agreements served the very purpose of filling up the gaps existing in the global network of double tax treaties and mirrored a great surge in number in the aftermath of the G20 Declaration of April 2nd 2012, in more recent times it possible to observe that some off-shore jurisdictions have been able to negotiate the conclusion of general tax treaties with high tax Countries[111]. In this regard, it is also possible to observe that, especially when non-OECD Countries are involved, hybrid legal instruments, combining double taxation relief typical of double taxation treaties and administrative assistance provisions typical of a T.I.E.A., are becoming an increasingly common occurrence.[112]

In conclusion to this specific point it can then be observed that the traditional patterns, centered upon an alternative between general tax treaties and T.I.E.A.s, are increasingly being disregarded in favour of hybrid or, at least, less predictable approaches which might mirror the conclusion of a general (or "quasi general") tax treaty even by traditional off-shore centres.

As anticipated, the further issue that likely arises from the way the current regime of administrative co-operation in tax matters is structured revolves around the way the benefits arising from co-operation are distributed among parties.

In this regard, a general distinction could be set forth between:

a) a scenario where both Contracting States are high-tax Countries with foreseeably similar levels of need for extraterritorial tax information, and

b) an increasingly common scenario where one of the Contracting States is a high tax Country and the other Contracting jurisdiction is an off-shore centre or a jurisdiction enforcing a strictly territorial territorial system of taxation, thus much less reliant on extraterritorial tax information for the application and enforcement of its own tax laws.

With regard to the former scenario, the more conventional approach according to which administrative co-operation implies reciprocal although not necessarily mutual[113]co-operation offers the guarantee of the balance, although that of reciprocity should be considered as a rationale rather than a requisite for providing co-operation.

However, whereas the parties to the agreement are a high tax Country and an off-shore jurisdiction, as it is typically the case with T.I.E.A.s, the reciprocity rationale would lose its significance as it is only intuitive that the flows of information would be rather unidirectional, since, as anticipated, offshore jurisdictions may not feature specific

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[111] A notable example in this regard is the conclusion of a double tax treaty between Panama and Italy.
[112] A clear example of such a hybrid agreement is the Agreement concluded between Argentina and Uruguay on 24th April 2012.
[113] For further elaborations on the distinction between reciprocity and mutuality see Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims*, Kluwer, London, 2004, at 9

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exigencies for the carrying out of their domestic tax system as far as the gathering of extraterritorial information is concerned.

In this analysis approaches based on compulsion should be left aside: namely, as it has been anticipated, forcing other jurisdictions to comply with certain arrangements that would be beneficiary only for the requesting State would not only be could prove being counterproductive for the reasons mentioned above in this chapter. In this regard, incentivisation mechanisms might be necessary. This could indeed prove problematic from a legal perspective as, once a treaty has been agreed and concluded, the general obligation to execute treaties in good faith[114] would likely render treaty performance a gratuitous obligation, so that an information-supplying jurisdiction bond by a T.I.E.A. should not receive any (monetary) compensation for the ordinary costs ofdoing so, nor would it normally be considered entitled to receive any share of the additional revenue raised. Such a ban on direct or indirect forms of remuneration is currently not specified in any model legal instrument providing for administrative co-operation in tax matters nor it appears that specific clauses have been included in actual treaties. Based on such a survey of existing legal reference, the whole matter might be considered a non-issue.

Such a conclusion however appears to be at odds with the circumstance that the 1927 draft on administrative assistance, developed by the Experts of the League of Nations, explicitly foresaw a prohibition to provide any monetary remuneration in exchange of information or other forms of administrative assistance.[115] It may then be argued that if the problem was not felt at the onset of the history of administrative assistance when the phenomenon of off-shore jurisdictions had not yet become so prevalent, it now appears topical to investigate the desirability and, in the affirmative, the optimal design of incentives to ensure that even parties that would not have an interest in receiving tax information from other Countries and that, on the other hand, might endanger an important economic asset of theirs in signing in to administrative co-operation[116] may feel voluntarily compelled to join in this particular exercise of international co-operation.

[114] For an introduction to the general theory of the execution of treaties in good faith reference can be made to Zoller E., *La bonne foi en droit international public*, Paris, Pedone, 1977.

[115] Reports Presented by the Comm. of Technical Experts on Double Taxation and Tax Evasion, League of Nations Doc. C.216M.85 1927 II, at 40

[116] Thus, the national interest would seem to lie precisely in not providing information, thereby becoming a relatively more attractive location for investors and so securing some national advantage, whether in terms of tax revenue, banking business, or tourism. Against this, however, must be weighed the potential benefits of reciprocity: providing information to others may be the quid pro quo for receiving information from them. Thus, broadly speaking, capital exporting countries may be more willing to enter information exchange agreements than capital importers. This is not, it should be noted, simply a matter of industrialised Countries seeing themselves as losing tax base to tax havens. Developing and emerging market Countries too may suffer a loss of revenue from funds deposited abroad by wealthy residents and not declared for domestic tax purposes. With regard to the effects of capital flight on developing Countries, see Commission on Capital Flight from Developing Countries, *Tax Havens and Development*, 2009, retrievable at the following website: http://www.regjeringen.no/upload/UD/Vedlegg/Utvikling/tax_report.pdf

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Thus, the key theoretical challenges in this specific area would be to determine which policies can lead countries to provide information to others in an effective manner, relinquishing the assumption, as sound as it may be from a legal perspective in the light of the obligation to execute treaties in good faith, that information exchange agreements are self-enforcing.[117] In this regard, the growing literature on the topic, addresses the pattern of incentives more suitable to yield the desired result of full co-operation even among jurisdictions with asymmetrical needs as far as extraterritorial tax information is concerned. It may be, of course, that some Countries will choose to provide information, even if apparently against their own interests, because they believe this to be an aspect of international good governance, [118] and this is probably the soundest argument for administrative co-operation in the light of the prescriptive global governance perspective through which the topic of exchange of information is analysed in the following Paragraph; as anticipated, however, this Paragraph is chiefly concerned with an analytical the international relations rationale for administrative tax co-operation, so that assumptions not reliant of the self-interest of Countries should momentarily be kept aside.

In this regard, the design of possible incentives should investigate the potential motives that might bring to comply with a co-operative arrangements even jurisdictions not directly interested in receiving tax information. Such an analysis should however be investigated under at least two distinct scenarios.

Under a first, more simplified scenario, Countries may enjoy an indirect benefit from providing information when commitments to the extent of information exchange are made prior to the choice of tax rates (the former arguably being akin to a long-term treaty commitment, with the latter a policy decision that is more readily altered). In this case a Country may benefit from unilaterally choosing to provide some information[119] to its partner in the first stage of the non-cooperative game. By doing so, the otherwise recalcitrant jurisdiction may induce its partner to set a higher tax rate in the second stage because the knowledge that information will be provided to their domestic authorities makes it less attractive for its residents to invest abroad. Within such a setting, there are thus two effects of information exchange that a country must weigh against each other:

- an adverse revenue effect at unchanged tax rates; and

[117] See Tanzi V., and Zee H. H., *Can Information Exchange be Effective in Taxing Cross-Border Income Flows?,* Andersson K., Melz P. and Silfverberg C. (Eds) Modern Issues in the Law of International Taxation. Liber Amicorum Sven Olof Lodin,London, Kluwer International Law, 2001, at 261.

[118] This is for instance the position taken by the Bahamas as resulting from an interview of the author with the former Bahamian Chief Negotiator Dr. Rowena Williams (European University Institute, Fiesole, 2012).

[119] See Bacchetta P., Espinosa M.P., *Information Sharing and Tax Competition among Governments*, 39 Journal of International Economics August (1995), at 103

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- a beneficial strategic effect from an induced increase in the tax rate set by the other Country.

It can be foreseen that trading off these two considerations will generally lead a country to voluntarily provide at least some information to its partners.[120]

Under a second more realistic scenario, choices of tax rates and information provision would not be set as a once-only matter but as an infinitely repeated game[121] . In this case, prospects for self-driven co-operation are dimmer as further room for an opportunistic inconsistent behavior arises. In order to promote compliance on both parts, either a penalty based or incentive based approach can be adopted.

In the first instance, sustaining co-operative exchange of information would require that the propension of each country to defect from the agreement be balanced by some form of punishment in case of non-compliance.[122]

Besides the hypothesis of introducing compulsion and forms of punishment for non-compliance, an alternative approach to cope with the issue would consist in introducing some incentives to compliance. These incentives could be divided in monetary (or, more precisely, revenue-linked) incentives and non-monetary incentive.

The introduction of revenue-linked incentives develops from the assumption that there is nothing inherent in the efficiency rationale for the residence principle requiring that all of the revenue collected on cross-border investments as a result of information provided by the host country should accrue to the residence Country. Thus, there is no intrinsic reason why some of the additional revenue collected as consequence of information exchange should not be transferred to the Country that provides it.[123]

The incentivising effects of such transfers have been analysed by econonomic literature under different scenarios.[124] When adopting a simplifying and generalising approach it could be said that two main conclusions emerge.

First, the efficiency argument for such revenue sharing proves to be weak, in the sense that—somewhat counter-intuitively—the total amount of revenue raised (across all Countries) is actually lower the greater is the proportion of revenue that is allocated to the Country that provides the information. The reason for this is that such transfers make inward investment attractive to the source country not only for the tax the investors pay directly to the host Country but also for the additional revenue that the

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[120] Ibidem

[121] See Bacchetta P., Espinosa M., *Exchange of Information Clauses in International Tax Treaties*, 7 International Tax and Public Finance 3 (2000), at 275 and Huizinga H.; Nielsen S., *Withholding Tax or Information Exchange: The Taxation of International Interest Flows*, 87 Journal of Public Economics, 1 (2003), 39

[122] This basic issue has been remarked also in Tanzi V., and Zee H. H., *Can Information Exchange be Effective in Taxing Cross-Border Income Flows?*, Andersson K., Melz P. and Silfverberg C. (Eds) Modern Issues in the Law of International Taxation. Liber Amicorum Sven Olof Lodin, London, Kluwer International Law, 2001, at 270 et seq.

[123] See Keen M., Lighthart J., *Revenue Sharing and Information Exchange under Non-Discriminatory Taxatio*n, CenTER Discussion Paper, Tilburg University, 2005, at 5.

[124] Ibidem.

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host Country receives in respect of those foreign investors whose tax position is subject to further scrutiny as a result of exchange of information. This in turn induces Countries to compete more aggressively for such investment by lowering their tax rate, thus providing a further downward twist to mutually damaging international tax competition.

The second conclusion, however, is that, despite this adverse efficiency effect, the distributional effects of such revenue-sharing arrangements on the inter-Country allocation of tax revenues may mean that it has a useful role to play in inducing a low-tax Country to participate in information sharing. That is, although the high-tax Country forgoes revenue in transferring some of the additional revenue it collects from information received, it may nevertheless be in its interest to do so, since this may be more than offset by the advantage it receives by inducing the low-tax Country to provide more information than it otherwise would.[125]

The introduction of revenue sharing mechanisms could then be considered as a viable policy tool to ensure ex ante compliance with administrative assistance agreements. Such a conclusion, which can be derived from economic literature seems to have also encountered general favour among representatives from Tax Administrations.[126] It could also be remarked that such an approach has already been implemented with forms of administrative assistance involving collection, such as in the withholding tax model of the EU Interest Savings Directive and of the Savings Agreement between the European Union and Switzerland where a portion of the withholding tax collected by the "paying agent" and otherwise paid back to the Country of residence of the beneficial owner of the interest is partially (in the measure of 25%) kept by the State of residence of said "paying agent".

The implementation of a revenue sharing criterion mechanism in relation to exchange of information would however pose some further implementation problems when compared to the application of such an arrangement within the context of a withholding system.

Namely, in the latter case, the determination of the revenue deriving from the co-operative behavior of the Country where the withholding is applied is not problematic so that revenue sharing can be applied simply by resorting to a revenue sharing rate, as it precisely the case with the EU Interest Saving Directive.

On the contrary, determining the additional revenue resulting from the performing of administrative assistance in the form of exchange of information appears as more problematic. In particular, it should first be determined whether the relevant indicator of "revenue" should be found in the additional income which is assessed or rather collected by the State benefitting from administrative assistance. In this regard, since

[125] Ibidem

[126] Reported by De Goede J., *Efficiency of Mutual Assistance in Tax Matters; What is in a Name*?, Seer R., Gabert I., Mutual Assistance and Information Exchange, Amsterdam, IBFD, 2010, at 129.

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collection may abide to dynamics and be influenced from factors that are not in the prerogative of the assisting jurisdiction, it appears reasonable to hold that the relevant measure should be found in the additional income that is assessed. Such an objective would require that a reliable system to quantify said additional income be developed which might prove a particularly complex task and would in any case imply that updated and reliable statistics on the marginal contribution of administrative assistance on the assessment of taxes be developed and kept on a regular basis.[127]

Once the revenue indicator of choice has been defined, contracting States may agree on which rate should be in the prerogative of the jurisdiction which has supplied its administrative assistance.

An approach based on "revenue sharing" is not the only possible form of monetary incentive. Recent US literature has advocated, somewhat provocatively, yet very lucidly, a shift towards a more complete "global market" for tax information: based on the assumption that each Country's extraterritorial tax information needs are unique, the most important objective is perceived as being to increase the likelihood that Countries will succeed in acquiring the extraterritorial tax information they need. In order to reach such an objective, the proposed policy recommendations would involve the elimination of the requirement that information exchange be provided on the basis of a reciprocity criterion as well as of the implicit prohibition on using "consideration other than (…) tax information.[128] The concrete proposal in relation to determination of such alternative consideration would also imply that the additional revenue resulting from the provision of certain type of information be determined and a "price tag" for the supply of said information be consequently negotiated.[129] However it seems arduous to hold that even a very sophisticated system of revenue estimates could serve the purpose of elaborating a realistic ex ante pricing of the possible different items of information; moreover, such a solution would also imply very frequent revisions of such a pricing due to statutory amendments. These reasons would seem to be sufficient to argue that an ex post mechanism of revenue sharing would be more easily implementable, more

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[127] While statistics on the amount of information exchanged are already kept in detail by the Treasury of some Governments and aggregate statistical information is elaborated by the OECD and by the European Union, there is no notice of statistics quantifying additional revenue assessed as a result of exchange of information. Besides the actual practical possibility of designing such statistics, it might also be argued that individual Treasuries might not be willing to make these figures publicly available shall they portrait a relatively modest yield. Namely, besides actually contributing to a direct recover of revenue by filling the "actual" international tax gap, it could be argued that exchange of information serves a unique agenda as it also contributes to promoting voluntary compliance among taxpayers by fulfilling a deterrence effect. On the role played by publicisation on tax audit data in the framework of tax compliance monitoring, reference can be made to Blank J.D., Levin D.Z., *When is Tax Enforcement Publicized?*, 30 Virginia Tax Review (2010), at 1 et seq.

[128] Dean S., *The Incomplete Global Market for Tax Information*, 49 Boston College Law Review (2008), at 641.

[129] Ibidem. In particular, the Author makes the point that "If a given country could estimate the benefits it expects to derive from the receipt of extraterritorial tax information from a potential partner, it would be able to put a price tag on that information. The Author suggests that the estimate of such benefits should not imply problems radically different, in terms of revenue estimates, from those faced by policy makers when introducing new pieces of tax legislation.

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flexible and would also offer less room for opportunistic behavior of the jurisdiction acting as a “net exporter” of tax information.

From an implementation perspective, the amount of revenue assessed thanks to information provided by foreign Tax Authorities could be tracked by submitting obligatory questionnaires to the various units that have benefitted from administrative assistance. The drafting and dissemination of these questionnaires as well as the gathering of the results might be taken care directly by the liaison office within the Tax Administration that is typically responsible of exchange of information procedures.

The dimension of revenue sharing would also interact with the separate yet related issue of the sharing of the costs of administrative assistance. In this regard, Art. 26 of the OECD Model does not provide for any possible allocation criterion and the OECD Model T.I.E.A. stipulates that the incidence of costs incurred in providing assistance shall be agreed by the Contracting Parties[130], at the same time, the Commentary to Art. 9 of the OECD Model T.I.E.A. provides for a possible criterion of allocation which has proven very influential on actual tax information exchange agreements concluded over the last couple of years; in particular, costs that would be incurred in the ordinary course of administering the domestic tax laws of the requested State would normally be expected to be borne by the requested State when such costs are incurred for purposes of responding to a request for information. Such costs would normally cover routine tasks such as obtaining and providing copies of documents.[131] The same Commentary also foresees that the competent authorities may wish to establish a scale of fees[132] for the processing of requests that would take into account the amount of work involved in responding to a request.[133]

Based on such a framework on the sharing of costs, it might be argued whether revenue sharing should be implemented so to absorb also cost sharing, so that the recovery by the requested State of the expenses related to the provision of assistance would be granted only insofar the rendered assistance generates additional revenue for the applying State, or, rather, on top of cost sharing mechanism, thus effectively constituting a potential mark up to the recovered costs. The former approach may have positive effects on the Tax Administration of the requested State that would have an incentive to act in the most efficient way, that is, to generate the most additional income for the requesting State with the most limited possible incidence of expenses;[134] at the same time, such a system would likely be more prone to opportunistic behaviours on

[130] See Art. 9 of the OECD Model T.I.E.A..

[131] See OECD Model T.I.E.A., Commentary Para. 98

[132] Some jurisdictions such as Guernsey are known to have incorporated such a “fee list” as protocols to their T.I.E.A.s.

[133] See OECD Model T.I.E.A., Commentary Para. 99

[134] De Goede J., *Efficiency of Mutual Assistance in Tax Matters; What is in a Name?*, in Seer R., Gabert I., Mutual Assistance and Information Exchange, Amsterdam, IBFD, 2010, at 129.

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the side of the supplying jurisdiction since, given the uncertain nature of the additional revenue, might be led by risk management consideration to limit its information gathering efforts in order not to incur in expenses that may generate a loss in the absence of a direct compensation.

Besides monetary incentives, an alternative and subtler approach could consist in non-monetary incentives that would however come at the price of influencing the tax policy of the State willing to grant them.

An historical precedent in this regard are the tax information exchange agreements negotiated by the United States with some Caribbean and South American jurisdictions in the course of the '80s and throughout the '90s.[135]Namely, even before the adoption of the OECD Model T.I.E.A., the United States had concluded a number of information exchange agreements with many Latin America and Caribbean Countries. The first examples of these Agreements were solely based on US domestic laws, while the most recent agreements have incorporated some "foreign" elements[136] and mostly adopted the structure of the OECD Model Agreement on Exchange of Information in Tax Matters. The whole initiative started back in 1983 with the Caribbean Basin Economic Recovery Act, which allowed US taxpayers to deduct the expenses of attending conventions, seminars or similar meetings in the Partner Countries upon the entry into force among the latter and the US of an information exchange agreement which, in more recent years has become subject to the syndicate of the US Secretary of the Treasury.[137]

Another alternative non-monetary incentive is directly linked to the earlier mentioned issue of the choice of the legal instrument providing for assistance. In particular, the high tax Country may decide to conclude a double tax treaty with a low tax Country, even if very little for international double taxation might occur; this would be done in order to provide an incentive to the low-tax Country to comply as there would be benefits for the latter in terms of reputation and enhanced attractiveness: such an agreement would however practically result in a T.I.E.A. vested in a general tax treaty with only Art. 26 meant as a functioning provision.

When pondering the different alternatives, it would seem that a revenue-sharing approach would not introduce the conditionings on the tax policy of the Contracting

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[135] See, in particular, the Exchange of Information Treaty with Barbados, concluded on November 3rd 1984; the Exchange of Information Treaty with Jamaica, concluded on December 18th 1986; the the Exchange of Information Treaty with Grenada, concluded on December 18th 1986; the Exchange of Information Treaty with St. Lucia, concluded on 30th January 1987; the Exchange of Information Treaty with Dominica, concluded on 1st October 1987; the Exchange of Information Treaty with Bermuda, concluded on December 2nd 1988; the Exchange of Information Treaty with Trinidad and Tobago, concluded on January 11th 1989; the Exchange of Information Treaty with the Dominican Republic, concluded on August 7th 1989; the Exchange of Information Treaty with Honduras, concluded on September 27th 1990; the Exchange of Information Treaty with Guyana concluded on August 27th 1992.

[136] Ruchelman S., Shapiro S., *Exchange of Information*, Intertax 11 (2002), at 408.

[137] Referred by Tanzi V., Zee H., *Taxation in a Borderless World: the Role of Information Exchange*, 28 Intertax 2 (2000), at 61.

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States (i.e., in relation to domestic pieces of legislation with international relevance, such as domestic provisions concerning the deductibility of foreign sourced expenses or aspects of their treaty policy) and would have the advantage of being immediately measurable and adjustable to different considerations (for instance, the revenue sharing rate might be updated from year to year depending on the effectiveness of the assistance rendered by the applied State).

The third issue that any regime needs to address is that of monitoring. While the incentivisation of the involved actors to comply with the rules of the game ultimately descends from operating ex ante the leverages of the distribution of the benefits arising from co-operation, monitoring is concerned with an ex post oversight. Unlike other international regimes where monitoring could be more problematic, factors that currently characterise the international tax administrative assistance regime, although sometimes being perceived as inherent limitations of the current system, such as "on request" basis of the prospected administrative assistance and the bilateral structure of the underlying relations may indeed make monitoring more straightforward as the requesting Country would only have to check whether its requests are met in a satisfactory and timely way. In this regard, it is intuitive that pairs of actors can monitor the behaviour of the others, especially when the co-operative behaviour ultimately consists in following up to requests. At the same time, there is very little experience with regard to the monitoring within the current regime for administrative co-operation.[138]

Namely, before the watermark represented by the 2009 G20 Declaration, the lack of co-operation by some jurisdictions was expressed at a policy level, so that these jurisdictions simply avoided concluding tax information exchange agreements or other agreements instituting analogous obligations. On the contrary, since the almost universal endorsing of the international standards of transparency and exchange of information, the monitoring problem shifted to the phase of the implementation of the endorsed standards. In this regard, a primary monitoring mechanism is provided by the bilateral interactions between the concerned jurisdictions.

A key role as far as monitoring is concerned would also be played by the way agreements are drafted and rather they rely on a standard-based rather than on a rule-based approach.[139]A carefully crafted, rule-based agreement between Countries would appear as the most suitable choice in this regard as it would make it relatively easy for each to determine whether a counterparty is adhering to both the letter and the spirit of the pact.[140] In effect, such agreements would fill the gap left by the absence of a

[138] It could be argued that a form of monitoring may stem from the current process of peer reviewing being carried on by the Global Forum.

[139] For a discussion of the legal nature of the currently consolidating international standards for transparency and exchange of information see *infra*.

[140] Dean S., *The Incomplete Global Market for Tax Information*, 49 Boston College Law Review (2008), at 607.

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supranational bureaucracy (such as that provided by a hypothetical World Tax Organisation).

The resulting improvements in both worldwide and national welfare would tend to make any such agreement stable over the long term: this would ensure the implementation of a system of "transnational legal enforcement", a key element in any successful international cooperative arrangement.[141]

A secondary monitoring mechanism, operating on an aggregated scale, as much as necessary for the sustainability of the regime, would indeed be much more challenging; in this regard, the work of the Global Forum on Transparency and Exchange of Information[142] is of key relevance. While the legitimacy and the consistency of the peer review activity overseen by the Global Forum ought to be duly scrutinised, the system appears to this author as the more suitable solution to monitor compliance with the standards of the international regime of administrative co-operation in the absence of an international tax organisation or similar oversight bodies.

The final key issue faced by any international regime, that is, punishment mechanisms in case of non-compliance appears as the least developed one within the framework of the international regime of administrative co-operation in tax matters. Also in this case it is possible to distinguish between bilateral mechanisms and global mechanisms.

The former ultimately rely on the relative potential of the jurisdiction affected by a lack of commitment and compliance by its contracting Party. In this regard, in a first stage, requesting authorities could also punish non-cooperative treaty partners by refusing any of their future information requests,[143] by delaying the processing of these requests, or by not cooperating with them in other areas. A more severe step could be to introduce specific measures in domestic tax law targeting the concerned legislation by a mechanism commonly referred to as "blacklisting":[144] the inclusion in a blacklist might have the more varied consequences, from disregarding expenses arising from transactions with parties resident in the black-listed jurisdictions to excluding the possibility to recognise a transfer of tax residence to the concerned recognition.

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[141]SeeHathaway O.A., *Between Power and Principle: An Integrated Theory of International Law*, 72 University of Chicago Law Review (2005), at 514.The Author concludes that "empirical evidence supports the integrated theory's prediction that where transnational legal enforcement is weak, states will be more likely to commit to and less likely to comply with treaties (…) as collateral consequences of treaty membership can sometimes lead states with poor practices to commit to but not comply with a treaty."

[142] Whose activity is thoroughly discussed in detail *infra*.

[143] This possibility appears to be sanctioned also by the 2012 update of the OECD Commentary to Art. 26 of the OECD Model T.I.E.A.

[144] The mechanism of "black listing" is a variant of the "naming and shaming" control and penalty approach. In the realm of economic regulation, "black listing" was first developed within the context of anti-money laundering legislation. For an assessment of the "black listing" approach to the issue of harmful tax competition, see Kurdrle R.T., *Did blacklisting Hurt the Tax Havens?*, Journal of Money Laundering Control 1 (2009), at 33

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As anticipated, however, punishment mechanisms can also take a global approach, as it was threatened in various declarations issued by the G20's Finance Ministers[145]. This kind of pressure appears however having a somewhat more diplomatic dimension as the adoption of concrete countermeasures would still be left to the single States.

An analysis of the current framework for administrative assistance adopting the filter of international relations theory would then lead to the conclusion that indeed an international regime is in the making even though the main issues to which an international regime is typically subject, although perceived, are not being addressed in a coordinated manner.

3.3.2 From "Mutual Administrative Assistance" to "Administrative Co-Operation"

In the previous Paragraphs of the present Part of this thesis, reference has been made to different expressions such as "administrative collaboration", "mutual administrative assistance" and "administrative co-operation" as found in the international tax policy documents that have been analysed in an historical perspective.

However, one of the striking aspects of in the area of enquiry covered by this study is the wide variety of syntagms used to define the interaction between two of more administrations.[146] As it can be foreseen and as it will be further explained in the course of this work, the degree of complexity and the breadth of different configurations these forms of interaction can take is directly proportional to the vast mandate entrusted to Tax Administrations.

Administrative co-operation and mutual administrative assistance in tax matters tend to be seen as synonyms, whereas, on the contrary, their meanings do not exactly overlap. Before further delving into this attempt to deal with such issues and most notably with exchange of information in tax matters, few terminological remarks should be made.

Mutual administrative assistance[147] is here considered mostly in its international law dimension, rather than as an appendix of domestic tax laws stemming from the

[145] See Statement of the G20 Leaders at the Pittsburgh Summit of September 2009 where it was proclaimed *inter alia* "Our commitment to fight non-cooperative jurisdictions (NCJs) has produced impressive results. We are committed to maintain the momentum in dealing with tax havens, money laundering, proceeds of corruption, terrorist financing, and prudential standards. We welcome the expansion of the Global Forum on Transparency and Exchange of Information, including the participation of developing countries, and welcome the agreement to deliver an effective program of peer review. The main focus of the Forum's work will be to improve tax transparency and exchange of information so that countries can fully enforce their tax laws to protect their tax base. We stand ready to use countermeasures against tax havens from March 2010."

[146] Loebstein E., *International Mutual Assistance in Administrative Matters*, Vienna – New York, 1972, at 11.

[147] Sometimes defined as "Administrative Assistance" or "Mutual Administrative Assistance".

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interaction with other jurisdictions, so to avoid lengthy digressions into national legislations. Whereas the latter notion is directly addressed, it will be previously warned.

In broad terms, international mutual assistance can be defined as a practice whose ultimate aim is to allow domestic law to act effectively where the ability of States to act is instead restricted by International Law.[148] According to the different phases of the tax pipeline, it can take different forms, most notably exchange of information and assistance in the recovery of tax claims.

Whereas mutual assistance appears being a neutral concept, whose dimension can be more suitably defined on a case-by-case basis, international co-operation seems to imply the pursuit of common goals and an attribution of powers based upon the provisions of international law.[149] Thus, if a line should be drawn between the two, mutual assistance would occur under the provisions of specific clauses found under double taxation conventions, whereas it would be the case of international co-operation when some kind of agenda is set and the action is not restricted to bilateral channels but can take a multilateral form.[150]

Finally, when assistance is carried out at the sole benefit of one State, it would be more correctly defined as tax collaboration.[151]

Thus, it can be concluded that the three key expressions to which reference has been made and in relation to which definitions have been provided signal three different stages in the interaction between Tax Administrations of different Countries. The earliest phenomena in this area could likely be framed within the perspective of mutual administrative assistance and hinge on the reciprocity criterion that gained prominence with the 1946 London Model and which influenced the subsequent work by the United Nations and by the OECD. At the time, the issue of international tax evasion had already emerged and was addressed by some scholars with impressive foresight[152], nonetheless, subtler phenomena such as international tax avoidance had not yet acquired the proportion of an industry at the time. Moreover, even though the existence of "free ports" is documented since the earliest times, the notion of "tax haven" as it currently intended is a distinctly modern phenomenon[153].

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[148] Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims*, London, Kluwer, 2004, at 8

[149] Ibidem

[150] This would be the case of the Strasbourg Convention, which however quotes in its title "mutual assistance", rather than "international co-operation in tax matters". On the other hand, the conclusion that "mutual administrative assistance" and "administrative co-operation" lie on a continuum may also be testified by the circumstance that the European Directive that repealed Council Directive 77/799/EEC of 19th December 1977 in the area of mutual administrative assistance, Council Directive 2011/16/EU of 15th February 2011, is devoted to "administrative co-operation" rather than "mutual administrative assistance".

[151] Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims*, London, 2004, p. 9

[152] See in particular Piaitier A., *L'évasion fiscal et l'assistence administrative entre États*, Paris, Sirey, 1938.

[153] For an introduction see Palan R., *A History of Tax Havens*, History and Policy 2009. Retrievable at the following website: http://www.historyandpolicy. /papers/policy-paper-92.html

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Thus, it could be argued that the world where the original structure of administrative assistance provisions was designed was very different from the one that followed and, in a certain way, closer to the idea of a level playing field and less characterised by a polarisation between high tax and low tax jurisdictions and the connected phenomena of harmful tax competition. These were the years of "mutual administrative assistance" centered upon a strict reciprocity rationale[154] and still conditioned, either consciously or unconsciously, by the earlier cited "Mansfield rule", according to which assistance involving States in the area of taxation was to be seen as an exception to an otherwise contrary rule. Within such a picture, even though the players directly involved were tax administrations, mutual assistance was seen as one of the many items of a broader agenda of economic diplomacy between States.[155]

Later on, when the latter mentioned phenomena emerged in their full proportions, it might be argued that the parties involved became more opportunistic realising the absence of perception of a common imperative to fight international tax evasion and, when adopting the perspective of high tax Countries, the magnifying proportion of the "international tax gap".[156] As a result, the '80s and the '90s could be considered as the years of attempts by high tax Countries to win tax havens and offshore financial centres into what could be defined as "administrative collaboration", that is, forms of administrative assistance aimed at satisfying the needs of only one of the parties involved. It is apparent that, in order to make up for the lack of reciprocity inherent to such a "bargain", high tax Countries had to introduce specific incentives targeted at low tax Countries.[157] Moreover, negotiations were conducted in a top – down fashion and within the framework of a broader economic diplomacy agenda: it could actually be argued that these experiments further minimised the role of the involved Tax Administrations as no dialogue was developed but rather an opportunistic subservient relationship.

The earlier described work of the Global Forum on harmful tax competition and the adoption of the related Report signalled a radically new phase in the history of international tax relations, in which administrative assistance started being formally addressed with a bottom up approach, that is, by providing Tax Administrations with a common platform where to interact. Such a renewed setting also paired with the new

[154] The meaning of "mutual" may appear as somewhat of an ambiguous concept, especially in relation to that of "reciprocal". As it has been observed, the distinction between the two expressions lies in the circumstance that the former concerns an exchange while the latter concern a counterpart, so that "mutual" denotes the act of giving something and receiving something in exchange while "reciprocal" denotes giving back according to what is received. See Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims,* Kluwer Law International, London – The Hague – New York, at 10.

[155] As defined by Stewart M., *Transnational Tax Information Exchange Networks: Steps Towards a Globalized, Legitimate Tax Administration*, World Tax Journal June (2012), at 155

[156] See Avi Yonah R., Guttentag J., *Closing the International Tax Gap*, Sawicky M. (Ed.), Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration, Washington, EPI, 2005, at 99.

[157] The earlier cited US approach to T.I.E.A.s with Caribbean Countries is a clear example in this regard.

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climate that pervaded the international tax policy circles since the consolidation of the international standards of transparency and exchange of information, epitomised by the Joint Declaration of G20 Finance Ministers rendered in London on 2nd April 2012,[158] that constitute in themselves an expression of an international consensus in the area of the enhancement of transparency and exchange of information. It is then possible to say that the works of the Global Forum set the suitable context for the emergence of administrative co-operation in tax matters in the true sense.

3.3.3 Towards a Global Tax Administration?

The previous Paragraphs of this Chapter have addressed the international legal context in which administrative co-operation in tax matters and its historical developments; the same phenomenon has also been analysed in the light of international relations theory and economic theory in order to enucleate the key policy issues that lie at the core of what it has been demonstrated to be the "international regime" of administrative co-operation in tax matters. In this regard, definitional implications that mirror the evolution from an original theoretical framework that aimed at realising administrative *co-operation* but was downplayed in the practice of States taking, from time to time, and depending on the actors involved, either the form of administrative *collaboration* or that of (mutual) administrative *assistance*. At the same time, factors such as the political will by a core of influential advanced economies to put back exchange of information as a key issue in the international tax policy agenda, the recent crystallisation of an international standard of transparency and exchange of information which has been endorsed by most jurisdictions and the expansion spurt of the world tax information exchange treaty network are all pointing to the resurgence of a concrete example of international co-operation, that is, the emerging of a consistent co-operative behaviour between States in the light of specific generally agreed principles and geared towards shared objectives. Furthermore, within context of regional organisations, such as the European Union, it is possible to witness a further step, that of "administrative integration", that is, the development not only of a common administrative culture between Tax Administrations but, at least in the long run, of common administrative procedures that go beyond the current boundaries of exchange of information, even in its automatic version, in favour of practices such as the setting up of common administrative bodies.[159]

[158] The documents issued on the occasion are retrievable at the following link: http://collections.europarchive.org/tna/20090327035828/http://londonsummit.gov.uk/en/summit-aims/summit-communique/

[159] A very interesting example in this regard, although limited to the European experience, can be found in the proposed revision of the Savings Directive, in addition to its jurisdictional extension and revised legal and definitional

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These paths towards "administrative integration" could however be considered as one of the more advanced and more visible facets of a broader phenomenon, that of the "globalisation" of the Tax Administration.

Mentioning globalisation in the area of economic activities and, in particular, with regard to capital markets, would be a common place. At the same time,it has poignantly been argued that the most overwhelming progress in the path of globalisation are not limited to the economic sphere but, rather, the interactions between the economic and the institutional spheres;[160] namely, while economic globalisation *per se* is a largely foretold outcome whose progress in recent years has been chiefly quantitative, the emergence of globalisation in the institutional sphere stands out as a less predictable novelty.[161]

While, with specific reference to the area of taxation, such a novelty could be questioned, what seems undisputable is the consolidating phenomenon of "institutional globalisation", which also goes under the definition of "global governance", has primarily been driven by the interaction among different administrations rather than by more traditional diplomatic channels;[162] in this regard it appears possible to observe a burgeoning trend encompassing the affirmation of "administrations without State"[163].

In fact, it could be argued that rather than heading in different directions, administrations simply act as the vanguard on a path that is later licensed and endorsed by politics. We can find a clear confirmation of such a characterisation in the relationship between the steps taken by Tax Administrations since the '90s in addressing the issue of "harmful tax competition" and the follow up of "politics", more than ten years later, with the already recalled G20 declarations on the beginning of a "new era of transparency", whose road had however started being paved more than a decade earlier.

In particular, an innovative stream of scholarship has pointed out at a double parallel dynamic in the external and internal dimension of State powers: internally, States undergo fragmentation along the lines of their administrative components, which, in turn, develop into "a State within the State" arranging into "islands of sovereignty"[164]; these disaggregated administrations subsequently undergo a process of re-aggregation with other administrations of other Countries giving rise to so-called "transgovernmental

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aspects, is the institutionalization of a European tax administration agency (albeit with limited goals and scope). The revised Directive will strengthen the role of the Commission as a key node in the transnational tax administration network. The new proposals are consistent with the increasing institutionalization of cooperative processes and dedicated administrative units at the level of EU Member State tax agencies, under the recent Council Directives.

[160] Ferrarese M.R., *Le istituzioni della globalizzazione*, Bologna, Il Mulino, 2000, at 13.

[161] Ibidem.

[162] See Cassese S., *La Crisi dello Stato*, Bari, Laterza, 2002, at 19.

[163] Battini S., *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003.

[164] In this sense, Jayasuriya K., *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, Indiana Journal of Global Legal Studies 6 (1999), at 439.

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regulatory networks"[165]. As result, such a reconstitution of sovereignty in a world of rapid globalisation takes, on the hand, the internal form of fragmentation and "polycentricity" and, on the other hand, the external form of network governance[166]whereas administrative agencies network with their counterparts on a worldwide basis.[167]Established examples of such networks can be found especially in the domain of financial regulation with bodies such as the Basel Committee on Banking Supervision, the International Organisation of Security Commissioners and the Financial Stability Forum. The phenomenon seems to having been even more institutionalised within the framework of European Governance: a clear example in this regard is the setting up of "European Agencies" where the national administrations of the different Member States competent in relation to different areas of regulation are coagulated in a single body[168].

Tax Administrations have, probably even more than other administrations, perceived the need to fill , not only the already mentioned international tax gap but, in broader terms, the increasingly enlarging gap between economic and physical geography which has been central to the new global economy and are thus not immune to this general tendency towards networking.

As a matter of fact, it could be argued that administrations dealing with tax matters could well qualify as the forerunners in this exercise. Namely, tax administrators have successfully shared technologies through transnational networks in the past.[169] One meaningful early example could be found in the development of the technology of geometric land surveys and cadastres, which was instrumental to the reform of the land tax system in France, Austria and large parts of the German confederation[170] inspired by the land tax model developed in the Kingdom of Sardinia starting back in the 18th Century.[171] This episode stands out as particularly meaningful from both a comparative law and an international (global administrative law perspective): on the one hand, this

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[165] Ibidem. On the other hand, it should be acknowledged that although the study of networking administrations has been developed in other areas of global governance, the inclusion of international taxation within such a broader agenda has been aptly conceptualized by Professor Stewart. See ID., Transnational Tax Information Exchange Networks: Steps Towards a Globalized, Legitimate Tax Administration, World Tax Journal June (2012), at 155

[166] Jayasuriya K., *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, Indiana Journal of Global Legal Studies 6 (1999), at 447.

[167] Slaughter A.M., *The Accountability of Government Networks*, Indiana Journal of Global Legal Studies, 2/2001, at 347.

[168] Chiti E., *Le Agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Padova, Cedam, 2002, at 395. See also ID., *Decentralisation and Integration into theCommunity Administrations: A New Perspective on European Agencies*, European Law Journal, 10 (2004), at 402

[169] Stewart M., *Transnational Tax Information Exchange Networks: Steps towards a Globalized*, *Legitimate Tax Administration*, World Tax Journal June (2012), at 158.

[170] See Lebeau C., *Regional Exchanges and Patterns of Taxation in 18th Century Europe: the Case of the Italian Cadastres*,, Nehring H., Schui F. (Eds) *Global Debates about Taxation* , Pallgrave Macmillan, Basingstoke, 2005, at 30.

[171] Ibidem.

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episode may be pointed at as what could be defined as a tax transplant;[172] on the other hand, legal history suggests that such a transplant was the outcome of an early exercise of transnational administrative networking. Namely, at the time, most inter-governmental communication was limited to more traditional diplomatic channels, while the land tax model originated in Piedmont was disseminated across Continental Europe thanks to communications carried out among Tax Administrators.[173]

In more recent times, along with the more traditional diplomatic channels, it is possible to record the establishment of some informal groups of tax administrators from different Countries pursuing enhanced forms of networking. An important development in this regard was the formation in 1972 of the so-called "Group of Four", an informal organisation bringing together the Tax Administrations of France, Germany, the United Kingdom and the United States. The main activities of the Group of Four consisted in periodical meeting both at the direction and at the staff level for joint study of specific problems, such as, for instance, the carrying out of simultaneous tax examinations.[174]

The Group of Four served as a forerunner to other groupings of Tax Administrations with various regional affiliations which however were less characterised by the halo of secrecy that was associated with the early meetings of the original Group of Four.[175] In this regard, it is possible to mention, with reference to Europe, the so-called "Group of Six" comprising of Belgium, France, Germany, the Netherlands and Britain and with reference to the Pacific Region, the P.A.T.A., Pacific Association of Tax Administrations, comprising of Australia, Canada, Japan and the United States and established in 1980.

A very relevant grouping, especially in the perspective of exchange of information, is the C.I.A.T. (Inter-American Center of Tax Administrators), which has been in existence since 1967 and groups twenty-six Countries in the Western Emisphere. The C.I.A.T. holds annual assemblies and has permanent study group devoted to specific topical issues in tax policies.

An even more focused form of co-operation between Tax Administrations is that entailed by the Joint International Tax Shelter Information Centre (J.I.T.S.I.C.), established by a Memorandum of Understanding between Australia, Canada, the United States, the United Kingdom and Japan (China is an observer), devoted to sharing of

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[172] For the specific dynamics of legal transplants within the context of tax law, see Garbarino C., Tax Transplants and Circulation of Corporate Tax Models, *British Tax Review* (2011), at 159.

[173] See Lebeau C., *Regional Exchanges and Patterns of Taxation in 18th Century Europe: the Case of the Italian Cadastres*, H. Nehring , F. Schui (Eds) Global Debates about Taxation , Pallgrave Macmillan, Basingstoke, 2005, at 29.

[174] This administrative practice will be addressed in further detail in Part. 4 of this thesis.

[175] See Picciotto S., *International Business Taxation as a Study in the Internationalization of Business Regulation*, London, Weidenfeld and Nicolson, 1992, at 254.

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information concerning popular cross-border tax shelters deployed by individuals and corporations in pursuance of aggressive tax planning behaviours.[176]

All the earlier cited examples of transnational administrative networks find a common ground in a fairly informal institutional framework and in the pre-eminence of the personal participation of the officials involved, to the extent that the concerned groupings hint more at *tax administrators* rather than Tax Administrations. It seems to this author that a very fruitful perspective in studying such a phenomenon would be to include in the picture sociological perspectives addressing “transnational communities”. Transnational communities are social groups that emerge from mutual interaction across national boundaries oriented around a common project. The main characteristic of such communities is that they can overlap in different ways with formal organisations but, in principle, they do not need formal organisations to be sustained.[177]

On the other pole of the spectrum of transnational networking among Tax Administrations described above, which fall into the category of informal interactions between Tax Administrators, it is also possible to identify a second dimension of administrative networking, characterised by a more accentuated infrastructural formalisation and, in some cases, by the contiguity to actual international organisations. A fitting example in this regard is represented by the earlier cited Global Forum on Transparency and Exchange of Information for Tax Purposes. Although the Global Forum is, under many respects, a very original creation, whose closest kin is probably to be found in other bodies charged with carrying out peer-review activities, such as for instance the Financial Action Task Force in charge of the monitoring of a consistent worldwide implementation of anti-money laundering standards, it seems to this author that some of the key characteristics, of long established “international administrative unions” can be detected. Among such characteristics it can pointed out to the features identified as essential traits of international administrative unions[178] such as the setting up of steering bodies composed of representatives from the competent administrations of the adhering jurisdictions that jointly define or formalise standards and guidelines whose implementation is entrusted to the same administrations that have contributed to their formalisation.

Unlike traditional international administrative unions, however, modern administrative for a, such as the Global Forum have not been established based on international agreements but, rather, on an autonomous basis, so that the choice of

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[176] See *Joint International Tax Shelter Information Centre Memorandum of Understanding*, retrievable at the following website: www.irs.gov/pub/irs-utl/jitsic-finalmou.pdf.

[177] See Djelic M.L., Quack S., *Transnational Communities. Shaping Global Economic Governance*, Cambridge, Cambridge University Press, 2010, at I.

[178] The taxonomy is based on Battini S., *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, at 211.

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joining the Forum ultimately relies on each administration rather than on States.[179] Moreover, the standards issues and the conclusions reached by the Global Forum, for instance in the area of the peer-review activity, do not appear to be directed towards *States* and are typically issued in the expectation that individual authorities will take steps to implement them;[180] thus, it seems appropriate to conclude that even formalised examples of transnational administrative networks, such as the Global Forum, would not be suitable to *produce* international legal obligations incumbent on States. At the same time, when compared to other examples of "modern" examples of international administrative unions, such as the Basel Committee on Banking Supervision, the experience of the Global Forum features some features, largely due to its contiguity with and to the sponsorship provided by the OECD, that might more correctly qualify it as a hybrid between an international administrative union in the true sense and a sectorial international organisation. Namely, in relation to the latter, it has been observed that, from an administrative perspective, their chief characteristic is that, once the government representatives and the diplomatic personnel "have gone home", the task of managing the international organisation and pursuing its goal falls to the national government officials in the issue area concerned.[181]

On the other hand, a specular ambivalence, can be verified also in transnational administrative for a, not least the Global Forum, where although States are not formally part of the Forum, the underlying governance, for instance in the area of comitology and of the appointment of responsible bodies such as the Steering Committee, would ultimately seem to rely on logics based on the assumption of the equality among States rather than among participating Administrations.[182]

Finally, this author would also like to remark that, while this thesis is focusing on "information based" administrative co-operation and, in particular, on administrative co-operation in the area of assessment and enforcement of taxes, it cannot be denied that these areas, although the more visible due to their centrality to many issues in the current international tax policy agenda, are but a thread of a tapestry which also encompasses other administrative areas, such as collection, dispute resolution and what could be defined as the setting up of a transnational management system

[179] It could be argued in this regard that many of the members of the Global Forum, in particular traditional offshore jurisdictions are not States, thus this taxonomic criterion may partially lose its relevance in this context as it can arguably be very difficult to separate the orientation of the Tax Administration of an offshore jurisdiction from the policy orientation of its government, not only because the Tax Administration in these jurisdictions can be very little formalized but also because the issues dealt with under the Global Forum often qualify as of vital relevance for the same jurisdictions.

[180] Battini S., *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, at 211.

[181] Slaughter A.M., *The Accountability of Government Networks*, Indiana Journal of Global Legal Studies, 2 (2001), at 355.

[182] The governance of the Global Forum is specifically addressed *infra*, chiefly in a distinct although complementary, legitimacy perspective under Part. 3 of this thesis.

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governing enhanced relationships[183] between governments and multinational business in the build-up of what could be defined as an exercise of global regulation[184] in tax matters [185].

At least in the realm of the gathering of tax information, the way said global regulation is carried out is however evolving towards a relationship of mutual influence between regulated entities and regulatory bodies, which actually, often rely on the former for ensuring actual implementation as multinational enterprises and, especially, multinationals acting as global financial intermediaries are often the only institutions that have direct access to the kind of information and that are provided with the suitable information technology platforms that are both necessary for ensuring an actual implementation of the existing mechanisms of exchange of information in tax matters. It then seems only natural that jurisdictions have started to increasingly rely on a "privatisation" of many key passages of the international tax information pipeline. This has given rise to a phenomenon that, while a mainstay of the successful sustainability of most tax systems in the domestic context, is fairly innovative when examined in a cross-border perspective, that of the emergence of (transnational) tax intermediaries,[186] whose emerging role will be further analysed under Part 6 of this thesis.

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[183] Picciotto S., *International Business Taxation as a Study in the Internationalization of Business Regulation*, London, Weidenfeld and Nicolson, 1992

[184] Ibidem

[185] Adopting an effective description of the dynamics of the relationships between tax administrations and multinationals in a transnational scenario as coined by Stewart M., *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, World Tax Journal June (2012), at 152.

[186] From a domestic perspective, a satisfying systematisation of this legal-economic (and, in broader terms) social reality appears to be offered by the doctrine of "firm-based taxation" ("tassazione attraverso le aziende") developed by Professor Lupi. For an updated introduction see Lupi R., *Manuale giuridico di scienza delle finanze,* Roma, Dike, 2012, in particular, Chapter 2.

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4 PART 3: THE "INTERNATIONAL STANDARDS" OF EXCHANGE OF INFORMATION AND ITS IMPLEMENTATION

4.1 A Basic Outline of the Standard

The Global Forum originally referred to a "single" international standard of transparency and exchange of information in tax matters in its works but it has now shifted to referring to them as "the standards".[187] This linguistic shift is probably justified by the circumstance that, while originally, the Global Forum focused exclusively on exchange of information, since the launch of the peer reviews and as reflected in the peer review terms of reference, the standards have been broken down in three main areas, namely:

- availability of information;
- access to some critical items of information by Tax Administrations (in particular, bank, ownership, identity and accounting information); and
- exchange of information.

Since the first two areas are not addressed *per se* neither by the 2002 OECD Model T.I.E.A. nor by the last version of Art. 26 of the OECD Model Convention , the Global Forum had to include documents and guidelines issued by other bodies, as it will be outlined in the following paragraph.

It is interesting to remark that the five pronged standard as commonly found in the "Background Information Briefs", i.e., in the periodical releases that the Global Forum issues in order to freely make available to the Public in a summary fashion its main activities and achievements[188], is referred to but never explicitly outlined in the documents concerning the Peer Review procedure such as the Handbook for Assessors, the Methodological Outline or the Terms of Reference; in these latter items of documentation "the standard" is always referred to as "the standards" and a definition thereof is never provided but, rather, the standards are directly discussed as terms of reference for assessors and consequently broken down into "essential elements".

Based on the preliminary work carried out by the Global Forum as well as by the outline to be found in the "background information briefs" contemporary to peer reviews,

[187] In this regard, based on the belief of the "plural nature" of the international standards of transparency and exchange of information, reference has typically been made to "the standards" unless whereas explicit reference was made to the specific wording of a policy or administrative document using the singular form (sometimes also conveyed as "the internationally agreed standard".

[188] To date, the latest "Background Information Brief" was published on the Global Forum website on 21st June 2011.

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the standard of transparency and exchange of information consists of the following five items[189]:

1) ensuring that reliable information is available and that the competent authorities have the power to enter in possession thereof.

2) implementation of exchange of information on request where it is foreseeably relevant to the administration and enforcement of the domestic laws of the treaty partner, without incurring in "fishing expeditions";

3) elimination of the restrictions on information exchange based upon the need to preserve banking secrecy or on the absence of a domestic tax interest in the requested information or on the non-fulfillment of the dual criminality test in case the information required is needed in order to tackle tax fraud;

4) confidential treatment of the information exchanged;

5) safeguard of taxpayers' rights.

Items No. 2 to 4 of the Standard are all covered by different Paragraphs of Art. 26 of the OECD Model; in particular, item No. 2 is directly derived from Para. 1 of Art. 26 of the OECD Model; item No. 3 is drawn from Para. 4 and 5 of the OECD Model; item No. 4 is drawn from Para. 3 of Art. 26. On the contrary, item No. 1 has been derived from the work of the Joint Group on Accounts. Item No. 5, at least in the perspective of the Global Forum, as reflected in its Terms of Reference, should merely consist in respecting the limitations to exchange of information set forth by Para. 3.b. of Art. 26 of the OECD Model and Art. 7 of the Model TIEA[190].

It should be remarked that the reference to an international standard (or to international standards) is indeed quite an innovation typical of the last couple of years of the OECD and the Global Forum, since, in the previous years, no such wording had ever been used. In particular, it has been remarked as the expression "*internationally agreed tax standard*" was started being used in press releases and official documents of the OECD, having been pronounced for the first time by Professor Owens, Director of the OECD Centre for Tax Policy and Administration, only right after the London and Pittsburgh G20 meetings in 2009[191]. Based on the circumstance that the substantive

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[189] See *Background Information Brief*, 2nd May 2011, 3 and *Background Information Brief*, 21st June 2011, 17

[190] In this respect, it seems that other issues that have the subject of recent discussion in legal literature and that have been implemented by some national legislations (e.g., that of the Netherlands) such as that of the taxpayers' "right of prior notification" have not been taken into account when setting the international standard. The Global position in this respect would seem to be well represented by the OECD Commentary to Art. 1 of the OECD Model T.I.E.A. where it is affirmed that "*The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information*".

[191] See in particular Owens J., Countering Offshore Tax Evasion: Some Questions and Answers on the Project, 28th September 2009, retrievable on www.oecd.org/dataoecd/23/13/42469606.pdf , whereas it was repeatedly stressed that the standard, although developped by the OECD had been adopted by the G20. For a reconstructive analysis of

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elements of the standard had been existing for at least four years prior to those dates, it may be argued whether their "internationally agreed" nature derives from the endorsement provided by the G20 and the attribution of a mandate by the latter to the OECD and its affiliated *fora* . Moreover, it can also be observed that, not unlike transparency, the expression "*internationally agreed tax standard*" echoes a reference to former declarations issued by the G20, which expressed the need to adopt and endorse "*internationally accepted standards and codes*" in different areas of economic global governance, with particular reference to the regulation of financial standards and codes set forth by the Bretton Woods Institutions[192].

At a G20 level, explicit reference to the expression "standards of transparency and exchange of information" was introduced only in the Declaration following the 2004 Berlin Summit, where however, tax issues where not addressed as a problem *per se*, but chiefly in relation to their impact on the financial sector, with pre-eminence being awarded to the issue of the possibility of disclosing ownership information and lifting bank and fiduciary secrecy[193]. A further argument in favour of attributing the political paternity of the "internationally agreed tax standard" to the G20, while being its technical definition an achievement of the OECD, lies in the circumstance that the latter attributed a mandate to the OECD and the Global Forum to further foster the implementation of said standard and that the Global Forum regularly provides an update of its work to the G20.

Such a reconstruction might explain why the standard is referred to as "the standard" in the works of the G20 and of the OECD while it termed as "the standards" in the works of the Global Forum. In the former case, emphasis is put on the internationally agreed nature of the standard and consequently taken as a whole; in the works of the Global Forum, that are more technical in nature, such a veil is somewhat pierced and reference is directly made to the different elements that amount to the

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the term see also Christians A., *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, Northwestern Journal of Law and Social Policy5 (2010), at 455

[192] In the first G-20 Declaration in 1999, ministers and governors welcomed the "important work that has been done by the Bretton Woods institutions and other bodies toward the establishment of international codes and standards," and, to "demonstrate leadership in this area," they agreed to undertake the completion of Reports on Observance of Standards and Codes ("Transparency Reports") and Financial Sector Assessments." Such G-20 support for the work of the IMF and the World Bank likely accelerated the pace at which countries adopted internationally accepted standards and codes. For a more in depth historical retrospective, reference may be made to Powell G. et Al., *The Group of Twenty: A History*, 2009, freely accessible online at the following website: http://www.g20.org/Documents/history_report_dm1.pdf

[193] One of the more meaningful excerpt of the final Declaration read as follows: "*We reaffirmed our commitment to fight the abuse of the international financial system in all forms. To this end, we have committed ourselves to the high standards of transparency and exchange of information for tax purposes that have been developed by the OECD's Committee on Fiscal Affairs as set out in the attached statement. We will work to implement the high standards of transparency and effective exchange of information through legal mechanisms such as bilateral information exchange treaties, and we also call on those financial centres and other jurisdictions within and outside the OECD which have not yet adopted these standards to follow our lead and take the necessary steps, in particular in allowing access to bank and entity ownership information.*"

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standard, that in turn derive from a plurality of sources, thus the use of the plural number.

4.2 The Legal Nature of the International Standards

The expression "international standard (of transparency and exchange of information)" is probably the most innovative and stimulating contribution, at least from a legal theory perspective, that has been brought about by the new course in international administrative tax co-operation, whose beginnings can ceremonially be traced to the famous G20 declaration of 2nd April 2009.

At the same time, it seems to this author that the opportunity of taking the expression "international standard", especially whereas mention is made to a "standard" at face value ought to be more duly scrutinised. The word "standard" is a fairly tricky one within legal theory circles, replete with some specific implications; thus, it should be handled with caution.

The distinction between "standards" and "rules" is as fascinating as it is rife with complexities. Due to the stipulative nature of the related definitions, the usual conundrum arises and renders this issue even more intricate, since nothing can be more arduous than defining what a definition is[194]; it is then apparent that providing a theoretical definition of what is a standard as opposed to a rule goes well beyond the scope of this thesis.[195] Subject to the risk of a certain degree of approximation, a working definition of the distinction may be articulated as follows: the fundamental difference between rules and standards is the point at which each is given content:[196] a standard is provided with an *ex post*normative content[197] while a rule is already drafted with an *ex ante* normative content;[198] an intuitive example in this respect is the distinction between a "reasonable speed" requirement (a standard) and a "numerical speed limit" (a rule).[199]

An even rougher distinction could lie in the circumstance that standards constitutes a general normative proposition devoid of the specifications that are typically

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[194] The problem is indeed not exclusive to legal theory but it deeply engrained in the logics and epistemology of any scientific discourse, even in the hard sciences. See in this regard, G.Peano, 'Les definitions mathématiques', *Ier Congrès International de Philosophie*, Paris, 1900, Vol III, pp. 279 – 288.

[195] Useful bibliographic references in this regard are however, with no pretension of exhaustiveness, as follows: Diver C.S., *The Optimal Precision of Administrative Rules*, 93 Yale Law Journal (1983), at 71; Ehrlich I., Posner R.A., *An Economic Analysis of Legal Rulemaking*, Journal of Legal Studies 3 (1974) at, 257; Kaplow L., *Rules Versus Standards: An Economic Analysis*, 42 Duke Law Journal (1992), at 559; Sunstein C.R., *Problems with Rules*, 83 California Law Review (1995), at 953.

[196] Dean S., *Neither Rules nor Standards*, 87 Notre Dame Law Review 2 (2012), at 543.

[197] In more technical terms, it features a deferral of content specification. See Kaplow L., *Rules Versus Standards: An Economic Analysis*, 42 Duke Law Journal (1992), at 567.

[198] Ibidem

[199]Ibidem

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linked to rules. In this regard, from a policy perspective, it has been observe that standards serve a specific function in fostering political compromise while constituting a legal common denominator; namely, sometimes involved actors can agree on standards when they cannot agree on their specifications.[200]

Based on the above depicted rough, but hopefully effective, distinction, it may be observed that the new international standards are somewhat of a misnomer as their main concern is to fill the gaps in the current international legal framework overseeing administrative co-operation in tax matters. In order to fill such a gap, rules, rather than standards, are actually what the OECD first and, subsequently, the Global Forum found it was necessary.

A proof of the circumstance of the, apparently paradoxical, rule based nature of the "international standard" is that jurisdictions can be quantitatively assessed in their degree of compliance to said "standard": in order for such a cardinal approach to evaluation to be viable, in order to ensure measurability of the different degree of compliance, benchmarks are needed and rules, not standards, are the kind of legal propositions that can bring about such benchmarks. It is needless to say that the circumstance that the "international standard" is really a "set of rules" does not imply any assessment of it legal bindingness. A further confirmation of such a recharacterisation can be found in the circumstance that the policy documents governing the peer review process and restating the elements of the "international standard" make it clear that the standard finds its "sources"[201] in the "rules" contained in model provisions harboured by the OECD Model Tax Covention and, due to the latter's higher degree of detail, by the OECD Model T.I.E.A.[202]

It is even more interesting to remark that many of the so-called sources of the international standard are to be found in a manual aimed at tax administrations, that is, not even a model provision but a set of administrative regulations and procedures aimed at tax administrator. In this regard we can see a clear sign of an "administrativisation" of the whole discourse on tax co-operation, to the extent that this can clearly be seen as one of the possible building blocks of a "global transnational tax administration".

At this point it may be argued whether a rule-based approach is the most desirable one. In a broader legal policy perspective it has been observed that a mere collection of rules may lead to stagnation [203]and that rules not sustained by principles are less likely to be successful and enduring as would be deprived of a

[200] Sunstein C., *Problems with Rules*, 83 California Law Review (1995), at 965.
[201] So to use the same jargon adopted by the Global Forum.
[202] The circumstance that a standard has its "sources" in a set of rules should be surprising and further corroborate the conclusion that the "international standard" should really be qualified as a set of rules.
[203] Dean S., *Neither Rules nor Standards*, 87 Notre Dame Law Review, 2 (2012), at 559.

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justification.[204]Even in relation to the governance of exchange of information networks insightful scholarship has pointed to analogous risks and in particular to the possibility that a rule based environment would be more prone to obsolence[205]

The Global Forum has indicated in a clearcut fashion the sources of the standards of tax transparency and exchange of information from which the terms of reference driving the actual per review process have been derived[206].

Said sources are distinguished in primary authoritative sources and complementary authoritative sources.

The primary authoritative sources are referred to as "the primary authoritative source" even though said source is twofold, comprising of, first and foremost, the 2002 OECD Model Agreement on Exchange of Information including its Commentary and, on a slightly lower level, the 2005 version of Art. 26 of the OECD Model comprising of its Commentary.

These primary sources are integrated by "supplementary secondary sources". Said secondary sources can be reorganized according to the international organisation or body that drafted them.

Among the OECD derived secondary sources, there is the 2006 OECD Manual on Information Exchange, which is an update of previous versions of such a handbook directed to tax administration officials of the OECD Member States and which imparts practical directives about how to correctly and efficiently implement the standard of information exchange brought by the last version of Art. 26 of the OECD Model or by the 2002 Model Agreement on Exchange of Information in Tax Matters.

Among the supplementary sources derived by the Global Forum, its forerunners or by other *fora* promoted by the OECD, the following can be listed:

- the Guidance Notes developed by the Forum on Harmful Tax Practices. The Guidance Notes were published just before the release of the 2005 version of Art. 26 of the OECD Model and were meant, in particular, to provide guidance with regard to standards in the area of the availability of relevant and reliable information, with focus on issues such as the identity of legal and beneficial owners;

- the Notes and Annual Assessments published by the Global Forum. Particular relevance is to be attributed to the 'Note on Taking the Process Forward in a Practical Way' published in November 2008 and whereas a benchmark concerning the substantial implementation of the standards of exchange of information was found in the conclusion of agreements providing for

[204] Franck T.M., *Legitimacy in the International System*, 82 American Journal of International Law (1988), at 752 .
[205] See Dean S., *Neither Rules nor Standards*, 87 Notre Dame Law Review, 2 (2012), at 560 et seq.
[206] See in particular, the Annex II to the Terms of Reference.

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exchange of information with at least twelve OECD Member States. This document later inspired the position of the OECD Secretary General as exposed in the first ‘Progress Report’, whereas it was determined that the international standard of effective exchange of information would have been considered substantially implemented upon the conclusion of at least twelve agreements compliant with the standard, regardless of the OECD affiliation of the counterpart.[207] Other important sources of complementary guidance that were taken into account when defining the terms of reference (i.e., the actual parameters on whose basis peer reviews are carried out) have been derived from the annual assessments that have been published by the Global Forum from 2006 onwards titled “Tax Co-operation. Towards a Level Playing Field” .

The aforementioned supplementary sources are also complemented by the following documents issued by other international bodies, in some way connected to or promoted by the OECD in a greater or lesser extent:

- the Report by the Joint Ad Hoc Group on Accounts, a Working Group composed of members drawn from both OECD and non-OECD jurisdictions whose Report on reliable accounting records, necessary accounting records retention and access to accounting records was approved by the Global Forum on Taxation in 2005;

- the Recommendations, Standards and Reports issued by the Financial Action Task Force. These recommendations and standards, although directed towards the issues of the contrast to money laundering and terrorism financing practices are primarily concerned with the transparency of transactions, the disclosure of certain items of information and were then considered potentially useful when interpreting and applying the standards of tax transparency and exchange of information.

[207] It can then be clearly perceived that, while the standards of exchange of information *per se* have not changed before and after the commitment undertaken upon the April 2009 G20 meeting in London, the criteria determining the substantial implementation of the standards have definitely been made more “global”, as it was not explicitly foreseen that the counterparts of the international agreements enabling exchange of information be OECD Member States but, in this way, probably more lax as it considerably easier to conclude a tax information exchange agreement with a jurisdiction that does not normally resort to the exchange of tax information. This aspect could be considered as one of the main pitfalls of the earlier steps of the “global tax transparency revolution” (as defined by Mr. Gurria) but it seems that it served a strategic agenda aimed at somewhat instantly reward the commitment of some jurisdictions and involve as many jurisdictions as possible in the works of the Global Forum by setting objectives that seemed reasonably attainable. As it will be further exposed, the Global Forum has however recognised that it is not only the quantity of the agreements concluded that counts but also the characteristics of the respective contracting jurisdictions matter. This is well reflected, in particular, by the Term of Reference C.2 of the Peer Review procedure, according to which, a jurisdiction’s network of exchange of information agreements shall cover all relevant partners, i.e., all partners that may interested in entering into exchange of information arrangements with the concerned jurisdiction. As a result of this, it is generally agreed within the Global Forum that when a member jurisdiction expresses the desire to conclude a tax information agreement with another member jurisdiction, the latter cannot refuse.

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All the aforementioned are defined as “sources” in the works of the Global Forum but this should not ingenerate any confusion on the reader as far as all the earlier cited sources are either international recommendations or mere policy reports that apparently were not meant, at the time of their drafting, to be considered as a sources having any normative implications.

In this respect, the concerned standards are by their very nature “social norms” but their application in the Peer Review process may lead to consequences that are typically determined by “legal norms” (the peer reviews are conducted on a “soft law” basis, but they may result in “hard law”[208], i.e., reforms of domestic law provisions, (re)negotiation of treaty provisions, countermeasures against non-cooperative jurisdictions). Similarly, the role played by standards appears as being quite peculiar as the latter are “social norms” interacting with already existing “legal norms” (domestic legislation, treaty clauses on exchange of information).

Adopting a different perspective, it could be argued whether the international standard of transparency and information exchange is actually an item of soft law. A possible framework for positioning rules on the plan defined by the “soft law” and “hard law” axes could be to assess these rules from three different angles, the former two ultimately referring to an issue of sovereignty and revolving around the concepts of “obligation” and “delegation”, the latter focusing on the degree of precision of the concerned rules.[209]

Namely, the whole idea of a “standard of transparency and information exchange” is based on sources that are expressed in policy documents and international recommendations that could qualify as soft law, but the standard of transparency has not yet been coherently codified to date but can be inferred, in their concrete implications only from the ex post perspective of the methodological guidelines issued by the Peer Review Group.

The fact that background information briefs and previous policy documents published by the Global Forum set forth the aforementioned five pronged standard of transparency and information exchange, while the documentation specifically addressing peer reviews always refers to “standards” and does not faithfully reproduce the aforementioned five pronged standard but, rather, focuses on much more analytical “terms of reference” may lead one to question whether the standard of transparency

[208] It may be observed that the adjective hard should be redundant when applied to “law”, however, this possible redundancy has become a staple of legal scholarship in order to distinguish this kind of law from the possibility of soft law, “soft law” possibly being defined as non binding norms that however convey a certain degree of judicial effectiveness (See in this respect, Walter R., *Soft Law aus rechtstheoretischer und verfassungsrechtlicher Sicht*, Lang M., Schuch J., Staringer C. (Eds.), *Soft Law in der praxis*, Wien, 2005, at 21. For a thorough historical reconstruction of the antithesis hard law/soft law with specific reference to the international tax legal order, which goes beyond the scope of this study, introductory reference may be made to Klabbers J., ‘The Redudancy of Soft Law’, 65 *Nordic International Journal* (1996), at 167

[209] Kenneth W. Abbott et al., *The Concept of Legalization*, 54 International Organization (2000), at 401.

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and information exchange is actually fixed or is still an evolving and fine-tuning one which can be adapted for the purpose of conducting peer reviews. In the latter case, it is very important to ascertain how such a standard can be legally characterized as one of the key features of normativity is that norms, whether social or legal, once set can only be modified by the same body that issued them and in adherence to a pre-determined procedure. Whereas such a "working definition" be endorsed, it may be concluded that the international standard of transparency and exchange of information is not properly soft law because it lacks the basic features of a "norm", since, while its sources have been established, its actual formulation on the whole, as a standard and not as a collection of different elements appears quite volatile. On the other hand, the actual normativity in the peer review process is found in the "terms of reference" that are laid down and codified in a clear and straightforward fashion and cannot be amended by the persons in charge of carrying out peer reviews until the issuing Global Forum agrees by consensus to do so. At the same time, it could be objected that the "terms of reference" are nothing more than a "checklist" included in a manual destined to assessors and that their inherent normativity shall likely lie elsewhere[210].

Even whereas it would be reasonable to qualify the current international standard of transparency and exchange of information as an item (or a series of items of soft law), it could be observed that the "soft law" often carries along a transitional connotation. In particular, it possible to perceive an expectation that "soft law" plays a somewhat pioneeristic stage which should eventually bring about the adoption of items of hard law.[211] When transposed on the plan of international law, this tendency to the crystallization of soft law into items of hard law may be understood in the terms of the emergence of a peculiar facet of international law, an international custom.[212]

Thus, from a public international law perspective and leaving aside the radically different plan of "soft law", it could be argued whether, whereas the international standard does not fulfil the basic normativity requisites in order to be considered "soft law", the set of rules, whatever their ultimate source be, could be considered on the whole as a core of customary international law[213] and draw their normativity

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[210] It should also be made clear that, while the authoritative sources constituting the standards of transparency and exchange of information acts of foundations of the whole process, the Terms of Reference have a mere functional value and, at least in the intention of the Global Forum, they are not meant to be isolated from the Peer Review activity, in respect of which constitute a tool. As such, while the standards shall remain constant over time, unless amended by the OECD through the usual process of revision of model treaties and of the related commentaries, it is possible that, as the interpretation of these sources evolves, either on the basis of findings in the peer review process or otherwise, the Terms of Reference may be amended to reflect this. Such a conclusion has been clearly expressed also by the Global Forum. See the "Background Information Brief" dated 2nd May 2011, at 26.

[211] Abbott K.W. et al., *The Concept of Legalization*, 54 International Organization (2000), at 401.

[212] The qualification of elements of the so-called "International Tax Regime" as items of international customary law is highly disputed in international taxation. Among the most authoritative proponents of such a characterisation see Avi Yonah R., *International Tax as International Law: An Analysis of the International Tax Regime*, Cambridge, Cambridge University Press, 2007

[213] Autoritative international Tax Scholarship also appears to convergence, although with the necessary caution give the problematic nature of ascertaining a custom, towards partially similar conclusions. In this

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therefrom:[214] under such a scenario, the lack of "soft law normativity" of the international standard would be overturned in favour of a regained "hard law normativity" conveyed through an international custom .

In order for an international custom to emerge, two elements are necessary: *opinio iuris sive necessitatis*, i.e., the emergence of a subjective element which is used to judge whether the practice of a State is due to a belief that is legally obliged to do a particular act and *diuturnitas*, i.e., the existence of a consistent practice by States in adhering to the rules constituting the custom.[215]

The Global Forum membership comprises of more than one hundred member jurisdictions that have all formally committed to the "internationally agreed tax standard" and, even more significantly, have agreed to be tested ("peer reviewed") on the actual degree of implementation of said standard from their part. It could then be argued whether there is an *opinio iuris sive necessitatis* concerning this standard among a large share of the international community. At the same time, even assuming that *opinio iuris* is in place, which is a conclusion that no one has really been holding so far, the element of *diuturnitas* does not seem perceivable at all, also based on the circumstance that the exchange of information consensus was reached not before the end of 2009 and its effects are fully manifesting only now.

It is generally held in public international law scholarship that the element of *diuturnitas* is to be valued over that there mere detection of an *opinio iuris* when ascertaining whether a public international law custom has emerged.[216]

In the current state of affairs, *diuturnitas* is not perceivable; as such the international standard of tax transparency could then be considered as international custom only accepting the dubious theory of "instant customary law".[217] The activities of the Global Forum and the emergence of a standard could then be qualified as a set of practices and rules that, although not yet directly crystallised into an international custom, can prospectively constitute a basis thereof. On the other hand, leaving aside such a dubious theory, it has been recognised in international legal scholarship that a restricted but compact number of States , acting on behalf of and in representation of

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regard, see *Pistone P., Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, forthcoming on Bulletin for International Taxation 4-5 (2013)

[214] For the purposes of a correct taxonomy it shall be argued that while "customary law" is by definition a form of "hard law", since it is recognised as one of the sources of international law, it is nonetheless characterised by an informal, dynamic and uncertain nature, which nonetheless does not prevent it from sorting effects typically associated with fully fledged legal norms. In this respect, see Christians A., *Hard Law and Soft Law in International Taxation*, *Wisconsin International Law Journal* 2 (2007), at 55.

[215] In these terms, see, *ex multiplis*, International Law Association - Committee on Formation of Customary General International Law, *Statement of Principles Applicable to the Formation of General Customary International Law: Final Report of the Committee* (July 25-29, 2000).

[216] Ibidem

[217] See in this respect, Baxter R.R., *Treaties and Custom*, 129 *Recueil des Cours* (1970 – I), at 44 et seq.

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the whole international community, may prompt the creation of rules of international law[218].

In this perspective, even though it is true that the OECD cannot be considered as an international organisation representing the majority of the international community, it should be borne in mind that the primary source of the currently debated standards of transparency and information exchange is to be found in the 2002 Model Tax Information Exchange Agreement, which, although published as an OECD model agreement, represents the arrival point of the debate that took part within the Global Forum on Taxation, to which both OECD and non-OECD member jurisdictions took part. It could also be remarked that, even though there have been authoritative proposals to make the UN standard of information exchange more demanding, it can be observed that the OECD standard and the UN standard are, at least in the current state of affairs, substantially aligned, to the extent that the latter is expressly quoted as one of the "sources" of the internationally agreed standard. Additionally, the number of jurisdictions member to the Global Forum is such to suggest a high degree of representativeness and it is currently expanding.

In any case, regardless how theoretically promising such a school of thinking may be, it shall be concluded that the international standard of transparency and information exchange does not constitute a custom, at least in this phase, because the very standard devolves its actual implementation to the conclusion of treaties, either double taxation conventions or tax information exchange agreements. On the other hand, even though it is more likely not possible to currently acknowledge the presence of an actual international custom,[219] since there is a general understanding that tax treaties (either double taxation conventions or tax information exchange agreements) are in any case necessary for creating exchange of information obligations, it can be argued that, since the emergence and endorsement of the "internationally agreed tax standard", exchange of information clauses cannot be considered anymore, as far as the core elements of the standards are concerned, an issue to be negotiated among Contracting States but should come as a pre-defined package. Leaving aside the problem of automatic exchange of information and other forms of enhanced co-operation, the only outstanding issue within the boundaries of the internationally agreed tax standard would be the problem of determining when the information requested is foreseeably relevant, as the a shared understanding of what a fishing expedition and a

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[218] See Ziccardi Capaldo G., *Diritto globale*, Milano, 2010, at 96 et seq. . It is interesting to remark that, maybe not willingly, such an orientation may be found at the core of the expression "*internationally agreed tax standard*" deployed by Professor Owens in his declarations in the aftermath of the Pittsburgh 2009 meeting of the G20, whereas the international agreement on the standard would seem to be chiefly achieved, as anticipated, by means of its endorsement by the G20, which could be meant as a depository of such an "international vanguard".

[219] On the implications of having international customary rules reproduced in and vehiculated through treaties and the emergence of the so-called "codificatory conventional rules", introductory reference can be made to Villiger M., *Customary International Law and Treaties*, Dordrecht, Martinus Nijhoff Publishers, 1985, at 156 et seq.

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shared best practice in submitting request for assistance does not seem to have been reached yet. In any case, as it has been underlined in the previous Part of this thesis, tax administrations are increasingly involved in a networking activity; thus the emergence of a core of customary law concerning the obligation to provide information might be consonant with such a trend and provide a broad legal "umbrella" to the more flexible practices of the concerned Tax Administrations: thus it may be argued that in the long run it could be preferable to stick to a less detailed, standard-oriented legal framework and to leave further specifications to the more dynamic networking arrangements carried forward by Tax Administrations.

Moreover, it can be observed that, while the actual framework of information exchange is indeed a problem of international law as it refers to the broader area (which actually transcends international tax law) of administrative cooperation, other elements of the standard, such as the availability of reliable information and the possibility for the Competent Authorities to enter in possession thereof solely affects the domestic plan.

It could then be said that the standard of transparency and exchange of information has a hybrid legal import when the usual scholarly partitions are applied: namely it consists in the adoption of international law provisions, to be enshrined in the conclusion of treaties and, on the other hand, it postulates some form of harmonisation[220] as far as accounting rules and procedural tax law is concerned.

4.3 The Elements of the Standard of Exchange of Information

4.3.1 Introductory Remarks

In the following Paragraphs, a critical analysis of the constituting elements of the international standard of exchange of information for tax purposes will be conducted. Since it has been already clarified that the international standard is not separated from it "sources", i.e., chiefly from international recommendations issued by the OECD on the topic of exchange of information upon request, this analysis will also offer the chance for an assessment of these recommendations. Due to their relevance to the defining characteristics of the international standard, emphasis will be put on Art. 26 of the OECD Model T.I.E.A.. Original contributions by the UN Model, which, based on policy documents issued by the Global Forum, while not itself a source of the international standard, is found to convey the same content of the standard,[221] will also be acknowledged. On the other hand, solutions set forth under the Convention on Mutual

[220] The term harmonisation is probably not thoroughly appropriate in this context. Namely, the standard is first and foremost preoccupied with the achievement of certain outcomes but does not actually set forth prescriptive models *ex ante*. Harmonisation will be, whereas achieved, the *ex post* result of the peer review activities conducted by the Global Forum. In particular, the Terms of Reference according to which jurisdictions are examined, contain *in nuce* the elements of a "best practice" towards which jurisdictions are prompted to converge (thus implying some form of harmonisation). Moreover, the outcomes of the peer reviews may disseminate some actual best practices as performed by some of the jurisdictions that have been most positively evaluated.

[221] See the Background Information Briefs periodically published by the Global Forum.

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Administrative Assistance and the Nordic Convention, due to their multilateral character as well as those based on European Directives will be dealt with in another Part of this study.The same *renvoi* applies in relation to other model legal instruments, such as the US Model and the CIAT Model.

The following Paragraphs are articulated based on a systematic recollection of the "Essential Elements" used by the Global Forum as benchmarks for assessing the implementation of the international standards. In the view of this author, a distinction can be made between "substantive elements", dealing with a positive enunciation of the standard in relation to aspects such as its scope of application and its actual contents, and "procedural elements" , concerning the way the standard should be implemented, and "treaty policy elements", concerning the legal instruments through which the standard can be applied and the perimeter of the related treaty network.

4.3.2 Substantive Elements

4.3.2.1 Scope of Application *Ratione Personarum*

The personal scope of application of the international exchange of information standards embraces a twofold dimension.

The first one, which is not directly addressed in the explanation of the "internationally agreed standard" as advertised by the OECD and the Global Forum but that is functionally connected thereto, could be defined as the instrumental personal scope of application of information exchange clauses as found under double taxation conventions or tax information exchange agreements and directly refers to circumscribing the notion of "Competent Authority" for the carrying out of exchange of information, i.e., the determination of persons having the legal authority to exchange information.[222]

Whereas the framework for information exchange is provided within the context of a double taxation convention, no specific notion of Authority competent to exchange information is provided. Rather, the "Competent Authority" awarded competence to execute treaty provisions, including rules defining administrative assistance, are those generally included under the list of treaty definitions provided under the treaty article modelled after Art. 3 of the OECD Model Double Taxation Convention ("general definitions").[223] In such a perspective, besides possible comparative surveys among jurisdictions in order to identify the actual "Competent Authorities" for each State or territory,[224] there is little room for systematic recollections. Some general purpose

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[222] See *Implementing Tax Transparency Standards*, p. 28

[223] In this respect, the UN Model Convention adopts the same approach as the OECD Model. In particular, Para. 9 of the Commentary to Art. 3 states "*As in the OECD Model Convention, the definition of the term "competent authority" is left to the Contracting State.*"

[224] Such an exercise is typically included in most Peer Review Reports issued by the Global Forum.

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remarks are provided by the OECD Commentary to Art. 3 of the OECD Model Double Taxation Convention, highlighting the plural form "Competent Authorities" that is typically included in tax treaties and which is meant to highlight the circumstance that some jurisdictions may invest more than one authority with the competence of applying treaty provisions. Similarly, the OECD Commentary clarifies that in some Countries the execution of double taxation conventions does not exclusively fall within the prerogative of the "highest tax authorities" but, rather, it foresees that some matters may be reserved for other authorities[225].

The same approach is adopted under Art. 4, Para. 1 b) of the OECD Model T.I.E.A.. However, while the possibility of having more Competent Authorities responsible for the execution of the agreement is maintained, the Commentary to the aforementioned provision of the Model T.I.E.A. observes that "*while the definition provides the Contracting Parties with the possibility of designating more than one competent authority*[226] *(…) it is customary practice to have only one competent authority for Contracting Party*." Such a clarification would seem to be understandable in the specific perspective of legal instrument which is solely focused on the exchange of tax information rather than on a very broad range of policy objectives as it would be the case under a double taxation convention.

Even though no specific prescriptive guidelines have been set forth by the OECD or the Global Forum, defining the contours of the actual "Competent Authorities" appears as an extremely relevant issue in the perspective of the actual implementation of the international standard and the routing of information. Such a concern is well expressed by Art. 4 of Directive 2011/16/EU, which deals with the "structure of communication" and which foresees, *inter alia*, with the designation of a central liaison office in each Member State to be engaged in contact with the equivalent office in the other Member States.

Since, as it has often be recalled in this work, "the devil is in the details", practical and organisational issues concerning the actual implementation of the "internationally agreed standard" should not be underestimated. In such a perspective, it may be appropriate that recommendations concerning the setting up of a sole central liason office in each Contracting State be incorporated in the Commentaries to Art. 26 as well as to the OECD Model T.I.E.A.

On the other hand, it could also be remarked that, besides the actual strict designation of the competent authorities entrusted with the task of executing exchange of tax information as per treaty provisions, a broader meaning to the notion of "*competent tax authorities*" could be found in information exchange provisions found in

[225] See OECD Commentary to Art. 3, Para. 7.

[226] This may likely be the case of treaties whose objective scope of application embraces direct and indirect taxes alike.

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double taxation conventions modeled on the post-1977 version of Art. 26 as well as in tax information agreements modeled after the 2002 Model T.I.E.A.. Such an enlarged notion of "competent authorities" embraces authorities to whom the items of information received from the other contracting State can be disclosed, that is, authorities "concerned with the assessment, collection of, enforcement, determination of appeal in relation to or prosecution in respect of the taxes referred to in paragraph 1, or the oversight of the above[227]"[228].

Either in the perspective of information exchange provisions found under double taxation conventions or in tax information exchange agreements modeled after the respective OECD Models, it appears clear that no "triangular exchange of information" is possible. In this respect, an important specification is to be found in the Commentary to Art. 26 of the OECD Model Convention whereas it is stated that it is not possible to disclose information deriving from the application of Art. 26 to third countries unless the Double Taxation Convention contains a provision allowing such transfer[229]. No examples of treaty clauses allowing "triangular exchange of information" have however been recorded, at least so far.[230] Before the widespread commitment to the "internationally agreed" tax standard from 2009 onwards, such a specification proved instrumental in erecting "Chinese walls" around examples of enhanced administrative assistance by otherwise non-cooperative or sub-cooperative jurisdictions[231].

The issue of defining the contours of the suitable "competent authorities" may prove more slippery with regard to treaty-like instruments that are often concluded among specialised branches of the Tax Authorities and that are aimed at enabling specific forms of enhanced co-operation between jurisdictions already bound by some form of tax treaty. This is more likely the case of jurisdictions that are bound by double taxation conventions including an exchange of information clause, which, typically, although allowing for possible forms of enhanced co-operation, such as simultaneous tax examinations and tax examinations abroad, do not provide a specific procedural

[227] Among these "Oversight Bodies", Para.12.1 of the "Commentary on Article 26 concerning the Exchange of Information" mentions " *Authorities that supervise tax administration and enforcement authorities as part of the general administration of the Government of a Contracting State"*. An example for this may well be the Ministry of Finance as a whole as opposed to its specific Tax Policy Department.

[228] Para.2, Art. 26 of OECD Model Tax Convention on Income and on Capital 2005.

[229] Para. 12.2 of the OECD Commentary on Art. 26.

[230] Survey by the author based on information available on the IBFD tax treaty database. Last retrieved on September 2nd 2012.

[231] An interesting case in this respect is Switzerland, which had agreed to exchange information even beyond the limitation of its banking privilege legislation with the US and with Germany. With reference to the United States, a completely revised text of the previous 1951 Double Taxation Convention was adopted in 1996. In the 1951 version of the Double Taxation Convention, Switzerland already ensured to the United States its co-operation not only for the purposes of the Convention but also for tackling cases of tax fraud. In 1996, Art. 26 of the Convention was however modified with the introduction of the wording "tax fraud or the like"[231] which considerably extended the scope of co-operation between the two Countries. In 2003 an Agreement between the two Countries was reached so to clarify the application of the new Art. 26 With reference to the latter, enduring Swiss secrecy would have been severely endangered if the Convention had allowed the transfer of information from the United States or Germany to third Countries.

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framework thereto.[232] To this effect, specific branches of the Tax Administrations of the two involved Countries may enter into “administrative agreements” providing such a framework, typically under the form of a memorandum of understanding[233].

With reference to Italy, based on information provided to the related peer review questionnaires[234], it appears that the “Competent Authority” to execute tax treaties is the Ministry of Finance (and, in particular, the Tax Policy Department – *Dipartimento per le politiche fiscali*). At the same time, specific prerogatives concerning exchange of information practices are attributed to an Agency which had been carved out of the Ministry of Finance, the *Agenzia delle Entrate* (Revenue Agency)[235] as well as the Guardia di Finanza, a police body reporting directly to the Minister of Finance.

Despite the increasingly important practical role played by these latter mentioned bodies, it is interesting to remark that no actual treaty concluded by Italy so far designates them among the Competent Authorities for the execution of the treaty.[236]

While the above reported remarks underline how the internationally agreed tax standard does not include any prescriptive remark concerning the designation of the Competent Authorities entrusted with its implementation, the personal scope of application in relation to the taxpayers whose position may be made the object of an exchange of tax information is positively defined.

In particular, Art. 2 of the Model Agreement explicitly introduces the concept of jurisdictional limitation, which, on the contrary, at Art. 26 of the OECD Model Convention can only be inferred by the interpreter. Requested States are not obligated to provide information which is neither held by its authorities nor is in the possession or control of

[232] From an Italian perspective is represented by Memoranda of Understanding concluded by the Tax Administration and the respective authority in the other Country. To date, it is possible to report sixteen of such agreements, all concluded with European and North American “high-tax” Countries, with the exception of an unpublished T.I.E.A. with the Cook Islands concluded in 2011. Said agreements are typically not published in the Official Journal as no legal instrument is needed for their ratification. An example of publicly available agreeement is the Memorandum of Understanding between Belgium and Italy which has been published and commented in a leading legal journal. For further inquiries, see F. Andreoli, *Accordi amministrativi bilaterali per le verifiche simultanee in materia di imposte sui redditi*, Riv.dir.trib. 5 (1998), at 149.

[233] International legal scholarship generally qualifies as a declaration of intent that does not create international legal obligations and occupies an intermediary position between that of a “gentlemen’s agreement” and that of a treaty. For further analysis see Klabbers J., *The Concept of Treaty in International Law*, Den Haag, 1996, at 68

[234] See in particular, Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Review Report. Combined Phase 1 + Phase 2. Italy*, Paris, 2011, 8.

[235] La Scala A., *Italy. National Report*, Lang M. et al., Procedural Rules in Tax Law in the Context of European Union and Domestic Law, Aalphen an den Rijn, 2010

[236] It should nonetheless be remarked in this respect that the Guardia di Finanza has concluded a number of agreements, that typically go unpublished, with other similar Authorities in other Countries. Such agreements may vary in scope and purpose but typically feature an objective scope of application which is broader than that encompassed by T.I.E.A.s. In particular, said agreements often are part of broader cooperation efforts to tackle phenomena such as customs fraud or international money laundering with a comprehensive approach. Further analysis of an example of such agreements can be found in Turina A., *Recenti sviluppi nella cooperazione amministrativa tra Argentina e Italia, tra perseguimento dello standard internazionale di trasparenza e scambio di informazioni e “approccio strategico globale*, Diritto e pratica tributaria internazionale 3 (2011), at 1021, publishing and commenting a recent agreement between the Italian Guardia di Finanza and the Argentine AFIP (Administración Federal de Ingresos Publicos).

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persons who are within its territorial jurisdiction. Nationality and residence of the person object of the investigation do not however constitute restrictions *per se* to the transfer of information. In this case a functional approach has been adopted by the Model Agreement, whereas limitations merely arise whenever the requested information is not materially obtainable by the Tax Authorities of the Requested State within its own jurisdiction. If a bank headquartered in Country A operates branches in both country B and Country C, which have signed an information exchange agreement, the respective competent authorities of B and C are allowed to exchange information related to the branches of the bank, even though the latter is a resident of Country A. It is not clear whether such an interpretation, which appears to be textually well grounded within the context of the Model Agreement should be extended also to Art.26.

Such a broad personal scope of application is in line with (and actually somewhat further circumscribes) the policy choice made upon the adoption of the version of Art. 26 included in the 1977 version of the OECD Model , when it was explicitly foreseen that exchange of information is not restricted by Article 1[237]; thus, exchange of information may encompass not only residents of third countries but also taxes that would normally fall out of the scope of the Convention.

The circumstance that any restriction deriving from Art. 1 was lifted in the 1977 version of the OECD Model directly reflects the shift from the "*narrow exchange of information clause*" to the "*broad exchange of information*". Namely, whereas the only purpose of exchange of information be found in the application of the treaty provisions, extending its scope to non-residents would be irrelevant; on the contrary, whereas exchange of information be aimed at ensuring the administration or enforcement of the domestic tax law of the Contracting States, limiting the scope of exchange of information only to the position of residents of one of the two States may be detrimental to such a thorough administration or enforcement.

From a practical perspective, it can be argued, in particular, that the Tax Administration of one of the contracting States may have an interest in receiving information on activities carried on in the other contracting State by a particular person resident in a third country in order to enquiry the tax position of such a taxpayer in its capacity of non-resident or, otherwise, whereas said resident of a third Country is counterpart to transactions involving a resident of one of the contracting States[238].

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[237] I.e. the model provision typically segmenting the personal scope of application of a double taxation convention, according to which "*This Convention shall apply to persons who are residents of one or both of the Contracting States.*"

[238] The OECD *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes* provides some possible examples in this respect. In particular, examples seem to revolve around cases where the necessary information (and documentation) concerning a certain arrangement or transaction is in the prerogative of third party resident of a third State. The following can be reported among others: "*A trust has three trustees. Trustees A and B*

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As anticipated, compared to the enunciation of the standard under Art. 26, Para. 1 of the OECD Model, the wording contained in Art. 2 of the OECD Model T.I.E.A. appears to be more circumscribed, since it limits exchange of information only with regard to information held by its authorities or the possession or control of persons within its territorial jurisdiction. At the same time, the Commentary to Art. 2 of the OECD Model T.I.E.A. clarifies the notion of "authorities" should be interpreted broadly, specifying that the latter term includes all government agencies. Similarly, the same Commentary generally stipulates that the notion of "possession" and "control" of information by person within its territorial jurisdiction should be interpreted broadly. Such a matter, however, appears to be particularly critical. In particular, it has been underlined that an issue which, in most of the treaties, remains in the shadow and on which both the Commentary to Art. 26 and the Commentary to the OECD Model T.I.E.A. remain silent is that of the information procedure extended to persons other than the investigated taxpayer.

The question is whether investigations, occasioned by the request for information, may be directed only towards the taxpayer whose obligation to pay tax is concerned or whether it may also be directed towards persons, companies and bodies with which, according to the applicant country, the investigated person transacts business[239]. As a matter of fact, the standard seems to be silent on the point, so that no general answers can be provided but rather, the actual handling of the matter seems to be left to the domestic law of the requested State.

OECD sources generally state that there is very little difference between Art. 26 and the OECD Model T.I.E.A.. However, while the former explicitly includes in its wording that exchange of information an express waiver of Art. 1, so that it can be derived that exchange of information is not meant to be limited only to persons who are resident of one or both of the Contracting States, Art. 2 of the OECD Model T.I.E.A. , by specifying that "*a requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction*", sets a limit rather than introducing waiver, while the circumstance that "*the requested Party's obligation to provide information is not, however, restricted by the residence or the nationality of the person to whom the information relates*" is specified only in the related Commentary.

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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." See OECD, Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, Paris, 2006,11.

[239] Gangemi B., General Report, *International Mutual Assistance through Exchange of Information*, Cahiers de droit fiscal international, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 29

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In the view of the author, the above reported difference is just one of the inherent discrepancies between the sources from which the "*internationally agreed tax standard*" is derived that may in turn reverberate on the way said standard is actually implemented and interpreted.

In particular, the author believes that the wording included under Art. 26, Para. 1 of the OECD Model is substantially different from what can be derived from Art. 2 of the OECD Model T.I.E.A., even when interpreted in the light of the related commentary. Namely the wording of Art. 26 of the OECD Model leaves room not only to include non-residents of the Contracting States but also anything and anyone that at any given time may not fit in the definition of "person" under provisions modeled after Art. 3 of the OECD Model. On the contrary, extending exchange of information to subjects that do not qualify as persons does not appear as straightforward when exchange of information is performed on the grounds of a tax information exchange agreement.

4.3.2.2 Taxes covered

The internationally agreed tax standard as recollected in the materials published by the OECD or by the Global Forum does not seem to specify or recommend any particular objective scope of application of exchange of information in relation to the "*taxes covered*".

At the same, also to various extents and with different pratical implications, both the latest version of Art. 26 of the OECD Model and the 2002 OECD Model T.I.E.A. set forth rather clearcut positions in this respect.

In particular, the last sentence of Paragraph 1 of Art. 26 has come to include, since 2000[240], an express waiver of Art. 2 of the concerned Double Taxation Convention, i.e., of the treaty provision meant to deal with the "taxes covered" by the Treaty. As a consequence, exchange of information clauses contained in Double Tax Conventions have an autonomous and virtually unlimited personal (for the reasons outlined in the previous Paragraph) and objective scope of application that extends behind the circumscribed scope of applications that are typical of double taxation treaties. By means of the aforementioned express waiver, the paragraph was then amended so as to apply to the exchange of information concerning any tax imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, and to allow the use of the information exchanged for purposes of the application of all such taxes. As a result, the current scope of application of Art. 26 is so broad that it could even include custom duties; at the same time, as recognised by the OECD Commentary to Para. 1 of Art. 26, since said duties are typically covered by other legal instruments

[240] On the contrary, before 2000, in the absence of such an express waiver, there was a general understanding that exchange of information could be put into place only in relation to taxes covered by the Convention.

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setting forth administrative cooperation in those areas, the latter will typically prevail so that it is unlikely that exchange of information concerning custom duties be provided on the grounds of provisions included in double taxation conventions modeled after the OECD Model[241].

At the same time, the very OECD Commentary to Art. 26 acknowledges that some Contracting States may not be in a position to exchange information, or to use the information obtained from a treaty partner, in relation to taxes and duties falling outside of the scope of application of the Convention and in such case, leaves them the possibility to opt out of the waiver of Art. 2[242].

It could be argued, in conclusion, that within the context of a double taxation convention, waiving any limitation on taxes covered by the exchange of information clause may raise some unforeseen consequences when conventions are applied. For instance, such a provision somehow seems to conflict with the limitation to exchange of information when the latter is used to enforce domestic tax laws contrary to the Convention. In this respect, the Commentary offers no clarification but rather introduces further confusion, citing as an example the "*request for the imposition of a sales tax*" which "*needs not to be complied with by the requested State as it is not covered by the Convention*"[243]. Such a case could on the contrary be considered legitimate as the request is not contraryto the Convention, but simply falls short of the taxes covered by the Convention under Art. 2. Defining what is contrary to the Convention and what is merely excluded from its application is not always such an easy task. Serious interpretative problems may arise with reference to Contracting States which have not modified the 1977 or even the 1963 versions. The question regards the general principle of interpretation of treaties and wonders whether the most recent OECD Commentary could be used to justify an extensive interpretation of provision based upon older versions of an article of the Model Convention, namely Art. 26. When drafting the 1977 Model Convention the Committee on Fiscal Affairs declared[244] that existing conventions should be interpreted, as far as possible, "*in the spirit of the revised Commentaries*", as the revised Commentary reflects the consensus of the OECD Member Countries towards a renewed interpretation of existing provisions and their application to specific situations. However, it also specified that Commentaries covering amended provisions which "*differ in substance*" from the previous ones are not relevant for the interpretation of the latter. Interpreters do not agree on whether the 1977 and the 2000 modifications have rendered the existing version of Art. 26 substantially different from the existing one.

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[241] See OECD Commentary to Art. 26, Para. 5.2.

[242] See Para. 10.1 of the OECD Commentary to Art. 26.

[243] OECD, Note "b" to Para. 5(5) of the Commentary on Article 26 concerning the Exchange of Information.

[244] See Para. 33 and 34 of the Introduction to the OECD Commentary, 2005.

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It should be noted, however, that most Contracting State consider the extension of the scope of exchange of information beyond the same limits of the Convention as a substantial modification as the concerned Countries[245] have felt the need to engage into mutual agreement procedures and letters of intent in order to specify that despite the older wording contained in the existing conventions, Art. 26 should be interpreted according to its latest Commentary. On the contrary, Countries which have not made use of such procedures have stuck not only to the previous version but also to the former interpretation of Art. 26. Nevertheless, the Commentary suggests that some Contracting States may not be in the position to exchange information out of the scope of the Convention [246]; these States are thus fully entitled to stick to the previous version of Para. 1.

Compared to Art. 26 of the OECD Model, the OECD Model T.I.E.A. adopts a more circumscribed approach. Art. 3, in particular, foresees that the Contracting Parties can individually state the taxes covered by the Agreement. At the same time, when examining the multilateral version of the model provision, it appears that a pre-determined list of taxes involving taxes on income or profits, taxes on capital, taxes on net wealth and estate and inheritance or gift taxes has been stipulated. Whereas listed in the instruments of ratification, taxes imposed by or on behalf of political subdivisions or local authorities can also be included in the scope of application of the Agreement. Such an apparent gap between the bilateral version, where no specific minimum scope of application is specified and the multilateral version, seems to be filled by the Commentary, according to which bilateral treaties ought to cover at least the same four categories of taxes[247] envisaged under the corresponding multilateral version.[248] In this respect, the Commentary also underlines that even though each Contracting Party is free not to include an of the specific minimum categories of taxes mentioned above, it may not refuse to provide assistance in relation to any of them whereas the other Contracting Party has included them.

As a matter of fact, most of the double taxation conventions that are currently in force are based upon the 1977 version of Art. 26; thus, many double taxation conventions admit an extension of the personal scope of Art. 26 but still limit its application only to taxes covered by the OECD Model Convention. Moreover, even the most recent changes, such as the addition of Para. 4 and Para. 5 have been largely ignored by Contracting Parties.

[245] Notably, Scandinavian Countries and Germany.

[246] Para 10.1.(4)(5) Commentary on Article 26 concerning the Exchange of Information.

[247] All of which could interestingly qualify as direct taxes under the most common taxonomies, as such it could be argued that T.I.E.A.s qualify as administrative co-operation treaties in direct tax matters. Considering that T.I.E.A.s typically qualify as agreements between "high tax Countries" and off-shore jurisdictions that often do not feature direct taxes, the qualifications of said agreements as almost exclusively geared towards direct taxation seems to further exacerbate the inherent asymmetry to this kind of agreements.

[248] See Para. 9 of the OECD Commentary to the OECD Model T.I.E.A.

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4.3.2.3 Forms of Exchange of Information

The OECD Commentary to Art. 26 is responsible for the introduction of a classification that has influenced most of the initiatives dealing with exchange of information, as well as national tax practice and tax scholars. It is then due to report and clarify this land-marking distinction.

Exchange of information may either be qualified as “exchange of information on request” or “automatic exchange of information” or thirdly as “spontaneous exchange of information”.

The different implications of this classification should by no means be considered exhaustive either because these three different approaches can be mixed or because brand new system are also admissible even according to the Commentary[249]; nonetheless, the policy debate on the forms of exchange of information currently focus on the alleged dichotomy between exchange of information upon request and automatic exchange of information[250].

As such, great emphasis could be perceived when the “international standard” was formalised in late 2009[251] with regard to its exclusive encompassing of “exchange of information” upon request.

The notion of exchange of information upon request comes out as fairly intuitive and appears to have been historically linked to the traditional judicial practice of sending letter rogatories from one Court to another foreign Court in order to ask for specific items of judicial assistance[252].

At the same time, it seems appropriate to go deeper in circumscribing the notion of exchange of information upon request as opposed to other forms of exchange of information.

The OECD Commentary to Art. 26 of the OECD Model states that exchange of information upon request is the form of administrative cooperation which takes place when the a State applies to another Contracting State for cooperation because it has "a special case in mind"[253]. The need to link the setting forth of a request of information to an existing enquiry is confirmed also in the OECD Commentary to the OECD Model T.I.E.A., from which it can be inferred that exchange of information upon request refers

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[249] See Para. 9.1 of the Commentary on Article 26 concerning the Exchange of Information.

[250] Which will be further address under Part. 4 of this thesis

[251] See the Background Information Briefs periodically published by the Global Forum.

[252] The problems deriving from using letter rogatories in relation to tax matters have already been addressed under Part. 1 of this thesis.

[253] OECD Commentary to Art. 26 of the OECD Model, Para. 9

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to a case where "the information requested relates to a particular examination, inquiry or investigation".[254]

As it is often the case, some further specifications helpful in framing what a "request for information" actually is, can be retrieved by the OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes. In such a Manual, "exchange of information upon request" refers to a situation where the competent authority of one Country asks for particular information from the competent authority of another Contracting Party."[255] The Manual, echoing in this respect the Commentary to the OECD Model T.I.E.A. recalls that "typically the information requested relates to an examination, inquiry or investigation of a taxpayer's tax liability for specified tax years"[256]

Despite such emphasis on the factual circumstances that may surround a request for information, no general definition of "request" is provided so that a gap can be perceived between the general stipulations of the model treaty provisions and of the related Commentaries on the one hand and the Manual for implementing exchange of information on the other hand, where procedural details concerning the filing of such requests are outlined. Such a gap renders the legal qualification of a "request of tax information" rather difficult.

It could be said in this respect that, one adopting the classification outlined in the first part of this study, exchange of information upon request is directly linked to the gathering of *ex post* information as opposed to *ex ante* information, which could be provided by means of automatic exchange of information. Thus, a request for information could qualify as a cross-border example of tax audit. The difference with a purely domestic tax audit is that the counterpart of the auditing tax authority is not directly the concerned taxpayer but rather a third party, namely a foreign tax administration. In such regard, there should be no reason to consider such a request for information as structurally different from a request of information submitted to another national authority, such as for instance a Financial Market Regulatory Authority or a Cadastral Agency.

Within a domestic dimension said requests typically have to comply with specific procedural rules in order to be admissible. The same applies also within the context of regional forms of co-operation, such in the European Union, where Directive

[254] See OECD Commentary to the OECD Model T.I.E.A., Para. 39. Such a definition seems directly linked to the "foreseeable relevance" further discussed later on in this Part of the present study.
[255] OECD, Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, Paris, 2006, General Module, Para. 18.
[256] OECD, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, Paris, 2006, Module 1, Para. 1.

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77/799/EEC[257] does not provide a suitable legal basis to allow direct communication between two national tax administrations of two different Member States.[258]

As such, in order to gain a fuller understanding of this element of the standard, it should be investigated what are the formal requisites of a request for information meant as procedural rules to be followed by the applicant State and leaving aside at this stage any remark concerning the qualification of the requested information as "foreseeably relevant" to either the application of a tax treaty or the administration or enforcement of the domestic tax laws of the applicant State.

In this regard, no specific guidance is provided by Art. 26 of the OECD Model nor by its Commentary. The provision contained in the OECD Model T.I.E.A. addressing exchange of information upon request does not address such an issue outside of the aforementioned "foreseeably relevance" test.

As in many other instances, to date, the only available source of guidance with regard to the form a request for information should have is the 2006 Manual on the Implementation of Exchange of Information Provisions for Tax Purposes.

In this respect, it results that any request should be made in writing but, in urgent cases, an oral request may be accepted but only where permitted under the applicable laws and procedures for the purpose of initiating an enquiry and on the condition that it is followed up by a written confirmation[259].

The Manual has by definition no binding legal value and it is only directed at streamlining best practices among the co-operating Tax Administrations. Yet, as it has been anticipated, many key issues of the current international standard are addressed only in such a document to the extent that such a Manual could be considered one of the sources thereof.[260] The aforementioned issues fall in this category and in the view of this author it is recommendable that such an important aspect as the form of a request for assistance be incorporated directly in the text of the relevant model provisions. On the one hand, these aspects often entail complex rules that may not suitably be conveyed through standard oriented treaty rules, so that it is unlikely and probably not desirable that "international procedural rules" are introduced. The simplest option would then be to introduce an international conflict rule aimed at identifying which procedural rules, whether those of the applicant State or those of the applied State, should be applied.

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[257] The same conclusion could however substantially apply also with reference to the new Directive 2011/16/EU.

[258] Schilcher M., *The Directives on Mutual Assistance in Taxation*, in M. Lang et Al. (Eds.), *Introduction to European Tax Law on Direct Taxation*, II Ed., Vienna,Linde, 2010, 185.

[259] OECD, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, Paris, 2006, Module 1, Para. 3.

[260] The central relevance of the 2006 Manual also emerges when examining the terms of reference adopted by the Global Forum for the pur pose of conducting peer reviews.

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Conflict rules of such kind are implicitly already present in the framework of Art. 26 of the OECD Model or in the OECD Model T.I.E.A. with regard to the applicable confidentiality regimes, where it is foreseen that the State receiving information should treat such information in pursuance of the same confidentiality rules that would apply to information gathered domestically.

It is the opinion of this Author that the domestic regime of the requesting State should on the contrary be applicable with reference to the formal connotations of a request for information. The reason for this is that it would be extremely impractical for the applicant State to ensure compliance with the laws and regulations of another State; secondly, if we can place the whole exchange of information upon request within a "comity" framework[261], it seems more appropriate to have the applied State to adapt to the procedural rules of the applicant State even whereas said rules may different from its own ones. For instance, jurisdictions where information can be gathered from third parties only on the grounds of written questionnaires should not object to an oral request for assistance coming from an applicant State whose domestic laws enable such a form of enquiry.

A further issue concerns the way through which a request should be routed; as it has been already mentioned, the current legal framework does not provide for horizontal contacts between different branches of the Tax Administration of two Contracting States. The recommendation to be found in the 2006 Manual, according to which all requests should be routed through a central office of the Competent Authority seems can be shared and, while not explicitly foreseen under Art. 26 of the OECD Model or of the OECD Model T.I.E.A., it can be observed that such a practical solution has been incorporated in the text of the new 2011/16/EU Directive[262].

A final concern relating to the forwarding of requests is that of the language into which they should be handled. The language barrier may render exchange of information a particularly burdensome practice, especially when developing Countries are involved. Moreover, problems relating to translations may reverberate directly on the position of the taxpayer, due inaccuracies in translation or plain misunderstandings.

The issue of the language in which co-operation should be administered is not mentioned under Art. 26 of the OECD Model nor in the related Commentary. On the other hand, Art. 11 of the OECD Model T.I.E.A. foresees that the language in which requests, answers and further communications between the involved Tax Administrations ought to be carried out shall be agreed upon between the Parties by

[261] As analysed in the first Part of this work.

[262] Art. 4 of Directive 2011/16/EU deals with the organizational aspects of administrative co-operation. Art. 4, Para 2 of the Directive foresees that the Competent Authority shall designate a single central liaison office. A central liaison office is defined under Art. 3, Para. 1 of Directive 2011/16/EU as "the office which has been designated as such with principal responsibility for contacts with other Member States in the field of administrative co-operation."

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means of mutual agreement, with English or French serving as default languages where no option is agreed upon by the Parties.

Under some circumstances, the request for information may come with attachments that may be relevant for the inquiries (for instance, agreements, business correspondence, invoices). In this respect, the 2006 Implementation Manual recommends that the requesting Party should provide the requested Party with a translation thereof or at least of the most relevant excerpts[263].

There was a clear understanding that the endorsing of the recently formalised standard by an unprecedented number of jurisdictions was not only the result of increased political pressure by G20 States but it implied some kind of compromise between the involved parties aimed at defining some generally accepted principles to be conveyed by means of a fairly simply articulated standard. Since the Global Forum on Taxation already comprised of constituencies mainly drawn from OECD Member States and off-shore jurisdiction, it could have easily been anticipated that the standards to be defined as relevant was going to be a common denominator, a compromise according to some[264] and not necessarily the “best practice” in the perspective of OECD Member States whose more urgent preoccupation consisted in streamlining some actions to aim at filling their own international tax gaps by addressing the not less impressive international tax information gaps.

It seems particularly worth noting that the adoption of an existing and partially already tested model legal instrument, namely the OECD Model T.I.E.A., played a key role in this respect. In some ways, it may be argued that the need to measure compliance with the international standard implied the availability of some readily measurable indicators. In this respect, surveying the number of T.I.E.A.s adherent to the original model came out as the most straightforward option; such an approach was later amended with regard to its quantitative dimension as it was prone to easy manipulation[265]; yet, what could not be easily left aside was the need to have a ready made parameter such as the OECD Model T.I.E.A. T.I.E.A.s can often be more easily ratified than general tax treaties and are typically channeled through simplified procedures.

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[263] OECD, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, Paris, 2006, Module 1, Para. 8.

[264] See McIntyre M.J., *Identifying the New International Standard for Effective Information Exchange*, in Lang M. et al. (Eds.), Tax Treaties: Building Bridges between Law and Economics, Amsterdam, IBFD, 2010,at 481.

[265] The conclusion of twelve agreements is no longer considered sufficient, *per se*, to fulfill the requisites needed in order to join the folds of jurisdictions having substantially implemented the international standard unlike it was stated after the G20 April 2009 London Summit. The twelve agreements threshold was formulated the earlier work by the OECD in the immediate aftermath of the London 2009 G20 Declaration. A renewed approach has however been adopted since the start of the peer review process by the Global Forum. In this respect see Global Forum, Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions, at 30, footnote No. 27

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Thus, this author believes there are both immediate political and practical reasons behind the adoption of the exchange of information upon request standard. The practical reasons may lie, as anticipated, in the circumstance that the OECD Model T.I.E.A. appeared as the legal instrument more apt to disseminate in a short time the standard among the broadest possible circle of actors[266]; as such, the exchange of information upon request provision thereby contained became central to the standard.

Political reasons are also present but are inherently linked to the underlying compromise to the genesis of the whole OECD harmful tax competition initiative: when the OECD Model T.I.E.A. was formulated in 2002, reaching a common ground between OECD economies and offshore jurisdictions proved a difficult exercise; it should be observed in this respect that at the time when the OECD Model T.I.E.A. was drafted, even within the fold of high tax Countries, positions on some key issues could by no means be regarded as monolithic: in particular, the US Administration of the time (the Bush Administration) clearly signaled that it would not have endorsed extensive exchange of information at the international level.[267]

Finally it should be borne in mind that although automatic exchange of information goes back to the very first policy exercises in administrative assistance in tax matters[268], almost no concrete examples of automatic exchange of information had been put into place[269] when the OECD Model T.I.E.A. was in the course of being drafted.

Thus, the inclusion of automatic exchange of information in the agreed model would have appeared as almost inconceivable, it could then be concluded that the current prevalence of the exchange of information upon request standard is rooted in perceived practical difficulties and political compromises that are at least ten years old. In this respect, the international standard of exchange of information cannot indeed be qualified as a "new standard" as it may be perceived by a general public due to a carefully crafted communication strategy but rather as a fairly long established one that

[266] Besides differences concerning ratification, that however are ultimately grounded in the legal framework of each Contracting Party, not all Countries agree about the possibility to conclude general tax treaties with offshore jurisdictions. The basic argument in this respect is that, since the traditional primary purpose of general tax treaties lies in the avoidance of international double taxation and that such a phenomenon is unlikely to arise when one of the counterparts is an off-shore jurisdiction. Some Countries, such as Italy, have also refrained from concluding general tax treaties with offshore jurisdictions due to the fear of providing routing or treaty shopping opportunities. Such an orientation seems however to have started being left aside; it is possible to mention, for instance, the conclusion of a general tax treaty between Italy and Panama.

[267] For a vivid depiction of the evolution of the US approach to international administrative co-operation through the exchange of tax information see Spencer D., *Atmosphere is changing for Exchange of Information*, International Tax Review 5 (2010), at 42.

[268] At it has been illustrated in Part 2 of the present work, this form of administrative co-operation was contemplated already in the earliest 1927 Draft Model on Administrative Assistance.

[269] The OECD Model T.I.E.A. predates the approval of the final text of the European Savings Directive (Directive 2003/49/EC).

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has however only recently been put into practice to a significant extent and that is yet to be fully put to test.

Due to the controversial nature of the specific element of the international standard represented by the "on request" mode of exchange of information, even though its genesis can be fairly easily outlined, it could in the definitive be argued whether such a mode is a "good old habit" or just an old one.

In this respect, it could actually be argued that most detractors of the current international standard of exchange of information are actually pointing out more at the need to introduce forms of automatic exchange of information rather than at some inherent flaws of exchange of information upon request; in this respect, it seems utterly misleading to depict any kind of dichotomy between exchange of information upon request and automatic exchange of information. The real question then is whether, as international administrative co-operation in tax matters currently stands, exchange of information upon request can be deemed as *sufficient* in filling the "international tax information gap". No sound answer based on a functional efficiency criterion, i.e., on the balance between the efforts (direct and indirect costs) put in the cooperation process and the tax revenue that can be recovered by the requesting State[270] can be set forth in the absence, as it is currently the case, of comprehensive statistics; such statistics would also prove particularly difficult to design as the correlation between an inherently qualitative phenomenon such as the gathering of information and the possibly resulting tax audits on the one hand and the quantitative dimension of tax collection on the other hand seems particularly hard to grasp.

On the other hand, it has been remarked how exchange of information upon request may be more manageable not only, for obvious reasons, for the State providing information but also for the State receiving said information, in particular whereas the latter is a developing Countries or a Country whose Tax Administration has a limited capacity. As a matter of fact, information resulting from exchange of information upon request would result in being more targeted and easier to streamline. Such a conclusion would seem to be consistent with a recent shift in other areas of international regulation, such as money laundering control, where emphasis has been transferred from an *ex ante* rule based approach to a risk-based approach.[271]

[270] See De Goede J., *Efficiency of Mutual Assistance in Tax Matters; What is in a Name*?, Seer R., Gabert I., Mutual Assistance and Information Exchange, Amsterdam, IBFD, 2010, at 129.

[271] Such a policy dilemma is shared by other areas of international economic law with reference to the optimal approach to the supervision of compliance. A very relevant parallel field in this regard is represented by anti-money laundering control. In such a context, a debate between proponents of "ex ante" and "ex post" monitoring has also emerged; however, it is interesting to remark that the direction would seem to shift in the opposite way than that proposed in international tax policy circles as the European approach to monitoring gradually shifts from an ex ante to an ex post approach. In this regard, see Arnone M., Borlini L., *International Anti-Money Laundering Programs: Empirical Assessment and Issues of Criminal Regulation*, 13 Journal of Anti-Money Laundering Control 2 (2010) at 226. See also Spreutels J., Grijsels C., *Interaction Between Money Laundering and Tax Evasion: Belgian and International Measures in the Fight against Money Laundering*, EC Tax Review 1 (2001), at 3.

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The most fruitful approach from a policy perspective would then seem to look at the domestic dimension and try to determine, based on the categories developed in Part I of this study how much can be obtained with ex post information.

As a conclusion, the real issue as far as the standard is concerned is not about which method should be adopted, each method featuring its own advantages and specifying objectives, but, rather, which is the optimum mix between the two and other alternative forms of exchange of information, such as spontaneous exchange of information.

4.3.2.4 Purpose of the Exchange of Information

Exchange of information *per se* is an administrative practice that does not have any specific tax connotations. What makes exchange of information relevant in a tax perspective is rather the purposes to which such an otherwise neutral administrative practice is orientated. In this respect, identifying which purposes of the exchange of tax information between tax administration are contemplated by the standard is probably more relevant than arguing which forms of exchange of information should be favoured and what kind of information can be exchanged.

Such a relevance is well witnessed by the circumstance that scholarship[272] has coined specific expressions for different formulations of exchange of information provisions: in particular, provisions foreseeing exchange of information for the sole purpose of the carrying out of the provisions of a tax treaty have been termed "*narrow exchange of information clauses*" while exchange of information provisions aimed also at the administration or enforcement of the domestic tax laws of the Contracting States have been termed "*extensive exchange of information clauses*".

The expression "narrow exchange of information clause" has typically been used in order to describe the Swiss approach to tax treaty based administrative co-operation until the commitment made by this Country in 2009 to the international standard of

[272] While tracing the historical origin of the use of such expression proves somewhat problematic in relation to English language scholarship, it has been reported by Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 94 that a distinction between limiting exchange of information to the application of tax treaties and using exchange of information was formulated on a theoretical basis by Menck Th., *Internationale Amtshilfe in Steuersachen*, *Deutsche Steuer Zeitung*, 1971, 57. At the same time, it seems that such a dichotomy is suitable to have acquired a further layer of meaning after the introduction of the 1977 version of Art. 26. Ever since, it is the dychotomy between "narrow" and "estensive" clauses has starter being used to address two different issues: on the one hand, the use of the 1963 version of Art. 26 as opposed to the 1973 one; on the other hand, the expression "narrow exchange of information clause" has made its way into English language literature also to recere to the specific Swiss approach to exchange of information. To the best of this author's knowledge, the first example of such a usage can be found in Grüninger H., 'Cross Border Exchange of Information and Administrative Assistance in Tax Matters, in Particular between Germany and Switzerland', *European Taxation* 2 (1987), at 141. Due to the multiple meanings under which the expressions under scrutiny have been used, sometimes inconsistently, and considering that the variety of clauses in this regard could not match such a strictly binomial classification, it is the view of this author that the use of these very expressions should be abandoned.

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transparency and exchange of information[273]; on the other hand the dichotomy between the "narrow" and the "extensive" clause is also used, respectively, in order to refer to the 1963 and 1977 version of Art. 26 of the OECD Model. The latter meaning is however somewhat misleading. Namely, the original version of Art. 26 to be found in the 1963 Draft Model Convention foresaw that information had to be exchanged "*as is necessary for the carrying out of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is in accordance with this Convention.*" On the other hand, the 1977 version of the same model provision reads that information must be exchanged "*as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention.*" As it can be observed, never the OECD exchange of information model provision had solely encompassed the mere "carrying out of the Convention". At the same time, the circumstance that the 1963 Model provision referred to the carrying out of the domestic tax laws of the Contracting States "concerning taxes covered by the Convention" and insofar the resulting taxation be "*in accordance with the Convention*" led some Countries to interpret the provision as such to be only functional either to the direct application of treaty rules or to the application of domestic rules that had direct relevance for the carrying out of treaty provisions. Said diverging interpretations on the use of a double tax treaty based exchange of information clause to pursue objectives that would have been otherwise typically associated with an administrative assistance treaty[274] were specifically addressed in the 1977 Commentary to Art. 26[275], where it was expressly stated that Art. 26 had to be interpreted in such a way "*to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention even if, in the latter case, a particular Article of the Convention need not be applied.*"[276]

Thus, it could be said that the only concrete example of "narrow exchange of information clause" was to be found in a certain interpretation of the 1963 version of Art. 26 of the OECD Model which only later was concretised in the "Swiss model exchange

[273] As a matter of fact, at the time when the 2005 version of Art. 26 of the OECD had been approved, it appeared that among OECD Member States, only Switzerland had deliberately stuck to a providing assistance only for the purpose of applying a treaty. At the same time, the limitations with regard to the purpose of exchange of information can be found in the earlier treaties concluded by Japan.

[274] Even though administrative assistance treaties became more widespread in the '80s (either under the form of agreements between the United States and some Caribbean off-shore jurisdictions or in the form of regional or non-regional multilateral agreements, such as, respectively, the Nordic Convention and the Strasbourg Convention) and started proliferating only after the 2009 landslide following the G20 London Summit, administrative assistance treaties constitute the first historical examples of international treaties dealing with tax matters.

[275] Para. 4 of the 1977 Commentary to Art. 26 remarked that "*Experience in recent years has shown that the text of the Article in the 1963 Draft Convention left room for different interpretations.*"

[276] Para. 5 of the 1977 Commentary to Art. 26.

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of information clause", which in turn became the epitome of a "narrow exchange of information clause".

In this respect, it might be appropriate to remark that from 1977[277] until 1994, Switzerland set forth a total reservation to Art. 26 of the OECD Mode so that almost all Swiss treaties did not contain an information exchange clause[278]l

In 1994 Switzerland formally opted, by means of a reservation to the Art. 26[279] of the OECD Model for a fully fledged "narrow exchange of information clause" which was partially mitigated in 2005[280], when it was amended in such a way that Switzerland agreed to exchange information also for the purpose of carrying out the domestic tax law provisions of the other Contracting State for cases of tax fraud as resulting from the application of a dual criminality condition[281]. At the end of 2008 Switzerland withdrew any reservation to Art. 26.

The first Paragraph of Art. 26 OECD Model along with Art. 1 of the OECD Model T.I.E.A. incorporate the standard as far as the "purpose of information exchange" is concerned. Official documentation about the standard cites among its sources also Art. 26 of the UN Model Convention. Art. 26 of the OECD and UN Model are largely coextensive under the main specifications governing information exchange. The equivalence of the OECD and UN model information exchange clauses are openly affirmed in the official Global Forum background documents[282]. At the same time, such an "equivalence" is portrayed in a derivative fashion, where a path dependency of the development of the UN model provision from the OECD model provision seems to be suggested[283].

As a matter of fact, however, the Art. 26 of the UN Model seems to be carrying along some features that go "beyond the international standard" as far as the "purpose"

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[277] The reservation read as follows: "*Under the Swiss concept a double taxation convention aims at avoiding international double taxation; the information necessary for the correct application and for the prevention of an abuse of such a convention can be exchanged already within the existing framework of its provisions on the mutual agreement procedure, the reduction of taxes withheld at the source, etc. Switzerland considers a particular provision on the exchange of information as unnecessary since even such an express clause could not, according to the purpose of the convention, provide for more than for an exchange of information necessary for the correct application and prevention of an abuse of the convention. Accordingly Switzerland has an express reservation on the Article on the exchange of information*."

[278] US treaty?

[279] The 31st March 1994 reservation read as follows: "*Switzerland reserves its position on this Article. It will propose to limit the scope of this Article to information necessary for carrying out the provisions of the Convention.*"

[280] The 2005 Swiss reservation to Art. 26 of the OECD Model read as follows: "*Switzerland reserves its position on paragraphs 1 and 5. It will propose to limit the scope of this Article to information necessary for carrying out the provisions of the Convention. This reservation shall not apply in cases involving acts of fraud subject to imprisonment according to the laws of both Contracting States.*" The specific reservation to Para. 1 was aimed at ensuring adherence to the "narrow exchange of information" clause, while the reservation on Para. 5 was clearly meant to safeguard banking and fiduciary secret as an adequate ground to limit exchange of information in tax matters.

[281] That is, the request should refer to a criminal offence under both the laws of the requesting as well as that of the requested State.

[282] Global Forum, Implementing the Tax Transparency Standards: A Handbook for Asessors and Jurisdictions, at

[283] Ibidem

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of exchange of information is concerned whereas it explicitly foresees among the purposes of information exchange also the tackling of international tax evasion and avoidance.[284]This specification had already been underlined as particularly meaningful in a pre-2009 scenario where the lack of dual criminality was often invoked by some jurisdictions as a ground to refuse the provision of assistance[285].

In the view of this author, while the fight against international tax evasion can be dealt with by referring to the purpose of carrying out and administering the domestic provisions of the laws of the Contracting States and the same applies to the fight against tax avoidance[286], a possible scenario to explore would be to ascertain whether and to what extent exchange of information or, in broader terms, administrative co-operation can be used to tackle phenomena that are based on international tax arbitrage.[287] In the view of this Author, such a goal could not be pursued on the basis of the current wording of the OECD standard exchange of information clause unless at least one of the Contracting States incorporates provisions in its system aimed at countering such a phenomenon. Such a scenario is however unlikely because international tax arbitrage is typically not included in the common notion of tax avoidance, so that examples of anti-tax arbitrage legislation would be difficult to point at. On the other hand, although the different views are reported among scholars make the

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[284] Namely, the first Paragraph of Art. 26 of the U.N. Model Convention recites: The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes. The exchange of information is not restricted by articles 1 and 2."

[285] See McIntyre M., *How to End the Charade of Information Exchange*, *Tax Notes International* October 26 2009, at 259.

[286] This view is shared also by Gangemi B., General Report, *International Mutual Assistance through Exchange of Information*, Cahiers de droit fiscal international, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 26. In this respect it could also be argued that the notion of tax evasion, is to some extent more intuitive; although some definitory issues may arise, for instance when juxtaposing the notion of "tax evasion" with that of "tax fraud" or when adopting a surrogatory approach to the notion of tax fraud, such as for instance in the Switzerland – US tax treaty where the syntagm "tax fraud and the like" is used; in the latter case, however, the notion of behaviours tantamount to tax fraud was exemplified in a Memorandum of Understanding with fourteen binding hypotheses. On the other hand, it would be arduous to elaborate a "general" definition of what tax avoidance is, as such a notion is directly intertwined with the innermost features of a given tax system. As such a "standard" definition would probably not be desirable as it would imply an undue stretching of such a notion that would deprive it of any specific meaning or, on the other end of the spectrum, it would convey an excessively rigid notion to the extent of hampering the tackling of the more tax system-specific tax avoidance schemes. The same skepticism with regard to inclusion of the tackling of tax avoidance among the purpose of exchange of information is shared also by the earlier cited Author, according to whom "the same Author adopts however a skeptical position: "In this respect a preliminary problem arises from the ambiguity of the term which, as a rule, is not specifically defined in the tax treaties. The interpretation by reference to the meaning of the term under internal laws is in itself a puzzling problem: moreover, in some jurisdictions there is no statutory definition of the term and even where the attempt to define the intricate phenomenon has been made the distinction between tax evasion, tax fraud, tax avoidance, tax planning, abuse of rights is often only a fine line." Examples of exchange of information provisions aimed at tackling tax avoidance can be found even in fairly early treaties. Such a clause is prevalent within the British treaty network and can be found also in the older treaties concluded by Austria (such as those with Denmark, Luxembourg, the Netherlands, Sweden, Finland and Germany).

[287]For an introduction to the concept of international tax arbitrage see Dell'Anese L., *Tax Arbitrage and the Changing Structure of International Tax Law,* Milano, EGEA, 2006.

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topic of international tax arbitrage a fairly controversial one in the international tax policy debate[288], in the view of this author such a phenomenon should start being at least tentatively addressed in the view of the administrative co-operation agenda.

Once agreed that international tax arbitrage is a phenomenon worthy of further recognition by policy makers, it could be disputed, on the other hand, whether exchange of information is the correct tool to address it. In the view of this author exchange of information could prove as a valuable tool as long as it is placed in a broader framework allowing forms of data sharing of which the J.I.T.S.I.C. (Joint International Tax Shelters Information Center) represents a very promising example.[289]

4.3.2.5 Extent an Boundaries of Exchange of Information

This sub-paragraph is concerned with determining what could be defined as the four "poles" of the current geography of exchange of information, which are represented by the following two couples of standards.

The first couple is defined by the following juxtaposition :

- on the one hand, by the policy objective of ensuring that information is exchanged to the widest possible extent;
- on the other hand, by the requirement that only information that is "foreseeably relevant" to the purposes for which exchange of information is foreseen[290] should be exchanged.

The second couple is defined by the following two complementary limitations:

- the explicit limitation brought by a direct corollary of the abovementioned "foreseeable relevance standard", that is, by the prohibition to engage in what was defined by the OECD as "fishing expeditions" of tax information;
- the implicit limitation[291] deriving from the so-called "subsidiarity principle".

According to the current version of Para. 1 of the OECD Model Convention, information has to be "foreseeably relevant" for the correct application of the provisions of the Convention or of the domestic laws in the requesting States. This wording should clarify that "the Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given

[288] See for instance Rosenbloom H.D., *International Tax Arbitrage and the International Tax System*, *David R. Tillinghast Lecture on International Taxation*, 53 Tax Law Review (1998), at 137

[289] Which will be discussed in further detail in Part 4 of this work.

[290] That is, as outlined and analysed in the previous sub-paragraph, the carrying out of provisions of tax treaties and the administration, or the enforcement of the domestic tax laws of the Contracting States.

[291] Within a bilateral framework the limitation appears as implicit but it is phrased more openly in other legal instruments providing a legal basis for exchange of information such as for instance the 1977 Mutual Assistance Directive. See Art. 2, Para. 1 of Council Directive 77/799/EEC of 19 December 1977.

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taxpayer."[292] Until the update of the OECD Model Convention in 2005, the exchanged information had to be "necessary" to oblige the other Contracting State to exchange information.[293]

The OECD Commentary on Art. 26 OECD Model Convention stipulates that the changes of the wording of the provision "(...)were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation. For instance, the change from "necessary" to 'foreseeably relevant' (…) were made to achieve consistency with the Model Agreement on Exchange of Information onTax Matters and were not intended to alter the effect of the provision"[294] and that "the standard of "foreseeable relevance" is intended to provide for an exchange of information in tax matters to the widest possible extent (…)".[295] At first glance, this could mean that the scope of application of Art. 26 OECD MC was expanded but, it has to be stressed that this was also stipulated by older versions of the Commentary.[296] In addition, the contracting parties may *" (...) agree to an alternative formulation of this standard that is consistent with the scope of the Article (e.g. by replacing 'foreseeably relevant' with 'necessary' or 'relevant')*".[297] The OECD Commentary on Art. 26 of the year 2000 stated that "(…) *Some countries replace 'necessary' with 'relevant' in their bilateral conventions, regarding this as a better way to express the sense of the provision; in the view of the Committee on Fiscal Affairs, either word may be used in that context.* (...)".[298] As a consequence, either wording could be used without having an effect on the scope of Art. 26, Para. 1 of the OECD Model Convention. Following the OECD Commentary, the scope of the exchange of information clause was not expanded through the change of the wording and "necessary" and "foreseeably relevant" have to be interpreted in the same way.

However, considering the wording of the provision, it is obvious that the terms "necessary" and "foreseeably relevant" have a different meaning.[299] The term "necessary" was interpreted in a narrow way: information was considered to be

[292] See OECD Commentary (2010) Art 26 Para. 4.
[293] See OECD MC (2003) Art 26 Para 1.
[294] See OECD Commentary (2010) Art 26 Para. 4.1.
[295] See OECD Commentary (2010) Art 26 Para. 5.
[296] OECD Commentary (1977) Art 26 Para. 2,a ccording to which, "Therefore the present Article embodies the rules under which information may be exchanged to the widest possible extent, [...]."; see also OECD Commentaries 2000 and 2005, Art 26 Para. 2.
[297] OECD Commentary Art 26 Para. 5.
[298] OECD Commentary (2000), Art 26 Para. 5.
[299] The semantic difference is even more remarkable when considering the French version of the OECD Model, which is also an official version. In particular, the expression "foreseeably relevant" is rendered as "*vraisemblablement pertinents*", that could be more exactly translated as "likely relevant". The French version of the OECD Model Convention as, besides French speaking Countries, other Countries adopting a romance language, such as Italy, base the wording of tax treaties in their official language on the French version of the OECD Model Convention. See in this regard Maisto G., *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law*, Amsterdam, IBFD, 2005, at 67

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"necessary" if it was relevant for the tax purpose of the requesting State. Thus, the correct taxation in the requesting State was not possible without this particular information.[300] Moreover, information was held to be necessary if the requesting State was not able to gather information on its own by applying domestic information gathering methods.[301] The current OECD standard provides for the exchange of information, if the information is "foreseeably relevant" for the application of the Convention or for the application of the domestic laws of the requesting State. The main reason of changing the wording in the first Paragraph of Art. 26 of the OECD Model was that the requested State is unable to examine exactly whether the information is really necessary for the taxation in the requesting State.

The new wording "foreseeably relevant" in contrast implicates that it is easier for the requested State to ascertain if information can be exchanged. The information simply has to be foreseeably relevant not actually necessary for the taxation in the requesting State. This leads to the conclusion that, despite the contrary opinion laid down in the same Commentary to the same provision, the scope of Art. 26 of the OECD Model was effectively expanded. In this regard it is interesting to remark that the gap existing between the notion of "foreseeably relevant information" and "necessary information" was probably perceived even by the same OECD if the most recent amendment to the OECD Commentary has foreseen as a possible "alternative formulation" of the standard of foreseeable relevance and consistent with the objective of an effective exchange of information the wording "information that may be relevant".[302]This option appears as somewhat of a compromise even though it is indeed more geared towards the "foreseeably relevant" semantic field than the "necessary" one;at the same time, this author agrees with other commentators that the expression "may be relevant" stands out as clearer and more broadly encompassing. Moreover, the wording "may be relevant" is in line with the formulation already deployed under Art. 26 of the US Model, it could then be argued that the adoption of this alternative formulation under the OECD Commentary to Art. 26 testify the will to adopt an inclusive approach [303]. It is interesting to remark that Art. 26 of the UN Model also adopts the "foreseeably relevant" wording, however, qualified anedoctal evidence suggests that this wording was adopted following a lively debate as the original version of the most recent amendment of Art. 26 of the UN Model also adopted the "may be relevant" clause.[304]

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[300] See Vogel K., *On Double Taxation Conventions*' Art 26, MN 31.
[301] Ibidem
[302] See Para. 5.3 of the OECD Commentary to Art. 26 (2012 Version)
[303] Ibidem
[304] See Mc Intyre M.J., *Identifying the New International Standard for Effective International Exchange*, Lang M. et aa. (Eds.), Tax Treaties: Building Bridges between Law and Economics, Amsterdam, IBFD, 2010, at 502, see in particular footnote No. 38.

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The notion of foreseeable relevance has been directly addressed by the 2012 amendments to the Commentary to Art. 26 of the OECD Model which, to some extent, has tried to indirectly elaborate "rules" governing the application of the standard by means of providing possible tests and examples in relation to different difficulties concerning the application of the standard.

A first issue addressed by the amended Commentary concerns the point in time in which the "foreseeable relevance standard" should be met. In this regard the new Commentary clarifies that, to this purpose, it is required that there should be a "reasonable possibility" that the information be relevant. Such a reasonable possibility should not however be verified *ex post* but should be estimated at the time when the request is made, while it is irrelevant whether the information, once provided, actually proves to be relevant.[305]

The recently approved Commentary to Art. 26 also provides further specifications in relation to requests involving more than one taxpayer, substantially concluding that it cannot be excluded that the standard of "foreseeable relevance" is met only because a request concerns a plurality of taxpayers; it is however indirectly sanctioned that in order to ensure such a compatibility, the investigation to which the request for information refers should concern "a particular group of taxpayers".[306] In order to meet such requirements some procedural rules concerning additional information to be provided by the applicant State at the time of the request; in particular, it would be necessary that the requesting State provide:[307]

- a detailed description of such a "particular group of taxpayers";
- the specific facts and circumstances that have led to the request;
- an explanation of the applicable law;
- the reasons to believe, on the grounds of a concrete factual basis, that the taxpayers in the group for whom information is requested have been non-compliant;
- a showing that the requested information would be of assistance in determining compliance by the taxpayers in the group.

Even though the recent amendments to the OECD Commentary have introduced many specifications in relation to the contours of the standard of "foreseeable relevance", the latter should not be taken in an isolated way but, rather, it should be assessed and interpreted in the light of the other standards defining the broad scope and the specific boundaries of information exchange:

[305] See Para. 5 of the OECD Commentary to Art. 26.
[306] See Para. 5.2 of the OECD Commentary to Art. 26.
[307] *Ibidem*

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- the policy objective, stated in many instances in the relevant OECD documents and promoted also by the Global Forum, according to which information has to be exchanged “to the widest possible extent”.
- the prohibition of “fishing expedition” which sets limits to the foreseeable relevance of information and consequently, defines the negative scope of application of Art. 26 of the OECD Model;
- the principle of subsidiarity according to which a bilateral exchange of information is a subordinate means of gathering information.

There would seem to be an apparent dichotomy between the above outlined “foreseeable relevance” standard which determines which kind of information requests would be licit and which would not and the policy objective of ensuring that information is exchanged “to the widest possible extent”. In this regard it might be argued that the two standards operate on a different level, so that the “foreseeably relevant” standard acts as a pre-requisite to exchange of information. While practical reasons, such as the amount of time necessary to obtain a reply should be sufficient to discourage States from resorting to this source of information without any restraint,[308] thus putting a heavy burden on the administration of the requested State, it seems understandable that some caps should be put ex ante.

As it has been illustrated in the Paragraph devoted to the legal nature of the international standard, despite the wide publicisation of the latter term, the policy orientation in the area of administrative tax co-operation has been progressively but steadily shifting from a standard-based approach to a rule-based approach; thus, while the “foreseeable relevance” standard, although in its more narrow incarnation as the “necessary information” standard, had been included in the model provision governing exchange of information since its origins, the expression “fishing expedition” (and the prohibition thereof) was introduced only in the 2005 Commentary to Art. 26 after having made its appearance in the preamble to the 2002 OECD Model T.I.E.A. and the related Commentary. In either case, the expression “fishing expedition” was not backed by any stipulative definition or clarifying examples.

Due to the missing legal definition of the term fishing expeditions, academic literature interpreted it differently. Facing the adoption of the international standard had on the Swiss tax treaty policy and also in consideration of the big echo of the UBS case, it should not be surprising that local scholarship provided some valuable theoretical contributions.

In this regard, some authors approached the problem by providing a framework of “journalistic questions”: “who, when, where and what?” , that, whereas not properly

[308] See Gangemi B. , *International Mutual Assistance through Exchange of Information*, in *Cahiers de droit fiscal international*, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 32.

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addressed by the applying State, would give rise to a fishing expedition. Other authors restricted the fulfillment of the “fishing expedition” prohibition to the identification of the person, the description of the specific information needed and the underlying facts of the case.

On the other hand, quite surprisingly, even the decisions issued by the Swiss Federal Administrative Court in relation to the*UBS* affair[309] , where the issue of a correct formulation of the requests for information was a central one, failed to provide a key to what a forbidden fishing expedition was.[310]

In any case, the Swiss perspective (i.e., the perspective of the Swiss Tax Administration) on the issue of “fishing expeditions” can be summarised in the requirements[311] that the request for information be linked to the examination of the tax position of a particular taxpayer and that the requesting State provides “specific information” and, in particular, the name of the taxpayer and the name of the holder of information.[312] Based on such general requirements, it is possible to foresees which kind of scenarios will qualify as a fishing expedition in the perspective of the Swiss Tax Administration. The issue arise in particular in relation to requests referring to a plurality of taxpayers: while the admissibility of such requests is not denied *ex ante* from the perspective of the Swiss Tax Administration: for instance, assuming that the Tax Administration of the requesting State has identified some non-reporting account holders at a Swiss bank, a request concerning these already identified taxpayers would not considered a fishing expedition but a request aimed at finding out whether other residents of the same State also hold an account at the same bank would qualify as such, despite the circumstance that there is the likelihood that fellow residents may have followed the example of the taxpayers under scrutiny and opened unreported accounts at the same bank.[313]

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[309] *See* Waldburger R., *Entwicklungen in der schweizerischen Amtshilfepolitik in Steuersachen – ein Überblick*, *IFF* (2010), at 81; Waldburger R., *Das Amtshilfeverfahren wegen <<Steuerbetrugs und dergleichen>> mit den USA*, IFF (2009), at ; Heuberger R., Oesterhelt S., *Switzerland to Adopt OECD Standard on Exchange of Information*, European Taxation 2 (2010), at 58

[310] See Reich M., *Das Amtshilfeabkommen in Sachen UBS oder die Grenzen der Staatsvertragskompetenz des Bundesrats*, IFF(2010), at 116; Müller M., *Beschwerdeverfahren in Sachen Amtshilfe der Eidgenössischen Steuerverwaltung wegen Steuerbetrug und dergleichen an die USA*, Archiv für Schweizerisches Abgaberecht(2008/2009), at 838. A very insightful analysis oft he decisions oft he Swiss Federal Administrative Courts on this area is available in Italian. See Crazzolara A., Lurà F., *Lo scambio internazionale di informazioni in materia tributaria e la giurisprudenza svizzera*, published in three parts on the 2010 Issue of the journal Diritto e pratica tributaria internazionale.The key decisions in this regard are listed as follows. Ruling of the Swiss Federal Administrative Court 5.3.2009, I A-7342/2008 und A-7426/2008; auch 21.1.2010, I A-7789/2009; Ruling of the Swiss Federal Administrative Court 5.1.2010, II B-1092/2009; Ruling of the Swiss Federal Administrative Court 11.10.2010, A-4935/201.

[311] That is typically formalised, thus somewhat departing from the sources of the international standard, as a protocol to general tax treaties or directly included in Tax Information Exchange Agreements.

[312] See Hess M., *Exchange of Information: The Swiss Perspective*, Rust A., Fort E. (Ed.), Exchange of Information and Bank Secrecy, at 172.

[313] Ibidem.

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When information is exchanged on the grounds of a T.I.E.A. the situation appears less nebulous than when the legal basis is constituted by an exchange of information provision included in a general tax treaty and modeled after Art. 26 of the OECD Model. Namely, reconnecting to the "standards Vs. rules" debate outlined in the previous Paragraph, it may clearly be perceived that, while Art. 26 has adopted a standard-based approach, whose gaps, in the absence of an *ad hoc* judicial authority entitled to provide an interpretation of the standard, have been filled (with debatable degree of success) by the same issuing body through the recent amendments to the OECD Commentary, the OECD Model T.I.E.A. has endorsed a clearly rule-based approach, under which specific procedural requirements need to be fulfilled in order for a request of information to be qualified as legitimated in the light of the "foreseeable relevance" requirement.

In particular, specific criteria for defining when requests of information are carried out in conformity with the agreement are defined under Art. 5.5.f) of the Model Agreement, according to which the Requesting State should present a statement that the request is carried out in conformity with its own laws and practices. Along with this provision, the notion of conformity embrace all the information that the Requesting State is due to provide to the Requested Party, such as the identity of the person under examination, the tax purpose for which the information is sought, the grounds for believing that the requested information falls within the Requested State's jurisdiction and, finally, the statement that the Requesting Party has pursued all the reasonable means available in its own territory to obtain the information. Moreover, the observance of the reciprocity principle is re-affirmed, as the Requesting Party has to state that if the requested information was within its own jurisdiction, then the competent authority of the Applicant Party would be able to obtain the requested information under its own laws and normal administrative practice . In any case, the wording is commonly interpreted so that the Requested Party may always decline a request not only when the Requesting Party fails to provide the necessary information but also when the former has grounds to believe that the necessary statements have been provided in a vague and inadequate way .

The conformity test according to Art. 5, Para. 5 f of the OECD Model T.I.E.A. is rarely included in the additional protocols to bilateral general tax treaties;[314] nonetheless, the criteria embodied in the OECD Model T.I.E.A. could serve as a guiding line for all exchanges of information upon request. But it has to be stressed that only those criteria that are stipulated in the treaty are binding for the Contracting States.

[314] Examples in this regard can however be found in the Swiss treaties concluded in the aftermath of 2009, whose excessively restrictive approach has been a matter of criticism within the purview of the peer review process by the Global Forum; thus, more recently, Switerland has amended its policy. The outcomes of the peer review process are outlined and commented in further detail in the final Chapter of the Present part of this work.

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If the wording of the concerned actual treaty provisions requires the necessity of the requested information, the criteria themselves can be stricter and therefore, deviate from those laid down in Art. 5, Para. 5 of the OECD Model T.I.E.A..If these same requirements are used to define a request for a necessary information, at least, they have to be interpreted in a narrower way.

While the considerations advanced so far maintain a systematic relevance and may lead to question whether the prohibition of fishing expeditions should be seen as always justified in absolute terms, it cannot be denied thata remarkable leap forward in defining the elusive contours of the "notion of fishing expedition", which however still leaves quite a few grey areas, was brought by the 2012 of the OECD Commentary to Art. 26 of the OECD Model Convention. The amendments are somewhat peculiar as they provide a "general anti fishing expedition clause" which has not however been included in the provision. In particular, fishing expeditions are defined as "speculative requests that have no apparent nexus to an open inquiry or investigation". Quite surprisingly, the definition adopted by the OECD is not really a "newly coined" definition but, rather, is derived from the 2006 Manual on the Implementation of Exchange of Information Provisions for Tax Purposes.[315]

In the view of this author, the above expressed notion of "fishing expedition" would seem to be consistent with the "subsidiarity" principle, which will be addressed in greater detail further in this Paragraph: namely, by foreseeing that a request for information should be linked to an existing investigation, the Commentary clarifies that foreign sourced information should complement domestic enquiries rather than substituting them thus implicitly requesting the exhaustion of domestic means of acquiring information. The general definition provided above does not however qualify as exhaustive in the perspective of the OECD since the same Commentary specifies that, in order to avoid incurring in a fishing expedition, the requesting State should provide to the requested State information "sufficient to identify the taxpayer" , although this would entail the obligation to provide the name and address of the taxpayer as long as the latter can be identified in other ways.[316] On the other hand, the clarifications provided by the latest OECD Commentary dispel the Swiss claim that the request for information should also identify the person resident in the requested State that is believed to be in possession of the requested information.[317]

The amended Commentary also provide guidance in relation to requests referring to a plurality of taxpayers. What seems relevant to underline in the first place is that requests concerning a group of taxpayers would not automatically be considered a

[315] See OECD, Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, Paris, 2006, at Para. 23.
[316] See OECD Commentary 2012, Para. 5.2.
[317] *Ibidem*

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fishing expedition. At the same time, in order to provide evidence that the request is not speculative in nature (a characterisation that would then trigger the "fishing expedition" label) the requesting State should provide:

- a detailed description of the group under enquiry and the specific facts and circumstances of that have led to the request;
- an explanation of the applicable law;
- grounds (substantiated by a clear factual basis) for believing that the taxpayers in the group for whom information is requested have been non-compliant with the applicable laws of the requesting State;
- a showing that the requested information would assist in determining compliance by the taxpayers in the group.

It may then be argued whether a request focusing on a group of taxpayers identified as being account holders of a specific financial institution in the requested State would qualify as a fishing expedition, for instance when requesting a list of client of that specific institution. The answer would seem to be positive even whereas the taxpayers are not individually identified as long as the fulfillments concerning the request reported above are met by the requesting State.

The most recent version of Art. 26 also contains a series of examples aimed at defining a sort of "positive list" and "negative list" of what constitutes a fishing expedition.[318] Among the situations referred to as a "fishing expedition" it is possible to mention that of the Authorities of State A requesting that the Authorities of State B provide the names, date and place of birth and the account balance of the residents of the same State A that hold an account at an identified bank of the State B without providing further details concerning the request beside mentioning that is well known that many residents of State A hold an account in that specific bank established on the territory of State B. As it has been anticipated, what would likely qualify the request as a fishing expedition would not be the request *per se* but rather the fact that the circumstances underlying the request are not clarified and lack of a specific factual basis beside that of a "general knowledge".

There is no need to say that, due to the sensitivity of the topic of fishing expeditions, the above recent amendments to the OECD Commentary, as well as the other amendments to the Commentary and to the model provision, are subject to one of the possibly most controversial topics in the area of international tax law and the interpretation of tax treaties, namely the choice between the static or dynamic interpretative stances.[319]

[318] See in particular Para. 8.1of the OECD Commentary to Art. 26 of the OECD Model.

[319] For an introduction to this highly controversial topic, see Garbarino C., *Manuale di tassazione internazionale*, II Edition, Milan, IPSOA, at 196 et seq. (including the related bibliographic references) and Lang M., *Introduction to the Law of Double Taxation Conventions* , Wien, Linde, 2010, see marginal number 92 et seq.;

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Exchange of information should not only be performed “to the widest possible extent” while observing the “foreseeable relevance” standard and without incurring in “fishing expedition”; on the top of these express requirements, it is possible to derive from the relevant sources of the international standard that information should also be exchanged while having regard to the principle of efficiency.[320] According to this principle, the bilateral exchange of information must be an efficient way of gathering information. Therefore, a request has to be as specific to the extent that the requested State is able to answer it.[321]

Due to the principle of efficiency,[322] it may be argued that the minimum requirements foreseen by Art. 5, Para. 5 of the OECD Model T.I.E.A. have to be interpreted broadly.[323] A confirmation of such an implicit principle can be found for instance in the Commentary to the OECD Model T.I.E.A. where it is stated that the disclosure of the account number is already sufficient to proof the identity of the person according to Art. 5 , Para. 5 a) of the same Model treaty.[324]

According to the principle of subsidiarity, the requesting State first has to use its domestic information gathering measures to obtain the requested information before it could apply the exchange of information according to Art. 26 of the OECD Model. Thus, information is considered to be “foreseeably relevant”, if the information is not obtainable under domestic law.[325]; so that, in pursuance of the principle of subsidiarity, the burden of information gathering is not shifted to the requested State.[326]

Having regard to the requirement that the information has to be necessary, the principle of subsidiarity was interpreted differently: following a strict interpretation, information is considered to be necessary if all of the domestic information gathering measures were exhausted by the requesting State but the requested information could not be obtained. Following a broader interpretation, information can be exchanged if it is the more efficient way to obtain the information compared to domestic information gathering measures.Thus, the requesting State does not have to take all domestic information gathering measures before filing a request for informationto another jurisdiction. If the bilateral administrative assistance is the more efficient way, the requested State has to provide the required information. As a consequence,

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[320] This underlying principle has been proposed chiefly in the German language literature covering the area of administrative co-operation. For an introduction, see Hendricks M., *Internationale Informationshilfe im Steuerverfahren*, Köln, Schmidt, 2004, at 141 et seq..

[321] Ibidem

[322] Ibidem

[323] See the OECD Commentary to the OECD Model T.I.E.A., Para. 5.57.

[324] OECD Commentary to the OECD Model T.I.E.A., Para. 58.

[325]See Oberson X., *The OECD Model Agreement on Exchange of Information: A Shift to the Applicant State?*, IBFD Bulletin 1 (2003), at 14

[326] Ibidem

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therequested State may refuse the exchange of information, if the requesting State has not taken any measures of domestic law to gather the information.

As it has been anticipated, the subsidiarity principle constitutes an implicit boundary to exchange of information based on general tax treaties; as a rule such condition is taken for granted but in some Countries, e.g. France, Germany, Sweden, The Netherlands and Sri Lanka, although no explicit clause in this sense is included in the relevant tax treaties, the Competent Authorities generally request a formal confirmation by the applicant Country.[327]

A less strict interpretation of the principle of subsidiarity is derived from the wording "foreseeably relevant". The prohibition of fishing expeditions requires the existence of a detailed request for information. Thus, the requested State must have used its domestic information gathering measures to comply with the requirements laid down in the T.I.E.A. or additional protocols regarding the exchange of information clause at least. The less strict interpretation is also entailed by Art. 5, Para. 5, g) of the OECD Model T.I.E.A., according to which the requesting State has to pursue "*all means available in its own territory to obtain the information, except those that give rise to disproportionate difficulties*". Having regard to the fact that, according to the new OECD standard, a bilateral administrative assistance should be a more efficient way to obtain information; this objective is not achieved by following a strict interpretation of the principle of subsidiarity. The efficiency of the administrative assistance would be strengthened if not all domestic information gathering measures have to be exhausted.

4.3.2.6 Proactivity of the Requested State and Domestic Tax Interest

The international standard on exchange of information cites among its primary sources the OECD Model T.I.E.A. and Art. 26 of the OECD Model. At the same time, when enumerating the concrete terms of reference against which adherence to the standard is to be measured in the perspective of the peer review process, one of the most visible aspects of the of the aforementioned provisions, such as the obligation of the requested State to act in what could be defined as a "proactive" fashion, is not distinctly pointed out[328].

Said proactivity refers to what emerges from an examination of the fourth paragraph of Art. 26 of the OECD Model, where it is specified that in order to comply with a request for assistance, each Contracting State "*shall use its information gathering*

[327] As reported by Gangemi B., *International Mutual Assistance through Exchange of Information*, in *Cahiers de droit fiscal international*, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 32.

[328] As a matter of fact, within the "triad" elaborated by the Global Forum and comprising of "availability of reliable information", "access to information by tax authorities" and "exchange of information", the proactivity of the requested Tax Administration could well be depicted to be lying across the latter two dimensions.

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measures"[329]. Such a statement solves many interpretative doubts which had arisen before the addition of Para. 4 in 2005. It has always been discussed whether, in the absence of a more precise provision, States should have limited to exchange solely information of which they were already in possession or on the contrary should have adopted a pro-active approach and should have engaged into information gathering activities finalised only to meet the requests of the Applying State.

Before the 2005 addition, most Countries interpreted exchange of information in a restrictive way; however, in recent years, supporters of a wider interpretation of Art.26, aimed at encompassing the possibility that Requested Parties might be asked to resort to their information gathering measures, gained prominence either in courts decisions and jurisprudence. In this respect, a rather ground-breaking decision was that taken by the Federal Court of Canada in the "Pacific Network Services Ltd and another v. Minister of National Revenue" decision of the 6th May 2003, where the Pacific Network Services Ltd appealed against the use of tax assessment procedures by the Canadian Tax Authority for the purpose of transferring the gathered information to French Tax Authorities on the grounds that such a procedure was contrary to Art. 26 of the "Canada-France Income Tax Convention". The quoted provision did not feature any explicit reference to the use of information gathering measures by the Requested Party. Moreover, Pacific Network Services Ltd underlined that in the Canada-United States Convention of 1980, Art. 27 featured such an explicit provision. On the basis of the "parallel treaties"[330] interpretation criteria, such a different wording justified a restrictive interpretation of Art. 26 as found in the Convention between Canada and France. The Federal Court of Canada rejected however the interpretation suggested by the Pacific Network Services Ltd on the grounds that the obligation for the Requested State to make use of its own information gathering measures could be inferred by the fact that Art. 26 of the OECD Model Convention already featured provisions aimed at limiting the action of the Requested State when gathering information.[331] According to the Canadian Federal Court, such provisions were sufficient to infer an implicit obligation. Such a Court decision then qualifies as a forerunner to the current wording and interpretation of Art. 26 of the OECD Model.

Another extremely interesting tax-policy effect of such provision, if thoroughly applied, would most likely be to encourage the adoption of information gathering measures in those States where these procedures are not fully developed. This effect

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[329] Art. 26.4. of the OECD Model Tax Convention on Income and on Capital, 2005.

[330] On the interpretative practice of "parallel treaties" in international tax law see Vogel K., *Double Tax Treaties and Their Interpretation*, 4 International Tax Law and Business 1 (1986), at 37.

[331] See Art. 26.3. of the OECD Model Tax Convention on Income and Capital, 2000, which states that "*In no case shall the provisions of Para.s 1 and 2 be construed so as to impose on a Contracting State the obligation (…) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State.*"

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may be sharpened by the aforementioned "principle of reciprocity". States may be encouraged to adopt more sophisticated measures either because obliged to do so on the basis of Para. 4 or in order to invoke reciprocity: if States are willing to obtain sensitive information from their counterparts, then they must be ready to guarantee the same treatment.

States deal with information gathering in a wide array of ways and this lack of coordination may lead to some major misunderstandings with reference to the information eventually to be exchanged. In order to prevent, or at least, to minimise these inconveniences, a standard interpretation of "information gathering measures" has been put forward by the OECD itself; "*information gathering measures" then include laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information*".[332] The most relevant consequence of this definition is to be found in its inclusion of administrative and judicial procedures among information gathering measures. It is not undisputed whether these procedures are to be seen as a direct consequence of specific laws or, on the contrary, can be deemed as acceptable and sufficient even in the absence of specific legal bases.

Under this respect, some help may be provided by existing double taxation conventions,[333] which contain an additional clause stating that "each contracting State shall take the necessary measures including legislation, rule-making, or administrative arrangements, to ensure that its competent authority has sufficient powers (…) to obtain information for the exchange of information". Such a wording, by featuring mere "administrative arrangements" as an alternative to legislative measures, would suggest that the former are to be considered adequate for the fulfilment of the Convention's requirements even on a stand-alone basis.

Along with the afore-mentioned criteria, the 2006 OECD Manual [334] provides Contracting States with a list of appropriate measures such as questioning a person that may have knowledge or be in possession of information; request the production of books, papers, records and other tangible property or gain access to and search premises for the purposes of locating and securing books and records or other tangible property for examination.

The issue of the "proactivity" of the requested Tax Administration is directly related to the prohibition of subjecting the use of domestic information gathering measures to the existence of a domestic tax interest on the head of the requested State, which means that a Contracting State can only provide information to another

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[332] Para. 19.7.2 of the OECD Commentary on Art.26 concerning the exchange of information.

[333] Information reported by the OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, 2006, at 17.

[334] See OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, *General Module*, at 16.

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State if it has an interest in the requested information for its own tax purposes. However, since 2003 there is no longer any OECD Country which considers domestic tax interest as a condition to exchange of information.[335]

The overcoming of the "domestic tax interest" requisite is particularly meaningful since it testifies a shift in paradigm from "mutual administrative assistance" to "administrative co-operation". As a matter of fact, within the framework of "mutual administrative assistance", which chiefly lied upon a reciprocity requisite, a domestic tax interest could actually make sense in all those situations of asymmetry where one the parties involved resulted being a net "exporter" of information. Namely, in the absence of specific incentives to the exchange of tax information and whereas any broader conceptualisation for administrative co-operation based on the pursuit of a common general overriding reason of public interest suitable to thoroughly waive the revenue rule had not yet been recognised by the international community, foreseeing the existence of a domestic tax interest of the requested State as a pre-condition to the provision of an enhanced form of administrative assistance implying the deployment of the information gathering measures of the same State could well operate as justifiable limitation in the same vein of the current prohibition to engage in the co-called "fishing expeditions"; i.e. as a manifestation of a broad proportionality principle aimed at avoiding that exchange of information be turned into a way of outsourcing tax audit procedures.

On the other hand, the circumstance that the domestic tax interest requisite has been lifted by the vast majority of jurisdictions for almost ten years to date and that such an achievement was reached at least five years before the 2009 "revolution" testifies that the emergence of the international standard is not a unexpected breakthrough but a process that has been slowly developing over decades.

The issue of the proactivity of the requested Tax Administration and the boundaries of what should be perceived as the "normal course of administration" are strictly linked to the background areas of the standards of transparency and exchange of information that, in the jargon of the Global Forum, go under the definition of "Availability of Information"[336] and "Access to Information".[337] The 2012 amendments to the Commentary to Art. 26 underline such a link by foreseeing that, even though the requested State is not bound to provide information that can no longer be retrieved,[338]its

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[335]See *OECD Progress Report on Exchange of Information on Tax Matters*, 2003

[336] Reflected in the Terms of Reference A "Availability of Information".

[337] Reflected in the Terms of Reference B "Access to Information"

[338] From an Italian perspective, an interesting case in this regard may be represented by cases involving taxpayer that subscribed to one of the "tax shields" that were provided in the course of the first decade of the II Millennium. As subscription to the tax shield ensured that the tax position of the concerned taxpayer be sealed under a "tombstone like" Amnesty, the Italian Tax Administration, when required to provide information in relation to said tax positions by a treaty partner may be put in an embarrassing situation as that information are supposed to be unretrievable yet, at the same time, possibly still available based on ordinary statutory retention rules and statutes of limitation. For further

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information gathering measures should not be limited by statutes of limitations when collecting information to be transferred to another jurisdiction. Even whereas the statute of limitations or the domestic record retention period have expired, as long as the requested information is still available, the requested State cannot decline to gather such information and forward it to the requesting partner.[339] The new version of the Commentary goes however one step further, in a somewhat unprecedented way, in setting forth a recommendation directly aimed at influencing the domestic set of rules governing minimum retention periods. In particular, the 2012 Commentary foresees that "Contracting States should ensure that reliable accounting records are kept for five years or more."[340] Such an inclusion directly echoes the recommendations set forth by the Financial Action Task Force concerned with the combat of money laundering. These recommendations were directly adopted by the Joint Ad Hoc Group on Accounts that operated under the aegis of the OECD within the framework of the harmful tax competition project and which delivered a Report in 2005.[341] Based on the Report, "accounting records need to be kept for a minimum period that should be equal to the period established in this area by the Financial Action Task Force. This period is currently five years. A five-year period represents a minimum period and longer periods are, of course, also acceptable."[342]The Report also constitutes the basis of one of the Terms of Reference adopted by the Global Forum in conducting peer reviews.[343]

Leaving the more recent developments enshrined in the 2012 version of Art. 26, the OECD Model T.I.E.A. does not depart from the standard of proactivity and the lack of a self-interest requisite when compared; quite on the contrary, it can be observed that these very concepts were first developed within the context of the Working Group on Effective Exchange of Information. In this regard, the Model Agreement contains reference to further issues of greatpractical import. In particular, the Model Agreement foresees that "if specifically requested by the competent authority of an applicant Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records."[344] Thus, the T.I.E.A. Model provision goes a step further than Art. 26 in ensuring the provision of information in the format specifically needed by the requesting Party to meet the evidentiary requirements established under its own domestic laws.

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enquiries in this regard reference can be made to Mastellone P., *The New Italian Tax Shield: Amnesty for Undeclared Offshore Assets*, 50 European Taxation, 4 (2010), at 152.

[339] See Para. 19.7 of the 2012 version of the OECD Commentary to Art. 26 of the OECD Model.

[340] Ibidem

[341] JAHGA Report of 5th July 2005.

[342] See JAHGA Report of 5th July 2005, Para. 14

[343] More precisely, Term of Reference A.2.3.

[344] Art. 5, Para. 3 of the OECD Model T.I.E.A..

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The relevance of exchanging information under formats that comply with the procedural requirements of the requesting jurisdiction has also been upheld by the Global Forum, which has explicitly foreseen a specific term of reference with regard to effective exchange of information, according to which the request jurisdiction should ensure "the provision of information in the specific form requested (including depositions of witnesses and production of authenticated copies of original documents) to the extent possible under the jurisdiction's domestic laws and practices." The inclusion of such an assessment criterion as a relevant variable for peer review purposes seems somewhat inconsistent with the basic assumption according to which the international standard should be found, so to say, in the common denominator between the OECD Model T.I.E.A. and Art. 26 of the OECD Model, to cite the two most prominent model provisions in this area; however, it seems apparent in this regard that the relevance attributed to the OECD Model T.I.E.A. outweighs that of the model provision found in general tax treaties.

At the same time, the specifications provided in the Model T.I.E.A. appear as extremely relevant and, in the view of this author, it is high time they were introduced also in the model provision on exchange of information to be found in the OECD Model or at least in the related Commentary. Namely, there seems to be no doubt that administrative co-operation in tax matters ultimately consists in the carrying out of a two-step cross – border tax audit activity,[345] thus implying that items of evidence gathered in different jurisdictions are subject to an official recognition in the receiving State where the tax assessment is finalised.[346]

There seems to be no doubt that the model stipulation is however not binding in absolute terms, so that the requested Party may decline to provide the information in the specific form requested if such form is not allowable under its own laws. In this regard, the related Commentary clarifies that a refusal to provide the information in the format requested would not affect the obligation to provide the information under other forms.[347] The format of the requested information is indeed a very delicate issue and it may likely require the conclusion of *ad hoc* Memoranda of Understanding. It may be argued that recent emphasis on potentiating the existing network of tax information

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[345] In this regard, the definition provided by Udina in his seminal work *Il diritto internazionale tributario*, is still topical. In particular, Professor Udina defined administrative tax co-operation as "l' attività coordinata, ma distinta, di organi interni di due o più Stati, mirante di volta in volta ad adattare i fini di uno di essi indifferentemente, fini trovanti rispondenza negli analoghi degli altri, aventi egualmente diritto alla loro attuazione" (the co-ordinated, yet distinct activity, carried out by internal bodies of two or more States, aiming, from time to time, to adapt the objectives of one of them, indifferently, objectives that are mirrored by the same objectives of the other, that are equally worthy of being implemented)", see ID., *Il diritto internazionale tributario*, Padova, Cedam, 1949, at 428.

[346] In this regard, see Lampone, S., *La mutua assistenza amministrativa tra le Amministrazioni finanziarie dell'"UE*, 51 Rivista della Guardia di Finanza 6 (2002), at 2412.; Mastellone P., *Brevi note sull'applicabilità delle garanzie della CEDU alle procedure di cooperazione fiscale internazionale*, retrievable on the following link: http://www.unich.it/scigiur/index.php?action1=eventi&action2=interventi

[347] See Para. 44 of the Commentary to the OECD Model T.I.E.A..

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exchange agreements has somewhat negatively affected the refinement of such agreements and the inclusion of specific clauses dealing with issues such as those mentioned above. Based on practical evidence, an issue that seems particularly delicate is the interaction between the need to safeguard the informational self-determination of each taxpayer in the requested State and the need for the applying State to receive unedited records, that may however often make reference to the positions of taxpayers other than those under enquiry in the applying State. In such cases, a real conundrum would emerge due to the conflict between the informational self-determination rules in the requested State and the procedural rules in the requesting State, where unedited originals may be necessary in order to comply with locally applicable evidentiary requirements.

4.3.2.7 Possibility to Decline a Request. A Positive and Negative List

The standards of transparency and exchange of information as recollected in the background material made available by the Global Forum do not explicitly list, in their five key requirements,[348] a positive list of admissible reasons for turning down a request for information.[349]

Besides the already analysed overarching issue of the "foreseeable relevance" standard, the only positive prescription in this respect points to the "strict confidentiality" of information exchanged, which is however, it is a different issue since it concerns the way information should be processed and what kind of access regime it may be subject to, *once* it has been exchanged. On the other hand, what can be found in the key requirements of the standards in this regard is a (partial) "negative list" whereas it is specified that no restrictions on exchanging information "caused by bank secrecy or domestic tax interest requirements"can be foreseen. While the latter aspect has already been dealt with, the former is probably one of the most emphasised overturns achieved by the OECD agenda in this area.[350]

[348] As reproduced in the background information brief: 1) exchange of information on request where it is foreseeably relevant to the administration and enforcement of the domestic law of the treaty partner; no restrictions on exchange caused by bank secrecy or domestic tax interest requirements; availability of reliable information and power to obtain it; respect for taxpayers' rights; strict confidentiality of the information exchanged. See Global Forum, Background Information Brief of 2nd May 2011.

[349] It should be clarified from the onset that the wording "possibility to decline a request", used in the relevant policy documents, should leave no doubt with regard to the circumstance that these limitations do not act as prohibitions to exchange information, so that there should similarly be no doubt that the information so exchanged can be used in the recipient State and considered as fully legitimately obtained even whereas, despite the recurring of a possible ground for denying co-operation, the applied State fulfilled the request. See, Gaffuri A., *I limiti allo scambio di informazioni nelle indagini fiscali*, Fiscalità Internazionale 5 (2004), at 417.

[350] As it has already been remarked, bank secrecy, among other client-institution confidentiality commitments, could not constitute a valid reason for refusing to provide information at least since 2002, as specified by the explicit

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Similarly, when essential elements constituting the key term of reference "C.1", according to which "exchange of information mechanisms should provide for effective exchange of information", there is no specific reference to the limits to exchange of information.

At the same time, when confronting the "sources" of the international standard, namely, the OECD Model T.I.E.A. and Art. 26 of the OECD Model, it can be realised that an entire portion thereof is devoted to defining the acceptable grounds for refusing to provide information. Based on this discrepancy, it may be argued whether a certain jurisdiction, possibly moved by the hard-line orthodoxy which typically moves neophytes, could request and obtain from a treaty partner the conclusion of a

Treaty (either a general tax treaty containing an information exchange clause or a T.I.E.A.) where no valid grounds for refusing to exchange information are foreseen besides the prohibition of fishing expeditions and the adherence to a strict confidentiality regime for the exchanged items of information. It could be argued how the treaty policy stance of such a jurisdiction would be valued within the context of the peer review process and whether it would be rejected as a harmful to the internal coherence of the standard or on the contrary, it would be praised as a display of particular zeal[351]. Unfortunately, there are no examples of treaties styled in such way to date, but it could be argued that such a scenario is not so unlikely and purely theoretical as it could appear.

The key and recurring question, in this respect, seems to be whether the standard fully coincides with the existing treaty models (Art. 26 OECD and the OECD Model T.I.E.A. alike) or, instead, if it consists *stricto sensu* only of those features of the aforementioned models that are expliclity indicated as essential elements of the standard and against which jurisdictions are examined within the context of the peer review exercise.

The issue of the limits to exchange of information can be singled out as the area where the potential discrepancy between the "international standard" as it seems to be applied in action, i.e. in the course of the peer review process, seems to leave aside issues that are defined in its sources but that are not crystallised in the "terms of reference" based on which adherence to the standard is put to test. In the case of the

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prohibition included under Art. 5, Para. 4, a) of the OECD Model T.I.E.A.. A further milestone was represented by the inclusion of a dedicated Paragraph under the last Paragraph of Art. 26. At the same time, on a political level, it seems that consensus among industrialised Countries was publicized and started achieving momentum after the G20 April 2nd London Summit, with the now almost overheard statement according to which "*the era of bank secrecy is over*".

[351] For the sake of clarity and completeness, it should be underlined that the issue under scrutiny exclusively refers to the inclusion of specific wording concerning the "legitimate grounds" to provide information within exchange of information clauses and not the execution of treaty obligations and the concrete practices of States. In this latter respect, it is clearly stated in the Commentaries to Art. 26 of the OECD Model and Art. 7 of the OECD Model T.I.E.A. explicitly foresee that the refusal of providing information is not an obligation but it is discretionary upon the Requested State. All prescriptions found in the Commentaries on the issue are thus ultimately geared towards ensuring that the grounds for refusal are not interpreted too broadly rather than too narrowly or even bypassed.

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limits to exchange of information the matter seems particularly serious because, as it will be later exposed, the "acceptable limits" included under Para. 3 of Art. 26 and Art. 7 of the OECD Model T.I.E.A. are, on the one hand, among the few prescriptive measures that seem to be inspired by a concerned for the safeguard of the rights of the concerned taxpayers and, on the other hand, an excessively rigid adherence to the fairly nebulous prescriptions brought by these provisions could end up in being an Achilles' heel for the whole standard.

In this perspective, it is important to analyse the clauses that set forth legitimate limitations to exchange of information in order to ascertain whether they can be considered as inherently coherent to the international standard and provide some overarching principles to its application, even though they are not specifically scrutinised under the peer review process, or, on the contrary, they can be considered of remnants of an outdated way of understanding administrative co-operation in tax matters. In any case, it should be borne in mind that these limitations are not meant as prohibitions to provide the requested information but, rather, as a ground for a discretionary refusal which would however be exceptionally legitimated.[352]

These limitations can be ascribed to three major rationales:

1. the first one is, as anticipated, that of the protection of the involved taxpayers in relation to the safeguard of some specific kinds of secrecy that are deemed to be worthy of public protection under the shield of treaty provisions.[353] This dimension is particularly relevant because it is one of the few examples where tax treaties, that are otherwise typically concerned with substantive questions (i.e. with regard to distributive rules) and adopt a horizontal approach

[352] In this sense, Gangemi B. , *International Mutual Assistance through Exchange of Information*, in *Cahiers de droit fiscal international*, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 45.

[353] In this respect, it could be argued whether the *ex ante* clause preventing exchange of information in case it would lead to the revealing of business secrets should actually be understood as a form of safeguard for the potentially concerned taxpayer or rather as, at least primarily, a form of safeguard concerning the requested State and its interest not to disclose relevant data of its economy. The latter view has been held by Vogel K., *On Double Taxation Conventions*, at 1444. At the same time, there are diverging views on the "public" or "private" nature of such a limitation to exchange of information. An argument in favour of emphasising the safeguard of the interest of the concerned taxpayer could be desumed from the practice of the Tax Administrations of some States. For instance, it can be reported that in the view of the German Federal Ministry of Finance, no safeguard of such business secret can be awarded whereas, following exchange of information, a business secret would be disclosed between two associated enterprises. See Vogel K., *On Double Taxation Conventions*, at 1444 . The current OECD Commentary to Art. 26 would seem to promote the view that this form of limitation to exchange of information is meant to be based on a form of protection awarded by the requested State to its taxpayers whereas Para. 19 of the OECD Commentary specifies that "the requested State in protecting the interests of its taxpayers is given a certain discretion to refuse the requested information.". On the other hand, it is interesting to remark that this protection would have an objective scope rather than a personal scope: namely it is "the interest of the taxpayers", in the form of a certain business secret, and not the taxpayers themselves to be protected; thus, as clarified by the OECD Commentary to Art. 26, at Para. 19.2, the protection of the secret information may also extend to the information in the possession of third persons.

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(i.e., juxtapose the different prerogatives of the contracting States[354]) extend their scope to include issues that could be defined as procedural (in the sense that they are directly intertwined with the procedural tax law of the Contracting States) and do so in vertical perspective, i.e., directly addressing the position of the concerned taxpayers. at the same time, it might be argued from a policy perspective whether such safeguards should be provided, as it is currently the case, both before the exchange of information takes place (by virtue of the aforementioned limitations) and after the exchange of information takes place (by virtue of the secrecy clauses that will be dealt with in the next paragraph) or whether an exclusively *ex post* approach could yield to the same results in terms of taxpayers' protection without jeopardising the effectiveness of exchange of information ;

2. the second one is the respect of public policy, which can in turn be understood as a link between the aforementioned vertical and horizontal dimensions, according to which no Contracting State can be asked to push the boundaries of (its own definition) of public order in the purview of providing assistance to the other State and, also, in a vertical dimension, whereas trespassing of public order that may lead to violation of the rights of the involved taxpayer is not allowed;

3. the third one is a horizontal rationale and embeds the very principles that should guide administrative co-operation among States. Different characterisations can be set forth in this regard, the more traiditional ones being the "sovereignty" and "reciprocity" principles.

It has been argued whether these exceptions can qualify as "genuine exceptions" to exchange of information or, rather, if they simply serve a declaratory purpose in relation to rules that can directly be derived from principles of general international law, with preference awarded by scholarship to the latter conclusion.[355] Thus, it should not be doubted that provisions contained in tax treaties providing for a ground to refuse assistance in no way limit the applicability of rules of international law on the right to refuse a treaty obligation as stipulated under Art. 60 of the Vienna Convention on the laws of Treaties.

The different sets of limitations will be analysed following the above exposed order. With reference to the safeguard of some forms of secrecy that are deemed to be worthy of protection under a treaty, the third Paragraph, letter c) of Art. 26 of the OECD Model clarifies that the obligations to provide information to a requesting State in

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[354] Despite the point hereby made, it should be underlined that, as legal instruments governing administrative co-operation currently stand, the position according to which the *structure* of the concerned provisions is first and foremost in any case directed to States as the primary actors. See C. Brodersen, *Limits on International Exchange of Tax Information*, European Taxation6 (1987), at 175.

[355] In this sense, see K. Vogel, *On Double Taxation Conventions*, at 1439.

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pursuance of the guidelines set forth by the first two Paragraphs of Art. 26 cannot be construed in such a way to impose on a contracting State the obligation to supply information which would disclose "any trade, business, industrial, commercial or professional secret or trade process".

From the point of view of the drafting technique adopted by the OECD under both Art. 26 of the OECD Model Convention and the OECD Model T.I.E.A., trade, business, industrial, commercial and professional secrets as well as trade process are treated as a whole and a specific definition for each of them is not provided either in the treaties or in the related commentaries. For this reason, recent scholarship has proposed to treat them as a bundle and include these different dimensions of secrecy under the umbrella term "business secrecy"[356]; while this practice seems suitable to bypass the potentially plethoric wording "trade, business, industrial and commercial secret, or trade process" and is substantiated also by the circumstance that the, equally authoritative, French version of the OECD Model makes reference only to "*un secret commercial, industriel, (…) ou un procédé commercial*", thus at least minimising any possible semantic divergence between the notion of a "trade" secret as opposed to a "business" or "commercial" secret, the very notion of "professional secret" intuitively brings under the lens a wholly different facet of the complex phenomenon of secrecy; for the purposes of this Paragraph, "business secret" and "professional secret" will then be treated separately.

The canonical approach to deal with concepts whose definition is not autonomously provided under the treaty is, based on the second Paragraph of Art. 3 of the OECD Model, to adopt a *lex fori* interpretive stance, i.e. to make reference to the definition provided under the domestic law of the Contracting States. The outcomes of a recent conference have however showed that not only there are wide differences concerning what is covered by secrecy across different jurisdictions but also that the same notion and application of "secrecy standards" varies widely and ultimately depends on the administrative culture within each Country, so that an interpretation making reference to the domestic notions of the Contracting States would be deprived of any common background and would be severely hindered.[357]

Defining the exact contours of what kind of information can lead to the disclosure of a trade, business, industrial or commercial secret may prove problematic, considering that no autonomous definition can be found under the OECD Model Convention or under the Commentary; similarly, the notion is then entirely left to the tests accepted and available in the requested Country; at the same time, the burden of such a fact-

[356] See Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 185.

[357] Similar concerns have been shared by scholarship, particularly in relation to previous versions of the OECD Commentary. See, *ex multiplis*, Vogel K., *On Double Taxation Conventions*, at 1442.

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checking seems to lie entirely on the Tax Administration of the requested State, which, as it has been observed, may not have all the elements and knowledge necessary to properly judge the related factual and legal issues.[358] Indeed, the issue is fairly critical, namely, whereas an excessively narrow notion of "trade, business, industrial or commercial secret" is adopted, then the result may be tantamount to characterising the possibility of disclosing any of such secrets by exchanging information as a purely theoretical one[359]; on the other hand, as anticipated, whereas the notion of "trade, business, industrial or commercial secret" is awarded a way too broad meaning, the effect would be that exchange of information could easily be paralysed, in particular in relation to those areas, such as transfer pricing, where requests for information may point at data that could reasonably qualify as items of information enterprises have a strong interest to keep secret, such as for instance the margins of their foreign subsidiaries or the prices agreed with their suppliers or customers. In this regard, the Commentary generally stipulates that "financial information, including books and records, does not by its trade constitute" a business secret.[360] On the other hand, the Commentary as well as scholarly contributions on the issue seem to be silent in relation to management information and, in particular, extrapolations from the information system of a company and its managerial accounting records.

The problem seems to be an enduring one; at the same time, while no stipulative definition has been included in the OECD Model Convention, since 2005, the OECD Commentary to Art. 26 has attempted to introduce a "working definition" of the different forms of business secrecy. In particular, the OECD Commentary seems to recognise that secrets are by definition the most intangible assets and may consist even in "facts and circumstances".[361]

According to the OECD Commentary, what makes these facts and circumstances deserving of confidential treatment are the following characteristics, which should be observed jointly:

1. their being of "considerable economic importance";[362]
2. their suitability to be "practically exploited";[363]

[358]Gangemi B. , *International Mutual Assistance through Exchange of Information*, in *Cahiers de droit fiscal international*, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 33.

[359] This would seem to be the line adopted in the past by the British Tax Authorities in relation to domestic tax audits. In particular, the 1983 Report by the so-called "Keith Commmittee" on the Enforcement Powers of the Revenue Departments concluded that "the Inland Revenue acknowledged the difficulty of recognizing when information might constitute a trade or other commercial secrets but pointed out that so far as they were concerned there had never actually been any such occasion when commercially secret information has been passed on."

[360] OECD Commentary to Art. 26, Para. 19.2.

[361] OECD Commentary to Art. 26, Para. 19.2.

[362] Ibid.

[363] Ibid.

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3. the circumstance that an unauthorised use thereof may lead to "serious damage", specifically under the form of "severe financial hardship".[364]

Such a working definition seems to have been influenced by the case-law elaborated by the German Bundesfinanzhof and likely disseminated in the international tax law discourse by German authoritative scholarship; in particular, said scholarship had originally pointed out to the possible practical problems that could arise from the lack of an autonomous treaty notion of business secrecy as well as by the inherent difficulties to apply to this specific notion the hermeneutical directions provided by Art. 3, Para. 2 of the OECD Model Convention.[365]

While this "working definition" is indeed a step forward, the circumstance that refusing information on the grounds of the safeguard of business secrecy is ultimately a discretionary decision of the requested State[366] and the fact that such a working definition has been included in the Commentary, whose binding nature for interpretive purposes has been discussed at case law level even in the fold of OECD Member States, and not directly under Art. 3 of the OECD Model may ultimately lead to such a working definition being overlooked. It is then reasonable to assume that, not unlike the notion of "fishing expedition", the notion of "business secrecy" has the potential to stir controversy and generate some meaningful domestic litigation which may lead to further case law developments that are likely to shed some further light on this issue. In this regard, it is worth mentioning some conclusions bearing possible general relevance on the issue as resulting from some national case law.

Similarly, some hints concerning concrete examples of business secrets can be derived from surveys issued by the OECD as well as by international scholarship. A first example of a canonical business secret is provided by the same OECD Commentary whereas mention is made to the case of the possible disclosure of a proprietary formula used in the manufacture of a product[367]. On the other hand, proposals from scholarship seem to concentrate on items of information whose disclosure to competitors may lead to harmful consequences, included but not limited to, industrial secrets in the narrow

[364] Ibid.

[365] In Vogel's view, the terms of the matter can be summarised as follows: the business secrecy clause would cover "any knowledge to which no more than a limited group of people have access, which is capable of being exploited economically and the disclosure of which might place third parties at an advantage over those persons whose interests are protected by the secret." See Vogel K., *On Double Taxation Conventions*, London, 1998, at 1443. It is also interesting to remark that the wording currently adopted by the OECD Commentary on this point seems to have been directly influenced by German case law. In particular, a decision from the late '70s of the Bundesfinanzhof seems to have been echoed in the OECD Model almost *verbatim* (probably through the translated excerpt provided by Vogel's Commentary) when it defined business secrecy as "facts and circumstance of considerable economic importance (…) and utilisable in practice". See BFH, BStBl. II 268, 272 (1979), reported by Vogel K., *On Double Taxation Conventions*, London, 1998, at 1443

[366] Para. 19 expressly mentions that "The requested State (…) is given a certain discretion to refuse the requested information"; such discretionary prerogative goes to the extent that "if (the Contracting State) does supply the information deliberately the taxpayer cannot allege an infraction of the rules of secrecy".

[367] See Para. 19.2 of the OECD Commentary on Art. 26 of the OECD Model.

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sense, as formulated by the OECD Commentary but also covering areas that belong to managerial reporting, such as business development plans, Country pricing listings, Country market shares and so on[368].

In any case, the same working definition seems to be itself somewhat prone to possible diverging interpretations: in particular, it may still be argued how should the thereby depicted "serious damage" be identified.

In this regard, the same OECD Commentary clarifies that "the determination, assessment or collection of taxes as such could not be considered to result in serious damage"[369]. What the OECD Commentary seems to convey is that the mere circumstance that, following the access by the Tax Administration of the requesting State of information potentially within the purview of business secrecy, said Tax Administration uses such information to conduct a tax assessment cannot *per se* be considered as "serious damage" worthy of safeguard by the requested State.

A further issue, which has become particularly topical following the 2005 inclusion of the earlier cited "working definition" of business secret into the OECD Commentary to Art. 26 is whether the underlying notion of "serious damage" postulates an interaction between the taxpayer and the Tax Authorities of the requested State. This view is particularly prominent in Germany, which is also the Country where the notion of business secret currently adopted by the OECD was originally elaborated. This holds particularly true also in the light of the principle of "informational self-determination" ("*Grundrecht auf informationelle Selbstbestimmung*") which was originally derived from the German Constitution and further developed by the German Constitutional Court. Such a principle basically bestows upon citizen a fundamental right to keep all information regarding a citizen in the prerogative of the same citizen, unless an overweighing public interest requires otherwise[370]. In such a perspective, with specific reference to the potential disclosure of a business secret, the view has been expressly set forth in literature that consultation with the taxpayer should be generally required since "only in this way it is possible to determine whether there is a business or trade secret". [371]While such a reconstruction appears sensible and well grounded within the context of a system, such as the German one, which is already provided with specific

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[368] Further reference on these aspects can be made to Oliver J.D.B., Exchange of Information and the OECD Model Treaty, 1995 3 *Intertax*, at 117 and Brodersen C., *Limits on International Exchange of Tax Information*, 6 *European Taxation* (1987), at 175

[369] See Para. 19.2 of the OECD Commentary on Art. 26 of the OECD Model.

[370] For further insights and references on this principle see Schaumburg H., Schlossmacher S., *Article 26 of the OECD Model in Light of the Right to Informational Self-Determination*, IBFD Bulletin10 (2000), at 522. with specific reference to the potential disclosure of a business secret, consultation with the taxpayer should be generally required since "only in this way it is possible to determine whether there is a business or trade secret".

[371] Ibidem

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procedural safeguards as far as informational self-determination is considered,[372] it seems to this Author that would be probably far-fetched to derive such a general conclusion from the wording which has currently been included in the OECD Commentary, since secrecy-based grounds for refusing assistance, as it will be further analysed with regard to the safeguard of professional secret,[373] continue to be ultimately regulated by an implicit general *renvoi* clause to the domestic procedural laws of the requested State.

It has been understandingly envisaged that an excessively restrictive interpretation of this condition would severely hinder the effectiveness[374] of Art. 26; on the other hand, it may be argued to what extent the safeguard of "trade, business, industrial, commercial" and of "trade processes" can actually be linked to a human rights agenda under the safeguard of the right to property. While it can be conceded that such prerogatives may also involve individuals, it seems more likely that companies be pointed out as depositories of business secrets, in this regard, it should be observed that international legal scholarship is also divided with regard to the possibility of extending the safeguard of human rights to companies.[375]

While, once the notion of "business secret" and the violation thereof are properly circumscribed, it seems reasonable to agree with the view expressed under the OECD Commentary to Art. 26 of the OECD Model, according to which, "in most cases of information exchange, no issue of trade, business or other secret will arise", information requested for tax purposes to legal or business consultants may well lead to the infringement of professional secret. In this respect, information can be denied if the same information is safeguarded by secret under domestic law of the requested State. As anticipated, within the framework of Art. 26 of the OECD Model Convention, professional secret is paired with the various forms of "business secret", even though it seems apparent, also considering the separate attention that the OECD Commentary devotes thereto, that such a form of secrecy occupies a somewhat different status.

Also in this case the Commentary[376] tries to avoid abusive interpretations of this provision specifying that this situation is to be deemed as exceptional and has to be submitted to what could be considered a "proportionality test". Each Contracting State

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[372] It should nonetheless be remarked for the sake of completeness that a similar view has been held by international scholarship even outside German circles. For instance, J.D.B. Oliver, see ID., *Exchange of Information and the OECD Model Treaty*, 3 Intertax (1995), at 117, observes that the safeguard of business secrecy is closely connected "to the right of the taxpayer to be informed", since the State would often not be in a position to determine whether a certain item of information actually qualifies as an item of business secret.

[373] In this regard, as it will be further analysed, the OECD Commentary clarifies under Para. 19.3 that "an assertion that information is protected as confidential communication (…) should be adjudicated exclusively in the Contracting State under the laws of which it arises." Thus, if there is no domestic law which guarantees such a safeguard, there would be no basis on which such a right can be exercised by the taxpayer.

[374] See Para. 19. of the OECD Commentary on Art.26 of the OECD Model.

[375] See Emberland M., *The Human Rights of Companies*, Oxford, Oxford University Press, 2006.

[376] See Para. 19.3 of the OECD Commentary on Art.26 concerning the Exchange of Information.

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should carry out a case-by-case analysis and weigh if the interest of the taxpayer to secrecy justifies the aforementioned limitations.[377] Although this discretionary decision is based upon a weighing of the individual taxpayer's position, discretionary powers are awarded to Contracting States, as it is clear that such a detailed approach might result in a decisional paralysis or might exceed the organisational capacity of the State's Tax Authorities.

In this respect, the OECD has one hand recognised the wide variety of practices adopted by States, but on the other hand it has specified in the OECD Commentary that " (the scope of the protection) should not be overly broad so as to hamper effective exchange of information".[378] Instead of providing general criteria aimed at defining to what extent such protection is to be deemed as acceptable, the Commentary provides the interpreter with some specific cases. Namely, confidentiality is deemed as needing of protection only with reference to communications between attorneys, solicitors, "other admitted legal representatives" and their clients excluding those communications carried out in a role different from that of "legal representatives". Thus, when "legal representatives" act as, for instance, trustees or nominee shareholders and not as legal consultants, in those cases there is no secrecy to safeguard. The only information deserving a secrecy status is then information produced for legal advice matters or to be used or referred to in legal proceedings.[379]

It is interesting to remark that while "business secret" is dealt with in exactly the same terms under Art. 26 of the OECD Model Convention and under Art. 7 of the OECD Model T.I.E.A., the latter incorporates provides for a more circumstantiated definition of the "legitimate" professional secret. In particular, while under Art. 26, Para. 3, c) of the OECD Model, professional secret is simply listed along the various hypotheses of business secret,[380] under the OECD Model T.I.E.A., professional secret is treated separately and it is effectively limited only to the client-attorney privilege or other similar relationship involving a legal representation. In particular, Art. 7, Para. 3 of the OECD Model T.I.E.A. limits the possibility to decline a request whereas such request would lead to "the revealing of confidential communications between a client and an attorney,

[377] There is the risk that since treaties are, as reminded, chiefly concerned with horizontal relationships among States, the weight attributed to the interests of the requesting State outweight in a systematic way those of the concerned taxpayer. National practices show however that there are different approaches to the issue yielding towards a more balanced tempering of interests. For instance, it has been reported that, historically, Dutch Authorities have denied their assistance to the requesting State whereas the economic interest of the Dutch taxpayer was perceived being "considerably greater than the possibile interest of the foreign Authorities". See, Schmitz F.J., *The Netherlands. National Report*, *International Mutual Assistance through Exchange of Information*, Cahiers de droit fiscal international, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 422.

[378] Para.19.3.5 of the OECD Commentary on Art.26 concerning the exchange of information.

[379] The latter would however be already safeguarded under Para.2 of Art.26 of the OECD Model Convention.

[380] To the extent that recent scholarship uses the expression "business secrecy" as an umbrella term for trade, commercial, business and professional secret alike. See, for example, Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 185 et seq.

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solicitor or other admitted legal representative where such communications are: produced for the purposes of seeking or providing legal advice or; produced for the purposes of use in existing or in contemplated legal proceedings."

While the same conclusions can be reached with regard to Art. 26 when reading it in the light of the Commentary, in all those cases or Countries where the role of the Commentary is not, for various reasons, firmly established, it cannot be excluded that a different interpretation may be set forth, also considering that the boundaries of a "client – attorney" relationship should ultimately be defined by means of a *renvoi* to the law of the requested State.[381]

Moreover, the same Commentary to Art. 26[382] would seem to recognise one of the remarkable discontinuities between the approach adopted under the same provision and under Art. 7 of the OECD Model T.I.E.A., whereas it proposes to those States "wishing to refer expressly to the protection afforded to confidential communications between a client and an attorney"[383] to introduce the same wording found in the Model T.I.E.A,[384] so that a further ground for refusing assistance would be included under Art. 26, Para. 3 as follows: "in no case shall the provisions of Paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation to: (…) d) obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representatives where such communications are: (i) produced for the purposes of seeking or providing legal advice or (ii) produced for the purposes of use in the existing or contemplated legal proceedings."

Thus, it is possible to observe that, despite the OECD claim according to which "there is very little practical difference" between Art. 26 and the OECD Model T.I.E.A.,[385] also in the area of secrecy-based grounds for refusing assistance we can find some diverging approaches: in particular, the OECD Model T.I.E.A. would seem to significantly enhance the weight to be attributed to client-attorney relationships.[386] While it cannot be doubted that both approaches are consistent with the standard as currently

[381] In this regard, the Commentary openly acknowledges that "an assertion that information is protected as a confidential communication between an attorney, a solicitor or other admitted legal representative and its client should be adjudicated exclusively in the Contracting State under the laws of which it arises". Such a clarification would also seem to serve the ultimate purpose to avoid that, where applicable, a Court in the requested State be required to adjudicate based on the laws of the requesting State.

[382] See Para. 19.3 of the OECD Commentary to Art. 26.

[383] Ibidem

[384] The Commentary does not explicitly make reference to the OECD Model T.I.E.A., but upon comparing the proposed wording included under Para. 19.4 of the OECD Commentary to Art. 26 is the same found under Art. 7, Para. 3 of the OECD Model T.I.E.A.

[385] See OECD, *Manual on the Implementation of Exchange of Information for Tax Purposes*. *Introduction*, passim.

[386] It has also been rightly remarked, on the other hand, that unlike the approach adopted by the OECD Commentary to Art. 26, the Commentary to the OECD Model T.I.E.A. does not warn to interpret the privilege in a limited way. See Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 192.

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framed, it may be argued whether a coherent standard can afford to embrace such a differentiated approach. In this regard, since the boundaries of the standard are arguably to be defined as what would be permissible under one of the "sources" of the international standard, it should be concluded that, as far as secrecy-based considerations for refusing assistance are concerned, such boundaries are set by Art. 7, Para. 3 of the OECD Model T.I.E.A.

Based on the aforementioned considerations, it seems to this author that the *ex ante* secrecy limitations set forth by Art. 26, Para. 3, c) seem to spark some ambiguity.

The first area of potential ambiguity is, as anticipated, sourcing the rationale of these limitations: in particular, leaving aside constructions that argue that these limitations are set to safeguard an objective economic interest of the requested State[387], the question is a juridical one: in particular, are these limitations to be understood as absolute ones, thus directly awarding rights to the persons that may be immediately concerned with the safeguard of such items of secrecy, i.e., the concerned taxpayers and, in some cases, the third parties from which information could be collected or, on the contrary, are these limitations foreseen only as a specific facet of a much broader issue, such as the safeguard of the sovereignty of the State, that is, are these limitations to be enforced by the requested State only insofar the concerned interests of the taxpayer are already covered by domestic provisions.

Recent scholarship has taken the view that the limitations included under Art. 26, Para. 3, c) of the OECD Model and Art. 7, Para. 2 and 3 of the OECD Model T.I.E.A. should actually be dealt with from a sovereignty perspective as it ultimately concerns the preservations of the prerogatives of those domestic laws of the requested State that prevent the latter's Tax Administration to access to those very items of information.[388] Thus, no absolute right on the international plan would seem to descend from the discussed model treaty provision but rather, said provision just provide a shield around already set domestic legislations to preserve their unfettered application also within a cross-border situation.

Based on the aforementioned considerations, it seems that this typology of *ex ante* limitation may result in being either redundant (since the same results could be pursued on the grounds of general international law considerations, that are however covered by a distinct provision) or, more seriously, may be unduly stretched and provide possible grounds for undue refusals to provide assistance. It is thus the view of this author that Art. 26, Para. 3 c) of the OECD Model and Art. 7, Para. 2 and Para. 3 of the OECD Model T.I.E.A. should be eliminated and their wording be left exclusively in the related Commentaries as possible additional wording to be adopted by States (such as

[387] Ibidem

[388] See in this regard Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 189.

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for instance, the Netherlands and Germany) where the culture and procedural framework concerning informational-self determination are particularly developed.

A further ground for refusing assistance which lies at the cross-roads between the preservation of the prerogatives of the requested State and the safeguard of taxpayers' rights is that centred upon the possibility to refuse information "the disclosure of which would be contrary to public policy (ordre public)".[389] Based on indication contained under the OECD Commentary, this limitation concerns "the vital interests of the (requested) State itself" and it should only become relevant in extreme cases".[390] The Commentary then provides further exemplifications of such "extreme cases", among which we can find the hypothesis of a tax investigation conducted in the requesting State based motivated by "religious, racial, or religious persecution".[391] While the sensitivity towards such a phenomena should not be underestimated as tax assessments have been a well known tool used by various regimes to oppress their opponents, it seems to this author that adopting such an example may make the public policy limitation a redundant one; namely, it is already stipulated under Para. 1 of Art. 26 that one of the boundaries to the objective scope of application of the same provision is that "the taxation thereunder is not contrary to the Convention". Thus, episodes such as those exemplified by the OECD Commentary ought to be reasonably excluded already under the latter general stipulation.

On the other hand, it is conceivable that, under very specific circumstances, some items of information possibly relevant for tax purposes might be covered by some form of State secret. This typically entails information referring to high standing State representatives, diplomats or that have implications for matters of national security. On the other hand, it is interesting to remark that some States know a fairly extensive notion of State secret; in the specific case of Italy, for instance, even information that has been received from foreign Tax Authorities is covered by State secret.[392] The forwarding of such information would however already be precluded within the framework of Art. 26 or of the Model T.I.E.A., whereas the related Commentaries openly prevent the possibility of the forwarding of exchanged information to third States.[393] As for information concerning State representatives and diplomats, the respective cases would likely be covered by established principles of international customary law echoed in the "ne impediatur legatio" brocard.

Based on such a premise, it could be argued why States have been provided with such a wide discretionary power *vis à vis* such a substantially limited scope of

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[389] Art. 26, Para. 3 c) of the OECD Model Convention and Art. 7, Para. 4 of the OECD Model T.I.E.A.
[390] See Para. 19.5 of the OECD Commentary to Art. 26.
[391] Ibidem.
[392] As foreseen by Art. 2 of Ministerial Decree 29th October 1996, No. 603.
[393] See OECD Commentary to Art. 26 of the OECD Model (2012 Version), Para. 12.2.

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application of the concerned restriction, which would be even narrower considering the possible overlap with similar exceptions provided under other treaty provisions or principles of international law[394].

A limitation strictly linked to that encapsulated in the *ordre public* argument is found under Art. 7, Para. 6 of the OECD Model T.I.E.A. (but not under Art. 26 of the OECD Model) whereas it is foreseen that the Requested jurisdiction can legitimately refuse to provide administrative co-operation when information is requested "to administer or enforce a provision of the tax law of the applicant Party or any requirement connected therewith, which discriminates against a national of the applicant Party in the same circumstances." The related Commentary clarifies that the concerned stipulation is meant to ensure that the exchange of information does not result in discrimination between nationals of the requested jurisdiction and "identically placed nationals" of the requesting jurisdictions:[395] such a stipulationthus expressly exclude cases where different tax rules would be applied on the basis of tax residence since two nationals that, at the same time, are tax residents of two different States are not "identically placed". It is interesting to remark that the same Commentary to the concerned model provision is concerned not only with inequalities of treatment referring to substantive tax matters but also to procedural matters, such as the safeguards or remedies available to the taxpayer.[396] It may be argued why this specific ground for refusing co-operation has been included in the OECD Model T.I.E.A. while it cannot be found under Art. 26 of the OECD Model Convention.

The latter question seems could easily be addressed by reminding that such a limitation is already embedded under the first Paragraph of Art. 26, where the objective scope of application of the obligation to exchange information under the "extensive exchange of information clause" finds a boundary in those cases where the exchanged information would be foreseeably relevant for the administration and enforcement of domestic tax laws that would result in taxation contrary to the Convention.

On the other hand, it should similarly be reminded that, understandably, no similar boundary is found under Art. 1 of the OECD Model T.I.E.A. since this model treaty is not preoccupied with substantive aspects of taxation and does not contain general stipulations concerning, *inter alia*, non-discrimination. Thus, the need was perceived to include such stipulations, that would otherwise be redundant within the context of a general tax treaty, directly in the provision dealing with possibilities for declining a request for information.

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[394] A similar view is shared also by *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 193.

[395] See Commentary to OECD Model T.I.E.A., Para. 93.

[396] See Commentary to OECD Model T.I.E.A., Para. 93.

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A further block of legitimate grounds for refusing to provide information are recapitulated under Para. 3 a) and b) of Art. 26, according to which Contracting States are in no case obliged to "a) carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State; b) supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State."

It can preliminarily be observed that, as confirmed in the related Commentary, these provisions are based on the general assumption of the good faith of the requesting State so that it is expected that the requested information can be obtained by the requesting State in a similar situation unless the same State indicates to the contrary[397]. Such a conclusion is in line with the obligation to execute treaty in good faith but at the same time, would seem to suggest that cases of denial of assistance based on the inability of the requesting State to ensure the supply of the kind of information analogous to the items requested should be very rare as the requesting State, bearing in mind the concerned prescription, should self-discipline itself. As such, this specific limitation should more likely operate as an indirect boundary to the access to the treaty administrative instruments by the requesting State.

Several background classification principles have been traditionally provided in scholarship in relation to the aforementioned limitations. In particular, the two core principles[398] have been found to be:

- the safeguard of sovereignty, as far as the lack of any obligation for the requested State to waive its laws and administrative practices is concerned;
- the enforcement of a reciprocity principle[399], as far as there is no obligation to provide information that would not be obtainable under the laws and the normal course of administration of the requesting State.

In the view of this Author, however, these traditional classifications seem to have come at odds with the most frequent scenarios found in the current system of international tax relations.

In this regard, it could preliminarily be remarked that Art. 26, Para. 3, a) and b) can hardly be distinguished but, rather, it would seem that Art. 26, Para.3, b) is a special

[397] See Para. 18.1 of the OECD Commentary to Art. 26 of the OECD Model.

[398] See Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 193 et seq.

[399] References to the principle of reciprocity are actually to be found also in the Commentary to Art. 26 of the OECD Model Convention where at Para. 15 is specified that "a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system" and that the requested State can refuse to provide information where the boundaries set by the laws and administrative practices of the requested State would "result in a lack of reciprocity". The OECD understanding of reciprocity being central to the provisions under scrutiny has been reinstated also in the 2012 amendments to the OECD Commentary to Art. 26 where, at Para. 15, it is mentioned that "the principle of reciprocity underlies subparagraphs a) and b) of Paragraph 3."

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case of the general "*caveat*" set forth by Art. 26, Para. 3, a), which settles a prohibition to carry out administrative measures at variance with the laws and administrative practices of either Contracting State. Although in a reverse perspective, if the basic assumption that, as far as the international standard is concerned, Art. 26 and the OECD Model T.I.E.A. should yield to analogous outcomes, the possible redundance of the limitations included under Art. 26, Para. 3 a) and b) could be drawn from the fact that Art. 7, Para. 1 of the OECD Model T.I.E.A. only mentions that "the requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws."

Thus, even though sub-paragraph a) and b) of the third Paragraph of Art. 26 are reported as two distinct grounds for refusing assistance and ascribed to different rationales, in the end it can easily be demonstrated that the two subparagraphs are somewhat redundant so that ascribing their source to different rationales could prove arduous.

In particular, the often referred principle of reciprocity, which is mentioned, as earlier cited, also by the very OECD Commentary may not be the aptest legal concept to explain the rationale of the provisions under scrutiny.

Firstly, it can be remarked that "reciprocity" is a very broad concept under general international law. On the concrete plan, it is true that the practical import of such limitations can result in the requesting State being prevented from asking another State what it could not get on the grounds of its own practices. However, this author fails to see in such an outcome a reciprocity effect, unless a very vague meaning is attached to the word "reciprocity".

A further critique that could be moved to the reciprocity rationale is that, even adopting a fairly extensive notion of reciprocity, according to which both Contracting States assume the obligation to supply information in comparable circumstances and to a comparable extent,[400] the current provisions found under the first sub-paragraphs of Para. 3 of Art. 26 may lead to adverse consequences, especially when taking into consideration the post-2009 geography of administrative co-operation. For instance, reciprocity may severely be frustrated in those cases, that may become all the more frequent, where there the State that more frequently sets forth requests is also the one with the broadest information gathering prerogatives:[401] under such circumstances, information would be retrieved and consequently exchanged only within the limits allowed by the less penetrating information gathering prerogatives of the requested State which, at the same time would end up being a "net exporter" of tax information:

[400] See Vogel K., On Double Taxation Conventions, Article 26, mn 32

[401] This might be the case of OECD States requesting information from formerly non-co-operative jurisdictions or from developing Countries.

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instead of ensuring reciprocity, the current framework of limitations to exchange of information would then just lead to asymmetrical flows of sub-standard information.[402] If the goal really were reciprocity, the provisions under scrutiny, as currently designed, would seem to yield to very unsatisfactory results and could then easily judged as outdated. The question is then if these limitations should be amended or eliminated outright since they fail to reflect the current challenges that administrative co-operation seems to set forth.

A closer examination may however suggest that what could be outdated, , may not be the actual wording of these specific provisions, but, rather, the original rationale they were traditionally associated with, that is, that of reciprocity. On the other hand, the stipulations under scrutiny may still serve a declaratory purpose in relation to other principle of general international law that are very commonly highlighted even under tax treaties when referring to the so-called distributive rules but that deserve to be called into questions also when examining "administrative" treaty provisions.

In particular, once the limitations set forth by Art. 26, Para. 3 a) and b) and Art. 7, Para. 1 are examined jointly and put into a broader framework, it stands out that the purpose of these clauses is not to prevent that a certain States obtains information by outsourcing information gathering activities to another, more administratively endowed, Contracting State but, rather, that no State crosses the boundaries set by its legislation and administrative practice and gathers information it would not be entitled to acquire, with or without the intervention of another State.

It is true that emphasis seems to be put on the requesting State not crossing such a boundary, so that, for instance, Commentary to Art. 7 of the OECD Model T.I.E.A under Para. 73, clearly specifies that "this rule is intended to prevent the applicant Party from circumventing its domestic law limitations by requesting information from the other Contracting Party thus making use of greater powers than it possesses under its own laws." At the same time, there might be instances where the requested State may be tempted to trespass its own domestic boundaries to answer to a foreign request and, by this mean, come across some items of information that may be relevant for its own domestic tax purposes. While such a possible issue is not directly dealt with under the OECD Commentaries, it can easily be realised that the current wording of the concerned rules, especially of Art. 26, Para. 3 a) is perfectly fit to deal with and prevent such a possible scenario.

[402] The OECD Commentary, while apparently not preoccupied with the foreseeable increasingly asymmetrical nature of cross-border flows of tax information, acknowledges the adverse consequences that may result from a strictly reciprocity-oriented reading of the concerned provisions where at Para. 18 warns that "if the structure of the information systems of two contracting States is very different , the conditions under sub-paragraph a) and b) of paragraph 3 will lead to the result that the Contracting States exchange very little information or perhaps none at all". The OECD Commentary then suggests that "in such a case, the Contracting States may find it appropriate to broaden the scope of the exchange of information".

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Such an outcome is ultimately consistent with the general principle of international tax law according to which in no way and under no circumstance the tax prerogatives of a certain State can be set up or even extended by virtue of a Treaty. This conclusion is common place when taking into account distributive rules, so that, by concluding a tax treaties, contracting States agree to limit or relinquish their full power to tax in relation to some specific items of income and whereas some circumstances are met. It would be unconceivable, as far as substantive rules are concerned, even to foresee that a certain tax treaty can extend the power to tax of a certain contracting States. There is no reason why the same conclusions and the same *caveat* should not be extended also to the context of administrative and procedural tax rules. Thus, we agree that, while it may be useful for didactic and practical purposes to reconcile the grounds for refusal under scrutiny with principles such as those of the safeguard of sovereignty or of the implementation of reciprocity, we agree with the earlier cited view by Professor Vogel[403] according to which the limitations set forth under Art. 26, Para. 3 a) and b) are but exemplifications of the general international law boundaries that are inherent to any tax treaty, whose immediate consequence is that no international rule absent from the domestic legislation of the contracting States can be derived from the same treaty.

On the contrary, the sole purpose of tax treaties, even whereas administrative and procedural issues are concerned, is to dictate boundaries to the application of the same domestic legislation within a cross-border context. In this regard, it should be made clear that even whereas the wording “limitations to the obligation to exchange information” is adopted, said limitations have no specific absolute meaning but are simply meant to ensure that the legislation of *each* contracting States is not overridden nor their usual administrative practices bypassed solely on the grounds of the cross-border nature of a certain tax assessment procedure.

Such a limitation ultimately applies to the notion of excess of power, in the sense that the Requesting State’s Tax Authorities, when applying to information exchange, may not discard limitations to which they are subject within their own jurisdiction simply because the Requested State does not feature the same limitations. In this case the proportionality principle is ultimately aimed at protecting taxpayer’s rights. The wording “would not be able” would also suggest a stricter notion of reciprocity, attaining to the effectiveness of information gathering measures of the Requesting State. According to some interpretations, the Requesting State is not in the position to require information which it would find impossible to provide or to transfer in case it should act as the Requested Party.

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[403] Who nonetheless widely refers to the principles of the safeguard of sovereignty as well as of reciprocity in its Commentary to Art. 26 of the OECD Model Convention.

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On the other hand, such principle should be read in conjunction with Art. 10 of the Model Agreement, which establishes that Contracting Parties have the obligation to enact any legislation necessary to comply with the terms of the Agreement. It may be argued whether the same obligation is implicitly set forth under Art. 26 of the OECD Model. In order to ensure the uniformity and consistence of the international standard, in the view of this Author, the question should be answered in the positive. In particular, the failure of a Contracting State to implement at the domestic level measures necessary to comply with the terms of the Agreement, while not constituting treaty override in the narrow sense, since it does not imply a successive amendment of domestic law overriding treaty provisions nor even an example of treaty dodging as defined by Professor Vogel , since it does not rely on an abuse of an ambulatory interpretation of the treaty, would still be at odds with the broader general international law obligation to execute treaties in good faith.

Additionally, it seems to this author that even the traditional "sovereignty" argument typically called into question to explain the provisions under scrutiny should not be understood in an unidirectional way: in particular, the concerned provisions seem to be concerned not only with the safeguard of the legal and administrative order of the Contracting State but even more so with the prevention of an undue expansion of the domestic prerogatives of the same States.

In such a perspective, the traditional position expressed by the OECD Commentary on possible derogations to this general principle[404] should be considered with some degree of precaution. As a matter of fact, the supply of information that would not have be retrievable under the laws and administrative practices of either of the Contracting States should be considered as information not regularly obtained as it derives either from an actual breach of the domestic laws of the requested State or from a "virtual breach" of the analogous laws of the requesting State.

While it is true that the overarching purpose of Art. 26 is to permit information exchange to the widest possible extent, it is hard to deny that there is a strong correlation between threats to the safeguard of taxpayers' rights and the aforementioned actual or potential breaches: in this regard, one way to promote the development of a more effective framework for the legal protection of taxpayers affected by the international flow of tax information could be interpret stipulations under Art. 26, Para. 3, a) and b) of the OECD Model and Art. 7, Para. 1 of the OECD Model T.I.E.A. as actual limitations to the possibility of exchanging certain type of information rather than as possible grounds for refusal.

[404] In particular whereas, at Para. 17, the Commentary to Art. 26 observes that, while the requested State is at liberty to refuse the provision of information in the stipulated cases, "if it does give the requested information, it remains within the framework on the agreement."

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It might still be argued why, even though there is no doubt that the guiding legislation as far as information gathering is concerned is that of the requested State, the provision under scrutiny advocate a symmetrical safeguard of the legislation and administrative practices of both Contracting States, so that even whereas certain items of information lawfully and ordinarily fall within reach of the Tax Administration of the requested State, the same could not be gathered and consequently not exchange as they would not be retrievable on the basis of the laws and administrative practices of the requesting State. As such, a pronounced asymmetry in the information gathering prerogatives of the Tax Administrations of the two different Contracting States may possibly lead to a deadlock. Such a scenario is particularly likely and may have a very serious imports in relation to treaties binding a developed Country and a developing Country or, in any case, a Country whose legal administrative framework and whose Tax Administration are not comparable. Sharing an earlier cited concern set forth under the OECD Commentary, it may further be argued that, if this were the case, very little information could be exchanged when the domestic laws and practice of the Contracting States differ to a great extent in relation to information gathering. Such a remark seems however to be somewhat inconsistent with, or at least be perceived as a display of scepticism towards, the items of the international standards of transparency concerned with the access to information by Tax Authorities. Since these standards aim at establishing a common ground in this very delicate area it may speculated that, unless the whole paradigm of the international standards fail, a convergence among national legislations and administrative practices should be observed. Under such a scenario, a general consensus among States could be reached in relation to which items of information can be considered accessible and the worries expressed under the OECD Commentary could be left behind. At the same time, under such circumstances, the limitations under scrutiny would still maintain their relevance as clarifications of a general principle of international tax law and could arguably be deployed in a more focused and consistent manner.

A critical issue in this regard could be posed by those States, such as Austria, that have forms of tax secrecy[405] embedded in their constitutional framework. In order to comply with the international standards, Austria has since 2010 introduced a “double standard” of access to information in relation to information held by banks: in particular, information pertaining to non-residents can now be easily accessed in the purview of providing administrative co-operation to the requesting State of residence; on the contrary, the ban on bank information has been maintained for domestic

[405] Hereby meant in the broader sense of a preclusion for Tax Authorities to access certain items of information.

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purposes.[406]While, from a broader perspective, it has been observed that similar arrangements may be at odds with non-discrimination provisions as provided under bilateral investment treaties,[407] also from the narrower perspective of the legality of exchange of information some problematic issues may arise: in particular, it might be argued whether, whereas Austria acts as the requesting State, it should be entitled to obtain bank information on its own residents from another Contracting State. In the view of this author and based on the actual wording of Art. 26, Para. 3 a) and b), the answer should be negative, since the same information (bank information concerning Austrian residents) would not be retrievable on the grounds of Austrian domestic law and practice. Once more, such a conclusion seems to be at odds with a reciprocity reading of the concerned treaty provisions: namely, in this case, while there would be no room for Austria to refuse the supply of banking information concerning residents of the requesting State,[408] Austria would not be entitled to receive the same kind of information when acting as the requesting State. It is to be remarked that, in order to maintain consistency with the traditionally upheld "reciprocity" rationale, in its recent amendment of Art.26, the OECD Council had to somehow twist the plain wording of Art. 26, Para. 3 a) and b) by specifying that "if a Contracting State applies, under Paragraph 5, measures not normally foreseen in its domestic law or practice, such as to access and exchange bank information, that State is equally entitled to request similar information from the other Contracting State"[409]. In the view of this author, while the orientation adopted by the OECD Council cannot be ignored, it further corroborates the view that upholding to a reciprocity rationale may lead to otherwise hardy tenable interpretative twist, so that the reciprocity argument for limitations to exchange of information should be put aside or at least downplayed.

Once clarified which, in the view of this author, are the ultimate rationale and the possible evolutionary perspectives of the limitations set forth under Art. 26, Para. 3 a) and b) and Art. 7, Para. 1, it seems appropriate to address some expressions used in these provision whose interpretation may not be so straightforward and which has been further elaborated under the related Commentaries as well as by tax treaty case law and international scholarship.

The notion of "laws and administrative practices" of the Contracting States mentioned under Para. 1 of Art. 26 has been interpreted by international scholarship in a fairly broad way, so that laws have been found to be all provisions binding on the

[406] For further analysis of the "Austrian way" to tax transparency see Pistone P., *Waiving Bank Secrecy and Exchanging Tax Information in Cross-Border Situations: the Austrian Way to Global Fiscal Transparency*, Salvini L., Melis G. (Eds), Financial Crisis and the Single Market, Rome, 2011, at 169 et seq..

[407] In this regard, see Garufi S., *L'era della trasparenza* e dello scambio di informazioni. *Brevi note sul peer review process e sul Rapporto sull'Italia*, Diritto e pratica tributaria internazionale 2 (2011), at 607.

[408] As long as such information would be retrievable under the laws and administrative practice of the requesting State.

[409] See Para. 15 of the 2012 OECD Commentary to Art. 26 of the OECD Model.

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Competent Authorities of the contracting States in the purview of the constitutional order of the latter.[410] There should also be no doubt that the concerned laws are also the domestic provisions dealing with the safeguard of taxpayers' rights. As it has been rightly observed, while the grounds for refusing assistance, and especially those referring to the preservation of boundaries set by the laws of both Contracting States, have typically been seen as formulated from the perspective of the Contracting States, these prescriptions may constitute a vehicle through which the safeguard of taxpayers' rights is also factored in. Among the typical examples of such safeguards, the OECD Commentary mentions very "advanced" issues, that may be found only in the legislation of few States, such as the right of the taxpayer to be notified about an exchange of information, and very basic principles of most common to various legal orders, such as a ban on self-incrimination.[411]

In relation to the notion of "administrative practices", authoritative scholarship has adopted a functional notion, according to which "administrative practices" are meant to include all acts put into place by the requested State as a consequence of a request for assistance, so that not only acts by the Tax Administration but even acts of jurisdictional organs, such as for instance, judicial investigations, may be included.[412]

A further issue that has been scrutinised by international scholarship is the change of wording introduced with the 1977 version of Art. 26: while in the pre-1977 version the wording referred to "laws *or* administrative practices", the 1977 version adopted the wording "laws and administrative practices". On a literal plan, this may be perceived as a major shift restricting the room for the requested State to refuse information, since the condition sub Para. 3 a) could not be whereas, for instance, a certain administrative practice was not backed by a law or, *vice versa*, whereas a certain legal stipulation was not mirrored in the actual practice of the Tax Administration of the requested State. At the same time, there seems to be no echo of such a major shift in the 1977 Commentary, where, on the contrary, the previous wording "laws or administrative practice" is used as if the two expressions were interchangeable.[413] The issue is further complicated by the circumstance that Art. 7, Para. 1 of the OECD Model T.I.E.A. only makes reference "to the laws for purposes of administration or enforcement of its own laws", thus seeming to suggest a continuity with the 1963

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[410] See Vogel K., *On Double Taxation Conventions*, Art. 26, Marginal Number 101.

[411] Which, however, a salso recognised in the Commentary to Art. 26, under para. 15.2, should have limited relevance in relation to exchange of tax information. Namely, while the ban on self-incrimination is typically personal in nature, information gathering activities are typically directed at third parties such as contractual counterparts, banks and intermediaries, so that the ban on self-incrimination should in most cases not be called into question.

[412] Ibidem.

[413] See Para. 15 of the OECD Commentary to Art. 26.

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version of Art. 26 of this point, based on which the parameter of reference can be found also simply in the laws of the requested State.[414]

In the view of some Authors, the amendment introduced with the 1977 should not be taken at face value but rather the use of the "and" should not be meant to set forth a cumulative requisite of infringement of both the laws and the administrative practice of the requested State but rather a way to stress that both a legal and an administrative restraint can constitute the basis for a refusal to provide information[415]. In the view of this author, such a pragmatic consideration seems however hard to back based on the semantic cleavage between the co-ordination conjuction "and", typically importing a cumulation, and the conjuction "or", which is used to connect to alternative logical objects.

Thus, considering that the same Commentary makes use of the conjunction "or", it is the recommendation of this author that the current logical inconsistency be solved by re-adopting the 1963 wording of the concerned clause.

Art. 26, Para. 3 b) also refers to information which is "obtainable in the normal course of administration"; in this regard, the same OECD Commentary mentions that such a stipulation refers, quite obviously, to information already in the possession of Tax Authorities as well as to information that can be obtained by the Tax Authorities of the requested State "in the normal procedure of tax determination".[416] The notion of "normal procedure of tax determination" ultimately embraces the kind of investigations and examinations that the requested Competent Authority would carry out for its own purposes. The stress on a so defined "normal course of administration" seems to further confirm that the ultimate objective of such stipulations is to recreate an equivalence in the administrative and procedural sphere between domestic situations and cross-border situations.[417] The amendments to the OECD Commentary to Art. 26, approved by the OECD Council on 17th July 2012 also suggest that, whereas the foreseeable relevance standard is properly observed in the formulation of requests, the normal course of administration boundary should likely not be trespassed. In particular, whereas, in compliance with the specifications included in the 2012 of the OECD Commentary to Art. 26, the request for information set forth by the requesting State hinted at the service providers that might be in possession of the sought information, the requested State

[414] For the sake of completeness it should also be mentioned that the 1963 wording is found also in posterior sources such as Art. 21, Para. 2 of the 1988 Strasbourg Convention (which, in this regard, has not been amended by the 2010 Protocol) as well as in the European legal instruments dealing with administrative assistance.

[415] See Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 176.

[416] OECD Commentary to Art. 26, Para. 16.

[417] Which, in the perspective of the requested State, arise when its information gathering measures are used to provide information to the requesting State.

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would be expected to be able to obtain and provide such information to the extent that such information is held by one of the identified service providers[418].

Adopting a traditional distinction which has been used to analyse treaty provisions dealing with permanent establishments, it could be said that, whereas the third Paragraph of Art. 26 encompasses a “positive list” of possible grounds for the refusal of supplying information, other sections of the same model provision and, in particular, the fifth Paragraph introduced in 2005 set forth a specific “negative list”, that is, a list of circumstances that are intrinsically unsuitable to constitute a ground for refusing co-operation.

In this regard, the same OECD Commentary to Art. 26 acknowledges that the addition of this fifth Paragraph mirrors “the international trends” in the area of access to bank information for tax purposes “as reflected in the Model Agreement on Exchange of Information on Tax Matters”[419].

Besides influencing the very amending of the wording of Art. 26. Para. 5 of the OECD Model Convention which took place in 2005, it could be argued that between 2002 and 2005, the analogous provisions included in the OECD Model T.I.E.A. provided a basis for interpretations contrary to the assimilation of banking secrecy to business and professional secret on the one hand and to *ordre public* concerns on the other hand, that is, it was instrumental in eroding one of the main arguments on whose grounds banking secrecy had been called into question by some States as a legitimate reason for refusing to provide certain items of information held by banks.

In this regard, the Commentary to Art. 5, Para. 4 of the OECD Model T.I.E.A., at Para. 46, made clear that banking secrecy cannot be considered part of *ordre public* nor that information that does not otherwise constitute a business or professional secret would acquire such a status solely because it is held by a bank[420]. Thus, if a certain item of information does not meet the earlier outlined strict requisites to be deemed a business secret nor constitutes information linked to some form of client-attorney privilege, its supply cannot legitimately be refused.

The position so clearly outlined in the OECD Model T.I.E.A. and in the related Commentary somewhat represented the arrival point of a progressive shift of the OECD approach to exchange of information. In particular, it could be said that banking secrecy had not been existing as such within the framework of Art. 26 of the OECD Model at least since the approval of the 1977 version of the OECD Model. At the same time, an “original sin” could be traced to the original version of Art. 26 in whose Commentary banking secrecy was expressly mentioned as an example of secrecy regarding special kinds of information in many States . The outcome of such an “original sin” was later

[418] See Para. 16 of the 2012 version of the OECD Commentary to Art. 26 of the OECD Model.
[419] See OECD Commentary to Art. 26, Para. 19.11 .
[420] See Para. 46 of the Commentary to Art. 5, Para. 4 of the OECD Model T.I.E.A.

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echoed in the OECD Commentary to Art. 26 until its amendment in 2003, that is, right after the adoption of the OECD Model T.I.E.A.. In particular, Para. 19 of the OECD Commentary to Art. 26 acknowledgedthe freedom of the Contracting States to add further dispensations from the obligation to supply information such as in relation to "information that is subject to special protection on banker's discretion". Based on such a background, States adopted largely varying interpretations on whether the safeguard of business and professional secrets should also include banking secrecy[421].

In the meanwhile, however, arguably starting with the harmful tax competition project, a different sensitivity on the issue of the access to bank information by Tax Authorities had started to emerge, then fully mirrored in the series of report titled "Improving Access to Bank Information for Tax Purposes", to the extent that, as observed by the post-2005 version of the OECD Commentary to Art. 26[422], " the vast majority of OECD member countries already exchanged such information under the previous version of the Article and the addition of paragraph 5 merely reflects current practice." In this regard, the same Commentary emphasises the mere declaratory nature of the inclusion of Paragraph 5, so that an equivalent effect should be reachable also under the previous version of the Provision[423]. This conclusion has been upheld also by the Global Forum, so that having an exchange of information provision modelled after the 2005 version of Art. 26 is not considered a necessary requisite for being in line with the international standards[424].

At the same time, a small core of few yet influential dissenting Countries upheld to their traditional prerogative, upholding limitations directly rooted in their domestic legislation. In this regard, the OECD Model T.I.E.A., while still the product of a political compromise, had the merit of shading clarity on such a sensitive and controversial issue by addressing the real criticalities, which chiefly lay within the purview of the laws of the Contracting jurisdictions. In this regard, Art. 5, Para. 4 of the OECD Model T.I.E.A. is somewhat unique in directly addressing the domestic laws of the Contracting jurisdictions, by foreseeing that "each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request: a) information held by banks, other financial

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[421] It can be observed in this regard that no consensus was reached even at the level of international scholarship. For instance, the circumstance that many States included banking secrecy in their notion of business and professional secret was highlighted in *International Mutual Assistance through Exchange of Information*, in *Cahiers de droit fiscal international*, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 34. The opposite view was on the contrary held in Malherbe J., *Protection of Confidential Information in Tax Matters,* in *Cahiers de Droit Fiscal International, Volume LXXVIb,* XLV Congrès de Droit Financier et Fiscal, Barcelona, 1991 at 52 et seq..

[422] See Para. 19.10 of the OECD Commentary to Art. 26.

[423] Ibidem

[424] See for instance the admissibility of the expression "necessary information" as opposed to "foreseeably relevant" information.

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institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees; b) information regarding the ownership of companies, partnerships, trusts, foundations, "Anstalten" and other persons, including, within the constraints of Article 2[425], ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries."

The cited provision can be seenas a forerunner of one of the pillars of the current international standards, directly addressing access to information by the Tax Authorities and an example of a treaty provision which is not limited to the international plan of exchange of information but, rather, directed at ensuring the amendment of those provisions in the domestic laws of the contracting Jurisdictions that may be at variance with the hitherto stated objective, to extent that the execution of a such a treaty in good faith would definitely imply a binding commitment to amend the concerned domestic provisions. On the other hand, it can be derived that such an obligation only refers to the cross-border sphere, so that States so wishing may introduce specific information gathering prerogatives in relation to the positions of non-residents, while precluding access to the same items of information in relation to the positions of their own residents for the purposes of purely domestic situations.[426]

It has been argued whether the Global Forum which drafted the OECD Model T.I.E.A. and, later, when model provisions with analogous effects were introduced in the OECD Model, the OECD Council had infringed the sovereignty of States by encroaching directly on their national legislation. In this regard, some Commentators have argued that the position undertaken by the OECD and the Global Forum could only serve as a moral suasion towards States so that they ensured to exclude certain means of interpretation as part of the mutual assistance between States.[427] Such a minimalist approach seems however to have been overcome by the later course of events and by the way in which, following the peer review process, several States have agreed to amend their domestic laws with specific regard to access to information by their own Tax Authorities.

Compared to Art. 5, Para. 4 of the OECD Model T.I.E.A., the fifth Para. Of Art. 26 of the OECD Model does not make direct reference to the domestic laws of the Contracting States but rather provides an authentic interpretation in relation to the third Paragraph of the same provision defining the inherent limits pertaining thereto: in

[425] Art.2 setting the jurisdictional sphere of the same Agreement, so that the requested jurisdiction would not be obligated to provide information which is neither held by its Authorities nor in possession or control of persons who are within its territorial jurisdiction.

[426] As earlier mentioned, this has been the solution adopted by Austria.

[427] In this sense, Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 189.

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particular, these very limits cannot be invoked, outside their proper sphere of application, “solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.”

In this regard, it is not very clear if the difference in wording between the model provision found in the Model T.I.E.A. and the Model provision found in the OECD Model should lead to the conclusion that the latter is drafted in such a way to provide an international legal basis for overriding domestic laws on banking secrecy even in those cases where information haled by banks or by persons acting in a fiduciary capacity would not be retrievable within the legal and administrative framework of the requested State.

While the same Commentary states that “ (…) paragraph 5 overrides paragraph 3 to the extent that paragraph 3 would otherwise permit a requested Contracting State to decline to supply information on grounds of bank secrecy”, it seems to this author that construing Para. 5 as an absolute overriding provision would lead to some systematic aporiae, since it would unduly extend the information gathering prerogatives of either the requesting or the requested State. On the contrary, it seems that such a provision should be read in parallel with the fourth Paragraph of Art. 5 of the OECD Model T.I.E.A. as an commitment for the Contracting States, either by amending their domestic laws or their administrative practice to ensure that information held by bank and fiduciaries be accessible to the Tax Authorities: in such a way, any grounds for refusing co-operation based on Art. 26, Para. 3 a) b) would be eroded ex ante and from within, since they would lack any domestic backing. Further evidence in favour of the conclusion that the provision under scrutiny aims at impacting the domestic laws and practice of the Contracting States is further confirmed by the remark, which is found both under the Commentary to Art. 26 of the OECD Model and the Commentary to the OECD Model T.I.E.A.[428] that, whereas access to bank information is indirect, the procedural framework should be so construed as to not result in being too burdensome or time consuming, thus resulting in an actual impediment to access bank information. The fact that the same Commentaries distinguish between indirect, that is, mediated by an administrative or judicial procedure to access the information, or direct access to bank information is somewhat puzzling, since it is not clear what “direct access” should actually mean, even though a methodologies appears being indirectly singled out as the preferred method. In this regard, it may be argued how unprecedented policy options such as those adopted by the United States under Treasury 2 F.A.T.C.A. regulation, where information flows directly from the financial institutions to the Tax Administration of the recipient State (in this case, the United States) could be evaluated within the

[428] See the Commentary to the OECD Model T.I.E.A., Para. 48.

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purview of the international standards: while it is true that F.A.T.C.A. is based on automatic exchange of information, while the international standards only encompass exchange of information upon request, it might be argued that, if the contracting States so agree, it would be possible to introduce also in this case a mechanism where the requesting Tax Administration can file its enquiries directly to the concerned financial institution established in the requested State. A possible legal framework for such an exercise could be represented by the discipline of tax examinations abroad.[429]

It should also be remarked that, when examining the Commentary to the OECD Model T.I.E.A., it is possible to perceive that the foundations of the current peer review process had been posed at least since 2002, especially whereas it is mentions that "the purpose of the sub-paragraph is (…) to specify the types of information that a Contracting Party may legitimately expect to receive in response to a request for ownership information."[430]

In such a perspective, the negative list to be derived from the fifth Paragraph of Art. 26 of the OECD Model and the fourth Paragraph of Art. 5 of the OECD Model T.I.E.A. is completed by the unsuitability of "fiduciary secret" to constitute a sufficient basis to deny the provision of information. In this regard, the relationship between Art. 26, Para. 3 c) and Art. 26 Para. 5 is clearly defined in the related OECD Commentary, where it is stated that "if a Contracting State had a law under which all

information held by a fiduciary was treated as a "professional secret" merely because

it was held by a fiduciary, such State could not use such law as a basis for declining to provide the information to the other Contracting State."[431]Thus, when "legal representatives" act as, for instance, trustees or nominee shareholders and not as legal consultants, in those cases there is no secrecy to safeguard. The only information deserving a secrecy status is then information produced for legal advice matters or to be used or referred to in legal proceedings . In this regard, it could be argued that the model provision has introduced an autonomous definition of professional secret by defining in negative terms its acceptable boundaries.

The impact of such a stipulation can be very far fetching, once it is remarked that the notion of person acting in a fiduciary capacity is very broad, since it is meant to include any form of corporate service providers, such as company formation agents, trust companies, registered agents and lawyers.[432]

Finally, the negative list of unsuitable reasons for refusing to provide information is completed by a stipulation found only under the OECD Model T.I.E.A. but not under

[429]Which is analysed in further detail in the following Part of this study.

[430] Commentary to Art. 5 of the OECD Model T.I.E.A., Para. 50.

[431] OECD Commentary to Art. 26, Para. 19.12.

[432] See OECD Commentary to Art. 26, Para. 19.13.

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Art. 26 of the OECD Model. In particular, based on Art. 7, Para. 5 even though the claim to which the requested information relates is disputed. There seems to be a direct link between this stipulation and the foreseeable relevance standard which underlies exchange of information upon request: in the view of this Author, such a specification is aimed at clarifying that the foreseeable relevance of the request must be verified in relation to the phase of tax examinations, while the subsequent procedural implications ought not to be taken into consideration.

While there seems to be no reason to doubt that this specification can be extended also to exchange of information based on general tax treaties whereas the application of the domestic laws of the Contracting laws is at stake, it might be argued whether the same conclusion should be extend also to the case of exchanges of information performed for the purpose of applying the provisions of the very treaty, in particular in those cases where the request would be connected to the enforcement by one of the contracting States of a specific treaty provision on whose interpretation and application disagree. Such a scenario does not appear so unlikely and in the view of this author should specifically be addressed under Art. 26 as well as under Art. 25 of the OECD Model. This author believes that in order to avoid the introduction of a further ground for refusing assistance that may hinder the exercise of administrative co-operation, the explicit stipulation found under Art. 7, Para. 5 should be fully and explicitly extended also to Art. 26 of the OECD Model, while leaving any difformity concerning the interpretation and application of the treaty to be addressed and solved under the mutual agreement procedure.

4.3.2.8 Confidential Treatment of Exchanged Information

The official documents by the OECD and the Global Forum on the international standards of exchange of information distinctly refer to the safeguard of taxpayer rights as one of the key constituting elements of the standards, however, the issue is not further articulated and, based on further specifications provided in the same policy documents, it would seem that, at least at this stage, the taxpayer rights agenda upheld by the OECD and the Global Forum is chiefly concerned with the safeguard of the confidentiality of the exchanged information.[433] While this approach is somewhat limitative, as the present chapter of this study is concerned with an analysis of the current standards and not in a prescriptive platform of further elements that shall be incorporated in the standards, focus will be put on confidentiality with additional issues of great topicality, such as taxpayers' notification rights, to be addressed in the following chapter. At the same time, it cannot be denied that the issue at stake is of paramount

[433] A further confirmation can be found in the circumstance that the only Terms of Reference mentioning taxpayer rights are those referring to the confidentiality regime of the exchanged information.

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importance[434] even in a broader policy perspective. Namely, ensuring the confidential treatment of exchanged information seems the guarantee to penetrate into the last bastions opposing global transparency and global exchange of information. As it will be analysed in the last part of this work, anonymity is central to recent alternative policy proposal set forth by Switzerland through its so-called "Rubik Agreements"; however it should be made very clear that the framework of "transparent confidentiality" into which exchange of tax information takes place is a form of safeguard, both for the involved States and for the concerned taxpayers, that is drastically at odds with the concept of anonymity, although the latter has been stated as a desirable goal by some jurisdictions such a Switzerland: in other words the right to confidentiality cannot be disguised as a "right to anonymity" but rather the opposite as an effectively implemented confidentiality regime renders the (bona fide) need of anonymity irrelevant.

While by "limits to exchange of information" reference is made to all procedural and administrative arrangements that may affect ex ante the supply of information, treaty rules delineating the confidentiality regime of exchanged information operate *ex post*, that is, once information has already been exchanged. Thus, it is clear that the obligation to secrecy lies upon the receiving State.

Under general tax treaties based on the OECD Model, the model provision is found in Para. 2 of Art. 26 of the OECD Model. The structure of the Paragraph is based upon a bundle of *renvoi* clauses.

There are three main questions underlying the Paragraph:

- how shall the exchanged information be treated in terms of secrecy;
- to whom such information may be made available to and, finally;
- for which purposes the gathered information may be used in even unrelated public court proceedings or judicial decisions.

In this regard, it seems appropriate from a systematic perspective to distinguish and address separately, the secrecy regime of the exchanged information, in the narrow sense, and the ways and purposes by which and for which such information can be deployed in the receiving State.

With reference to the secret treatment of the exchanged information, the first question that ought to be addressed is identifying the rationale of such a stipulation. The issue is all the more interesting when observing that the OECD Model Commentary identifies secrecy as a pre-condition to exchange of information, without however specifying the underlying reasons.[435]

[434] Such a topical relevance of the issue of confidentiality is also testified by the recent publication by the OECD of a very comprehensive manual for tax officials (OECD, Keeping it Safe, 2012). The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes.

[435] According to Para. 11 of the OECD Commentary to Art. 26 of the OECD Model, "reciprocal assistance is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation."

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A traditional explanation for the existence of a distinct treaty stipulation concerned with the secrecy regime is the need to ensure that the tax secrecy regime recognised by most constitutional legal orders is preserved also in cross-border situations. In particular, when information is exchanged, the supplying State has no further prerogative to guarantee secrecy in relation to the items of information it has exchanged. In order for analogous guarantees to be safeguarded within a cross-border situation, the obligation to observe and enforce secrecy would have to be transferred to the State which is a recipient of the exchanged information.[436]

In the view of this author, the above outlined reconstruction would seem however to be somewhat at odds with some factual circumstances. First of all, tax secrecy standards diverge to a great extent within different jurisdictions: for instance, in the perspective of Nordic jurisdictions, tax secrecy is not perceived as a value *per se* and it is often overridden by other domestic provision pursuing a freedom of information agenda. This is just an example pointing at the conclusion that, while most constitutional legal orders incorporate some forms of protection, provided for the benefit of the concerned taxpayer, the way such protection is ensured may differ to a vast extent. In this regard, identifying the treaty obligation to secrecy as a device to transfer the obligation of observing tax secrecy from the State where the tax information has originated to the State where the tax information is going to be used does not offer any guarantee that the same degree of secrecy observed in the supplying State be met in the receiving State: namely, at least based on how the second Paragraph of Art. 26 of the OECD Model is currently worded,[437] the receiving State would only be obliged to treat the received information as secret in the same manner as information obtained under its own domestic laws. Thus, whereas, for instance, the supplying State featured very strict tax secrecy rules, while the receiving State awarded primary relevance to transparency and freedom of information, it would be difficult to argue that the same obligation to a secret treatment of the exchanged tax information is simply *transferred* from the supplying State to the receiving State.

A possible alternative explanation for the inclusion of a secrecy provision into an exchange of information stipulation can probably be more easily derived when examining the evolution such a model provision has undergone since its original drafting in 1963.

In particular, the original version of Art. 26 of the OECD Model was not based on a *renvoi* clause but, rather, incorporated an autonomous secrecy regime, so that it foresaw that “any information so exchanged shall be treated as secret” : in other words, it created an autonomous international obligation to tax secrecy. At the same time, such

[436] See Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009at 134.
[437] And the way in which it has been worded since its original drafting in 1963.

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a general obligation to secrecy risked to remain somewhat deprived of any concrete import, as this would have required the inclusion of some basic international procedural rules that would have been however very difficult to encroach in the legal order of each concerned Contracting State. Thus, the wording of the provision was changed to incorporate a *renvoi* and the related Commentary openly acknowledged that "the maintenance of secrecy in the receiving Contracting State is a matter of domestic laws".[438]

Thus, it could be argued that the current wording of Art. 26, as adopted in 1977, could be seen as some sort of second best, the optimum being the safeguard of an international general duty of secrecy which would however have been practically unattainable. Such a rationale, although pursued by suboptimal means seems to this author to constitute one of the few treaty provisions genuinely concerned not only with the interest of the Contracting States, that may indeed have a practical interest in preventing that exchanged information indiscriminately falls in the public domain so to potentially frustrate, for instance, parallel information gathering enquiries, but also with the legal protection of the taxpayer and in particular with its right to privacy.

At the same time, it seems to this author that the *renvoi* included in the current version of the second Paragraph of Art. 26 appears slightly plethoric when taking into account that it would be hard to argue that different (lower) standards of secrecy should be applied to information received under a tax treaty than to other third party information sourced domestically".

The scope of application of the secrecy regime extends to all stages of exchange of information. In this regard, the Commentary originally stated that the confidentiality regime should apply to all types of information received under Paragraph 1, including both information provided in a request and information transmitted in response to a request.[439] The amendments introduced in July 2012 build on this general principle to address peculiar cases such as the possibility to access the letter requesting information: such an issue is of great practical relevance in those jurisdiction where notification rights or even pre-emptive remedies to exchange of information are granted to the concerned taxpayer. In this regard, the clarifications introduced in 2012 seem to safeguard these enhanced forms of legal protection of the taxpayer by allowing the disclosure of the request letter in court proceedings in the requested State as the default regime, to be waived only in case the requesting State expressly specifies otherwise[440]. Whereas no such special protection is foreseen, the disclosure of the letter of the request is discouraged in order not to frustrate the efforts of the requesting State, while, not surprisingly, the disclosure of the "minimum information" contained in the

[438] See OECD Commentary to Art. 26, Para. 11.
[439] See Para. 11 of the OECD Commentary to Art. 26 of the OECD Model.
[440] Ibidem

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Competent Authority letter necessary for the requested State to be able to obtain or to provide the requested information to the requesting State.[441]

Once clarified the rationale and the scope of application of the international legal obligation to confidentiality, it may be argued what kind of remedies are offered to the supplying State and the concerned taxpayers in case of breach. While, due to its *ex post* connotation, the failure to comply with the obligation to confidentiality does not generally constitute a ground for refusing assistance, the 2012 amendments to the Commentary to the second Paragraph of Art. 26 of the OECD Model have introduced an apparently groundbreaking stipulation, especially when considering that amendments to the Commentary often serve as forerunner to amendments to the actual model provisions: in particular, the OECD Commentary has come to recognise that "in situations in which the requested State determines that the requesting State does not comply with its duties regarding the confidentiality of the information exchanged under this Article, the requested State may suspend assistance under this Article until such time as proper assurance is given by the requesting State that those duties will indeed be respected."[442] The same Commentary understandably suggest that, in order to comply with such stipulations, the competent Authorities may enter into specific arrangements or memoranda of understanding regarding the confidentiality of the exchanged information. Indeed, the kind of scenario envisaged on this point by the recently amended Commentary does not seem to be deprived of some practical difficulties. A preliminary remark would be that the list of grounds for denying assistance acts, as clarified in the previous paragraphs, as a *numerus clausus*: it would then seem particularly sensitive that such a narrowly phrased provision could be expanded *ad libitum* as a sort of *ex post* retaliation against the failure by the recipient State to comply with the obligation to secrecy. Moreover, such a stipulation would also somewhat imply that the supplying State would be in the position to syndicate how the recipient State administers its own domestic provisions regarding secrecy, a conclusion which would clearly be prone to many systematic and practical difficulties. For these reasons, the concerned amendment does not seem to provide a suitable basis for an extension of the grounds for refusing a request of information and should likely be of limited practical import, unless it becomes the object of deliberately abusive behaviours by Contracting State, ultimately aimed at restricting the scope of assistance.

A different dimension whose exploration appears more concerns the remedies available to the concerned taxpayers in relation to a breach of the secrecy obligation by the recipient State. In this regard, recent US case law has made some interesting, although controversial, points, on the possibility for the concerned taxpayers to

[441] Ibidem

[442] OECD Commentary to Art. 26, Para. 12.

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denounce States as liable for damage.[443] The case originated from a transfer pricing case, deriving from a simultaneous tax audit carried out by the IRS along with Japanese Tax Authorities. As a result, the IRS and the Japanese Authorities advanced substantial transfer pricing adjustments at the detriment of the concerned taxpayers (a US based shareholding company and the Japanese distributor of a company into which the US company held a substantial participation). The taxpayers later complained to the IRS that the Japanese Tax Authorities had publicly disclosed the results of the simultaneous tax audit, which involved also the transfer of information from the IRS to the Japanese Tax Authorities. In particular, the disclosure had resulted in a substantial business loss for the taxpayer. Somewhat anticipating the position adopted by the OECD in the latest version of the Commentary, the IRS immediately put the transfer of information to a halt and terminated the joint tax audit. Nonetheless, the US company in relation to whose tax position information had been transferred to the Japanese Tax Authorities sought monetary damages from the IRS. The legal basis on which the plaintiff relied was a provision included in the Internal Revenue Code[444] which foresees the direct liability for damages of the IRS in case of unauthorised disclosures of tax returns and tax return information. This provision had often constituted the basis of purely domestic cases,[445] the Aloe Vera case is however notable because it concerns the unauthorised disclosure of tax information in a cross-border situation and as a result of an exercise of administrative co-operation. Moreover, the plaintiff expressly mentioned a breach of the secrecy regime of exchanged information as foreseen by the provision on exchange of information included in the 1971 tax treaty between Japan and the United States. In a decision dated 21st September 2000, the US District Court held, *inter alia*, that the IRS could be liable for damages whereas"IRS knew or should have known, based on the alleged prior history of mutual relations with the NTA (Japanese Tax Administration), that the latter routinely failed to comply with the terms and conditions of secrecy mandated by the Convention, the IRS's disclosure of any return information (…) to the NTA was not authorised by the Convention or by the statute." Even though the decision was subsequently reviewed by the competent US District Courtbased on lack of sufficient evidence, the conclusions mentioned above are extremely interesting and provide for a creative solution enabling to transcend the strictly inter-state nature of tax disputes.

At the same time, the solution offered in the Aloe Vera case somewhat contrasts with the assumption according to which it should not be the supplying State to be sued, since this State is not in a position to syndicate the application of the secrecy legislation

[443] Aloe Vera of America, Inc., et al v. U.S.A., Case: 10-17136. Commented by Brauner Y., forthcoming in Kemmerren et. al., Tax Treaty Case Law around the Globe (2012).
[444] Namely, Section 7431 of the Internal Revenue Code.
[445] Ibidem

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of the recipient State but, rather, taxpayers should directly claim responsibility from the same recipient State, which has carried out a breach of its international obligation. The possibility to access such remedies depends however on the procedural framework available in the same recipient State. Whereas no legal grounds for such remedies are provided to the concerned taxpayer under the legal order of the recipient State, some very interesting questions would be raised: the first question concerns the interrelationships between the general international public law mechanism of diplomatic protection and the possibility for a taxpayer to be ensured diplomatic protection in tax matters by its State of tax residence, even when it is not a national of the same State. The matter is on the other hand the subject of ongoing debate under general international law in relation to companies and other legal persons that do not possess a "citizenship"; a further question would address the way diplomatic protection could be exercised in cases involving a harmful breach of secrecy obligations, that, although having their source in an international legal provision such as a tax treaty, are ultimately substantiated in the domestic laws of the recipient State.

Besides the confidential treatment that should be reserved to the exchanged information, a further aspect is the definition of the circle of persons and authorities who may enter in possession of such information and the purposes for which such information may be used.

In this regard, the wording of the model provision has considerably changed over time progressively expanding the categories of persons and authorities that may receive and process the exchange information.

The original 1963 OECD Draft contemplated only persons or authorities concerned with the assessment or collection of the taxes covered by the Convention. Even though the model provision did not include judicial authorities, such an extension was optionally foreseen in the related Commentary, which foresaw a possible alternative wording , according to which judicial determination should also be included in the broader notion of "assessment".[446]

The optional wording included in the 1963 Commentary was then incorporated in the basic model provision on the occasion of its 1977 amendment. At that time, the clause took a shape not dissimilar from the current one, foreseeing that exchanged information "shall be disclosed only to persons or authorities (*including courts and administrative bodies)* involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. (…). They may disclose the information in public court proceedings or in judicial decisions."

[446] See Para. 9, Art. 26 of the Commentary to the 1963 OECD Model.

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It is interesting to remark that the circle of subjects to which information could be disclosed was directly affected by the related objective scope of application. In particular, even though in the year 2000 the objective scope of application of the provision was extended behind the limitations set forth by Art.2 of the same Model Convention, the second Paragraph of Art. 26 foresees that the authorities entitled to the disclosure of the information are those competent with regard to "taxes referred to in Paragraph.1". The *renvoi* to "taxes referred to in Paragraph 1" seemssomewhat plethoric, considering that the same Paragraph 1 extends the objective scope of application of the exchange of information provision *ad libitum*. On the contrary, the versions of Art. 26 up to 2000 limited the disclosure of information to Authorities "concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, *the taxes covered by the Convention*". In this regard, it may observed that the standard of disclosure has been remarkably expanded over time. Namely, whereas information can be exchanged in relation to any tax and it is stipulated that information can be disclosed to authorities similarly competent "in relation to any tax", there is room for cross-checks as some item of information exchanged in relation to inheritance tax could be relevant for income tax purposes and *vice versa*; there seems to be no doubt that such cross-checks would be licit under the current formulation of Art. 26 as no one-to-one correspondence between the taxes in relation to which information may be exchanged andthe circle of authorities entitled to the disclosure of such information appears to be postulated. On the contrary, based on the wording included in most double taxation conventions up to 2000, such a possibility seems to having been precluded.

A basic but controversial question is whether the taxpayer is entitled to access the exchanged information and whether such access should extend also the letters of request and transmission.

Quite surprisingly, the OECD Commentary devotes a very brief reference to such a delicate issue, which seems to having been somewhat overlooked also by international literature.

While the 1963 version of the OECD Commentary skipped the matter altogether, in 1977 it was explicitly foreseen that "the information may also be communicated to the taxpayer, his proxy or to the witnesses".[447]

As a matter of fact, the specification provided in the Commentary is somewhat puzzling as it seems to be in contrast with the general *renvoi* clause which constitutes the basis of the confidentiality regime to be applied to information exchanged in pursuance of Art. 26. In this regard it may be argued to what extent the interpretation provided in the Commentary may be applicable in those instances where, based on the

[447] Para. 12 of the OECD Commentary to Art. 26.

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domestic law of the receiving State, access to information derived from other Tax Authorities may be denied to the taxpayer.[448]

From a practical perspective, the issue may be solved in favourable terms for the taxpayer by referring to the "right of information" that is often encroached in many jurisdictions as a basic right of the taxpayer[449]. On the other hand, when adopting a more markedly Eurocentric perspective, it is beyond the scope of this work to ascertain whether right of information could be derived from overarching principles included in the European Convention of Human Rights.

At the same time, when the abovementioned reference to the taxpayer was included in the Commentary after 1977, nothing in the wording of the corresponding model provision seemed to suggest such an interpretation as the provision referred to persons "*involved in* the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention." In this regard, it is interesting to quote a decision of the French *Conseil d'État* dating back to 1993.[450] On the basis of the wording of the treaty provision,[451] in 1993 the *Conseil d'État* denied the right of a taxpayer to be informed with reference to the information received by French Tax Authorities coming from the US Internal Revenue Service on the grounds that the taxpayer could not be considered a person "*involved* in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention". It appears in this respect that the French judges completely ignored the indications contained in the Commentary and awarded prevalence to a literal interpretation of a treaty provision on whose sole basis, as it has previously been remarked, it would be difficult to derive that the taxpayer should be allowed to access to the exchanged information.

Possibly in response to this and similar streams of case law, in 1995 the OECD Council amended Paragraph 1 of Art. 26 by replacing the wording "persons and authorities *involved in*" with "persons and authorities *concerned with*". However, the amendment was not awarded major relevance and the Commentary, quite on the contrary when paraphrasing the content of the Model provision kept adopting the previous formulation ("involved in"); it should be remarked that such a discrepancy between the wording of the model provision and the related passages in the Commentary continues to this day.

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[448] It is possible to find an example of such a limitation within the Italian jurisdiction, where, based on Art. 2, Para. 1 b) of Ministerial Decree, "documents referring to agreements of co-operation, also of investigative character in the institutional areas involving foreign (…) Tax Authorities" cannot be accessed by the taxpayer.

[449] Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, at 208 et seq.

[450] Decision No. 105069, *Revue de Jurisprudence Fiscale* (1993), at 674.

[451] Art. 27 of the Convention between France and the United States of 1967 referred in particular to "*personnes ou autorités (…) concernées*".

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It is also to be remarked that many Countries, such as France, Germany, Italy,[452] Luxembourg and Spain have informally[453] opted for keeping the previous formulation, so that decisions such as the earlier cited French case might still find room within the respective jurisdictions.

In the 2005 version of the model provision, the circle of persons and Authorities entitled to access the exchanged information was further expanded to include supervisory bodies to the competent authorities in charge of the assessment, collection and enforcement of taxes which, before 2005, were substantially excluded from such access.

The rationale of such an inclusion has not been openly stated but may be linked to the kind of issues reported above. In particular, a sentence included in the Commentary in 2005 foresees that "information can be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses".[454] Such a sentence may come as slightly puzzling, since the previous one seems to openly confer to the taxpayer the right to access the exchanged information. At the same time, as mentioned above, the secrecy regime applicable to exchanged information is primarily based on a general *renvoi* clause. As such, the inclusion of the expression "oversight (authorities)" may have been dictated precisely by the need to deal with such cases and provide said judicial authorities, that are not technically tax courts, such as the Council of State of other similar administrative justice body to ascertain whether the release of the received

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[452] In the case of Italy the matter is even more macroscopic as the wording adopted in the Italian versions of tax treaties concluded by this Country uses the expression "*incaricate*" (charged with), thus apparently excluding the taxpayer from access to some information in an explicit way. Such a wording, coupled with the circumstance that the interpretative relevance of the OECD Commentary seems to be far from settled in the case law of the Italian Supreme Court is conducive to the conclusion that the exclusion of the taxpayer from the possibility to access the exchanged information is more than concrete. A confirmation of such a reality, even though the case did not even take into account the relevant exchange of information treaty provision, can be found in Decision 9th December 2011, No. 6472 of the Council of State which, by reversing the outcome of the appeal administrative Court, denied the taxpayer the possibility to access information which had been transmitted by the French Tax Administration. The case caused quite a sensation as the exchanged information had been obtained by France in an arguable manner, resorting to a "whistleblower" that had copied a list of clients and accounts held by the Swiss branch of an international private bank (so called "Falciani list"). The sensitivity of the matter however somewhat subtracted relevance to broader general issue of the possibility for an Italian taxpayer to access data and items of information obtained by the Italian Tax Authorities in pursuance of an exercise of administrative co-operation. For the sake of completeness, it should be remarked that based on Art. 7, Para. 1 of Law 27th July 2000, No. 212 (Taxpayers' Bill of Rights) prohibits to motivate tax assessments by making reference to items of documentation not attached to the same tax assessment. Thus, when grounding their tax assessment on foreign sourced information, the Italian Tax Authorities would be required to attach data and documentation so received, so that, at least based on Italian domestic law, it is possible to conclude that the taxpayer should ultimately have access to the exchanged information pertaining to his position (In this regard see also the following cases: Italian Supreme Court, Decision of 30th May 2008, No. 14516; Provincial Tax Court of Mantova, Decision of 27 May 2010, No. 137; Provincial Tax Court of Como, Decision of 15 November 2011, No. 188). In this regard, while on the one hand, in the earlier cited decision by the Council of State such access was denied, the related tax assessment was dismissed by the Provincial Tax Court of Como precisely due to the non-fulfillment of the attachment of the concerned documentation.

[453] As no specific reservation to the model provision can be observed in this regard.

[454] See Para. 12 of the OECD Commentary to Art. 26

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information to the concerned taxpayer is legitimate under the laws of the same receiving States.

All the above described model stipulations stress a strictly functional link between the gathered and exchanged information of one Contracting State and the "administration or enforcement"[455] of domestic tax laws of the other Contracting State.

Another problem arises from Countries having ample information disclosure requirements in their statutes, such as freedom of information.[456] In this respect, it can also be observed that while the backbone of the model provision under scrutiny is constituted by a *renvoi* clause to the confidentiality regime of the receiving State, the syntagm "(any information) (…) shall be disclosed only to people or authorities concerned" introduces a positive obligation bringing about a minimum standard of confidentiality which can be considered to be binding on the receiving State. At the same time, as it has been observed in relation to the possibility for the taxpayer to access exchanged information, it may be argued on which basis the notion of "people or authorities concerned" should be interpreted. In the view of this author, considering that the expression is not defined in the convention and remarking that the clause under scrutiny is clearly based on a *renvoi* mechanism, it seems that said notion should also be interpreted in such a way to be consistent with the domestic law of the receiving State. Thus, it seems to this author that whereas, based for instance on the constitutional paradigm of a certain jurisdiction, the whole community ought to be considered as "people concerned" with the taxation process and this sensitivity be reflected in formal rules commending freedom of information, the disclosure of exchanged information to the public should not be considered as inadmissible as long as the same disclosure regime would be applicable to domestically sourced tax information under analogous conditions.

This is not however the position endorsed in the OECD Commentary, which seems to imply that it is not conceivable to construct the expression "persons or authorities concerned with (…)" in such a way to include the broader public when it foresees that "information covered by Paragraph 1, whether taxpayer specific or not, should not be disclosed to persons or authorities not mentioned in Paragraph 2, regardless of domestic disclosure laws such as freedom of information or other legislation that allows greater access to governmental documents."

[455] Para.1, Art. 26 of OECD Model Tax Convention on Income and on Capital 2005.

[456] For instance, in Denmark newspapers and other Media have full access to tax files archives. See Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Kluwer Law International, Alphen aan den Rijn, 2009, fn 29 at 139. The proceeds of a conference (held in Rust, Austria, in July 2012) devoted to the topic of "tax secrecy" are forthcoming and will provide the most updated and detailed survey on confidentiality rules in tax matters.

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As a matter of fact, the above mentioned amendment was introduced in 2005 following a high profile case in the US[457]: in particular, a publishing house challenged upon the US Freedom of Information Actthe denial set forth by the IRS in relation to its request of accessing and publishing the texts of certain advance pricing agreements which the IRS had concluded with other Tax Authorities and which had implied extensive exercises of exchange of information.

It seems to this author however that the abovementioned conclusion cannot be plainly reached when considering the text of the model provision due to its inherent *renvoi* to the domestic legislation of the recipient State. For this reason, whereas the receiving State is not an OECD member and it is thus not bound to observe the interpretative stances set forth under the Commentary, the supplying State would not be in the position to challenge the receiving State and denounce a misapplication of the treaty provision on exchange of information.

It seems to this author that the abovementioned specification introduced in the Commentary testifies a certain unease of some States with the “relative secrecy clause” which after 1977 took the place of the absolute secrecy clause of the original 1963 draft.

From the perspective of the safeguard of the rights of the targeted taxpayer, there seems to be no doubt that the post-1977 wording of the model provision offers less certainty and less protection to the taxpayer, since the relative standard of confidentiality fluctuates and the possibly volatile rules on secrecy embedded in each Country’s jurisdiction are the ultimate term of reference. In this regard, the effect achieved by the 1977 is somewhat unsettling as it seems to be in contrast with one of the most remarkable outcomes of tax treaties besides preventing international double taxation and allowing co-operation between Tax Administrations, that is, the possibility of providing taxpayer with a more predictable framework of administrative and procedural rules.

Thus, this author argues that the current international standard of administrative co-operation should openly leave the option open for adopting the pre-1977 formulation as far as the secrecy clause is concerned.

A further relevant yet controversial specification to be found in the Commentary is the impossibility to disclose information deriving from the application of Art. 26 to third countries except that the Double Taxation Convention contains a provision allowing such transfer.[458] It may be argued whether the new formulation of Art. 26, Para.2, according to which “notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of

[457] BNA v. IRS Nos. 96 – 376, 96 – 2820 and 98 – 1473 Daily Tax Report for Executives, Bureau of National Affairs, Tax Notes International 4th June 1999.

[458] Para. 12.2 of the OECD Commentary concerning the Exchange of Information

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the supplying State authorises such use" may provide any ground for allowing triangular exchange of information as a form of use of the exchanged information "for other purposes". In the view of this author, the matter should however be solved in the negative as the new wording of the Commentary refers to "both States" thus implicitly limiting the alternative use of the exchanged information only to the two original contracting States. The issue under scrutiny, which will be further examined in the following Chapter is, in the view of this author one of the most critical points in the way the international standards are currently implemented. Namely, the standards, have, by their very nature a multilateral substance, as they tend to ensure that information be exchanged "to the widest possible extent". However, the form through which the standard is chiefly implemented is still bound to bilateral channels such as general tax treaties and tax information exchange agreements. Assuming that, starting from 2009, the margin for negotiating exchange of information provisions departing from the standard is becoming increasingly slimmer, it is possible to envisage, at least in the long run, a substantial uniformity of the exchange of information treaty network. Ringfencing single bilateral arrangements by putting a street ban on triangular exchange of information thus appears somewhat anachronistic, to the extent that, in this specific respect, the 2012 amendment of Art. 26 and the related Commentary appears as a missed chance.

It could be said that before international consensus was reached on the international standards of transparency and exchange of information, it was also upon this specification that generally non-cooperative jurisdictions could enter into agreements with selected treaty partners giving more generous concessions than under their ordinary policy while at the same time not jeopardising the effectiveness of their ordinary policy. An interesting case is Switzerland, which has agreed to exchange information even beyond the limitation of its banking privilege legislation with the US and with Germany. With reference to the United States, a completely revised text of the previous 1951 Double Taxation Convention was adopted in 1996. In the 1951 version of the Double Taxation Convention, Switzerland already ensured to the United States its co-operation not only for the purposes of the Convention but also for tackling cases of tax fraud. In 1996, Art. 26 of the Convention was however modified with the introduction of the wording "*tax fraud or the like*"[459]which considerably extended the scope co co-operation between the two Countries. In 2003 an Agreement between the two Countries was reached so to clarify the application of the new Art. 26 With reference to the latter, enduring Swiss secrecy would have been severely endangered if the Convention had allowed the transfer of information from Germany to third Countries.

[459] See Art. 26 of the Convention between the Swiss Confederation and the United States of America, 1995. Examples of situations which are deemed as alike to tax fraud can be found in the Mutual Agreement between Switzerland and the United States of 23rd January 2003.

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As anticipated, in 2012 the text of the Model Provision was amended precisely in relation to the "use" of the exchanged information by foreseeing that "notwithstanding the foregoing,[460] information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use."

The amendment to the model treaty provision is, as it is often the case with amendments to the OECD Model, a follow up to the inclusion since 2005 of an optional alternative clause included in Commentary to Art. 26,[461] which foresaw an additional paragraph allowing the sharing of tax related information, available in principle only to Tax Authorities, to other law or judicial authorities.

Such a provision results from an already existing practice and interpretation but it was put on paper only after the revision of Art. 26 occurred in the year 2000. It is not clear whether this departure is admissible only with reference to "high priority matters" such as money-laundering or terrorism, or, rather, Contracting States are free to extend this provision *ad nutum*.

The new addition to the second Paragraph of Art. 26 thus allows Contracting States to share information received for tax purposes provided two conditions are met:

- the information may be used for other purposes under the laws of both States;
- the competent authority of the State supplying the concerned information authorises such a use.

The receiving State intending to benefit from such a possibility would be required to specify to the forwarding State the non-tax purposes for which it wishes to use the received information.

The inclusion of the aforementioned specifications in the wording of the model provision builds up on an analogous optional clause foreseen by the previous version of the Commentary to Art. 26 (introduced in 2005) which was meant to allow the sharing of tax information by the Tax Authorities of the recipient State with other law enforcement agencies and judicial authorities to be found in the same State in relation to some high priority matters such as the combat and monitoring of money laundering, corruption and terrorism financing.[462]

[460] That is, the other stipulations concerning the confidential treatment of exchanged information.

[461] Para.12.3(3)(4) of the 2005 version of the OECD Commentary concerning the Exchange of Information already contemplated the possibility that "*Contracting States wishing to broaden the purpose for which they may use information exchanged under (…) may do so by adding the following text to the end of Para.2: "* Notwithstanding the foregoing, information received by a Contracting Statemay be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use."

[462] It is interesting to remark in this regard that the examples of "high priority matters" cited by the Commentary are areas where the OECD has been active as a player, in particular with reference to the monitoring and combat of corruption as with the drafting of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of December 17th 1997.For further information on the activities of the OECD in the area of the tackling of corruption, see www.oecd.org/corruption/

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The OECD Commentary on the newly introduced stipulations signals an overturn as it seems to convey as a best practice a use of the exchanged information that was previously expressly sanctioned as prohibited under the same Commentary.[463]

In this regard, due to the circumstance that the new wording of the second Paragraph of Art. 26 was already foreseen but merely as an optional wording, there would seem to be no doubt that the ambulatory interpretation could be used to extend the effects of the new model stipulation to existing treaties. Moreover, the possibility to share the exchanged information with other Authorities in the recipient State does not operate by default but it is in any case conditional upon the agreement of the State forwarding the information.

In this latter respect it should also be observed that neither the model provision nor the Commentary makes reference to how the consent of the supplying State should be expressed or required. As no reference is made to mutual agreement procedure, whose timing would by the way somewhat deprive the forwarding of exchanged information of its topicality, it seems that Contracting States are free to foresee the more suitable channel. In the view of this author, it seems that a specific authorisation request may be included in the request for information. The issue remains that it is not clear whether it is sufficient that the consent of the supplying State be provided *ex ante*at the time of the request of information, tantamount to a *carte blanche* given to the receiving State[464] or, rather, the consent of the supplying State should be expressed on a case by case basis depending on the prospective alternative use of the exchanged information as well as of the kind of non-tax authority that would be entitled to access the exchanged information.

While there is no question that administrative tax co-operation should be conceived within a broader perspective involving other areas of international administrative assistance as well has having direct ties to areas of judicial assistance covering international white collar crime, it may be argued whether tax treaties should be seen as the best medium through which such co-operation shall be exercised.[465] In

[463] Para. 12.3 of the previous version of the Commentary foresaw that "if the information appears to be of values for other purposes *(i.e. non-tax purposes*), that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes (e.g. for a non-fiscal crime to a treaty concerning judicial assistance").

[464] A possible solution, in this regard, could be to include an authorization request in the same letter requesting the information.

[465] An interesting experiment at the regional level can be found in the European initiatives in the area of the tackling of international tax fraud. See in this respect, the Communication of 28th June 2000, COM (2000) 358 where a "global strategic approach" to the tackling of fraud, not limited to tax fraud, is invoked. On an international bilateral level, it can be observed how some examples of co-operation aimed at jointly addressing issues such as tax fraud, custom fraud, the combat against counterfeit products can be found in some bilateral administrative agreements developed by some Tax Administrations. An example in this regard is the earlier cited Memorandum of Understanding of 15th October 2010 signed by the Argentinian *Administración Federal de Ingresos Públicos* and the Italian *Guardia di Finanza*. For an analysis of the Agreement reference can be made to C. El "Memorando de Entendimiento sobre cooperación e intercambio de información entre la administración federal de ingresos blicos (AFIP) y la Guardia de Finanzas de la República Italiana", del 15 de octubre de 2010. La perspectiva desde la

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this regard, the same OECD Commentary acknowledges that States may wish to refer to more general legal instruments such as a mutual legal assistance treaty that would cover also the exchange of tax information.[466]

Para. 2 concludes with a sentence dealing with the privacy of the taxpayer in relation to whom information is exchanged. Such right to privacy is dismissed with reference to judicial proceedings, as information gathered by the competent Authorities can be made public in court proceedings and in court decisions, even in non strictly fiscal matters, either civil or criminal. To limit this derogation, the Commentary makes clear that no additional information can be provided by the competent Authorities out of the information necessary to the court proceeding; moreover, a restrictive approach, not encompassing the use of the exchanged information in court proceedings, is considered admissible by the Commentary.[467] It is then devolved to the Contracting States to define how strictly the already mentioned functional link should be intended, as the OECD Model Convention merely sets it as a broad standard, without providing an all-encompassing definition.

Confidentiality in the context of the Agreement is ensured by Art. 8.b which does not add much to Para. 2 of Art. 26 of the Model Convention with the notable exception that this article was modelled after the pre-2005 version of Art. 26. The aim of the provision is to guarantee that the exchanged information is not used for non-tax purposes. Fiscal information obtained pursuant the Model Agreement shall not be used for the prosecution of non-tax crimes. Such a measure is intended to safeguard the legitimate interest to privacy of the taxpayer. Along with the Authorities responsible for the assessment, the collection and the enforcement of taxes covered by the Agreement, also tax payers as well as their proxies and consultants are eligible to be informed with reference to the exchanged information. Such a faculty should not be considered as a must, as, under some circumstances, Tax Authorities have the interest not to disclose the gathered information to the taxpayer, in order to prevent the risk of evidence tampering.

As for the provision found under general tax treaties, disclosure to third Countries is not admissible, unless the Requested Party gives express written consent. It is not clear whether States that take part to the multilateral version of the Agreement but that are not directly bound to a given Requested State by a bilateral agreement should be considered as a third party. The most likely solution is that all States outside of each bilateral agreement should be considered as third parties, considering that the

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legislación interna y práctica argentinas, *Diritto e pratica tributaria internazionale*, 3/2011, p. 999, from an Argentinian perspective and, from an Italian perspective, Turina A., *Recenti sviluppi nella cooperazione amministrativa tra Argentina e Italia, tra perseguimento dello standard internazionale di trasparenza e scambio di informazioni e “approccio strategico globale” alla tutela dei rispettivi interessi finanziari*, Diritto e pratica tributaria 3 (2011), at 1021.

[466] See Para. 12.4 of the OECD Commentary on Art. 26.

[467] See Para. 13.4. of the OECD Commentary on Art. 26 concerning the Exchange of Information, 2005.

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multilateral version of the agreement is not a "multilateral agreement" in the traditional sense, but it should rather be considered as an integrated bundle of bilateral treaties[468].

4.3.3 Procedural Elements

4.3.3.1 Safeguard of the Rights of the Involved Parties

Although the safeguard of the rights of the taxpayer is among the elements taken into account in the international standards of transparency and exchange of information, the underlying documentation does not offer any specific prescription in this regard that could used as a "building block" of a system of safeguard and involvement for the taxpayer affected by cross-border exchange of information.

Thus, this Paragraph will examine some possible orientations in this regard as resulting from some particularly forward-looking national practices.

As a general rule, then, the participation of taxpayers to the procedure of information exchange will be determined by the interaction of the specific provisions found in the legislation of the involved Countries. In this respect, a comparative analysis suggests that there are two trends which stand out quite neatly and which are quite revealing with reference to individual Countries' attitude toward information exchange. There are then Countries that, by implying that exchange of information is an absolutely necessary tool to contrast international tax evasion, have decided to limit the taxpayers' right of participation to the exchange of information; on the other hand, there are Countries that maintain a sceptical outlook towards exchange of information, preferring to maximise taxpayers' safeguard when the latter are affected by an international exchange of information[469].

The very notion of taxpayers' participation rights risks however becoming an excessively vague one. The OECD Tax Committee has then undertaken the task to draft a report devoted to the various kinds of participation rights to be awarded to taxpayers in an international context[470], which have been labelled as follows:

- provisions granting notification rights;
- provisions granting consultation rights;
- provisions awarding intervention rights.

It shall be made clear that these provisions are typically implemented by the Requested State, being the Applying State not supposed to notify the information

[468] See Para.4 of the Introduction to the OECD Model Agreement on Exchange of Information on Tax Matters, 2002.

[469] Calderon J.M., *Taxpayer Protection within the Exchange of Information Procedure Between State Tax Administration*s, Intertax (2000), at 464.

[470] OECD, *Tax Information Exchange between OECD Countries(a survey of current practices)*, Paris, 1994, Para. 66.

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exchange to the involved taxpayer, outside of peculiar forms of administrative co-operation, such as simultaneous tax examinations.[471]

Notification rights refer to those provisions that make sure that the involved taxpayer has been adequately informed of the pieces of information that undergo transmission to the Applying State. Basic information items that are supposed to be made available to the taxpayer are:

- the Country which has asked for the information;
- the tax positions to which the information refers;
- the legal basis upon which the transfer of information takes place;
- the possible safeguards that can enable the taxpayer to oppose the transfer of information.

Notification rights are then rights that are granted *ex post*, once the exchange of information has already taken place. This is actually the main difference between the former and the so-called consultation rights, as the latter imply that Tax Authorities of the Requested State have to notify the transfer of information to the involved taxpayer beforehand. It should be remarked however that the wording “consultation” may lead to some misunderstandings. In the context of consultations rights being granted, the taxpayer’s consent to exchange of information is by no means binding or necessary; the final decision to transmit the requested information is taken by the Applied State’s Tax Administration.

Intervention rights go a step further, as they allow the involved taxpayer to know exactly what information is involved and to subject the legality of the process to administrative and jurisdictional control before the information is sent. This form of safeguard is actually rarely granted, even in exceptional cases and, within a European context, it is found only in the Dutch and the Swiss jurisdictions[472].

Despite the OECD Report, most Countries, dating to 2006, still did not feature specific regulations in the field of taxpayers’ safeguard with reference to exchange of information.[473] Then, it clearly appears that taxpayers can defend themselves from the improper use of the exchanged information by resorting to the general system of appeals. This is usually not a problem in the Receiving State, once it can be demonstrated that the received information has been improperly used. On the other hand, if the taxpayer wishes to safeguard himself before the information is transmitted, two cases can occur. In the first case, the information to be exchanged is already in possession of the Tax Administration, while in the second case it has to be obtained

[471] Gangemi B., *General Report*, *International Mutual Assistance through Exchange of Information*, in *Cahiers de Droit Fiscal International*, LXXVb, Stockholm, 1990, passim.

[472] Calderon J.M., *Taxpayer Protection within the Exchange of Information Procedure Between State Tax Administration*s, Intertax (2000), at 469.

[473] See Persano F., *La cooperazione internazionale nello scambio di informazioni, il caso dello scambio di informazioni in materia tributaria*, Torino, Giappichelli, 2006, at 69 et seq..

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directly from the taxpayer. In the latter hypothesis there is not one single answer to the question asking whether the request for information must provide not only the information the taxpayer has to provide but also the underlying purpose of the investigation. Some States, such as Belgium[474] and the United States[475] grant the taxpayer affected by this kind of information gathering measures the capacity to file an appeal against a request for information carried out by the Applying State.

The same kind of safeguard is not ensured in those cases where the information to be exchanged is already in the possession of the Tax Administration. This may well be the case of automatic exchange of information and spontaneous exchange of information. In these cases decisions are taken by the Tax Administration, with the taxpayer not being in such position to be informed or interfere in any way in the transfer of information either by opposing it or appealing against it. On the account of the basic principle of treating equivalent situations in the same way, a solution such to enable the taxpayer to be safeguarded also in these cases is to be found. According to scholars,[476] there are two possible theoretical approaches to the subject. The first hypothesis features some major practical pitfalls and consists in making any form of information exchange, even with reference to bulk information and spontaneous exchange of information, subject to an administrative review aimed at judging whether the information to be transferred may endanger taxpayers' rights. It is clear that such an approach would have some disruptive consequences, as it would slow down any form of administrative assistance and would imply great financial and administrative burdens. A second possibility is to acknowledge the taxpayers' right to access information files handled by the Tax Administrations of their respective Country. Such a provision would enable the taxpayer to safeguard his own rights more promptly and effectively by resorting to the general system of appeals. In such a scenario, litigation would basically turn into a policy tool. Instead of granting a set of ex ante rights safeguarded through the administrative tool of a pre-emptive review, the issue of the right of taxpayers to defend the confidentiality of some particularly sensitive information items is ensured with an ex post intervention carried out at the taxpayer's discretion. Both models clearly have their pitfalls. The former, administrative, model, apart from the apparent costs and burdens it carries along, it inevitably bears the problem of defining what Authority should be entitled to review all the requests for administrative assistance and on what principles shall a request be deemed as not admissible. In the latter scenario, the problem lies in the transaction costs implied by resorting to the general system of appeals and the risk to face a dramatic decisional paralysis, with the risk that such a

[474] Docclo C., *Exchange of Information*, European Taxation (1999), at 313.

[475] See Ruchelman S., Shapiro S., *Exchange of Information*, Intertax (2002), at 416.

[476] Calderon J.M., *Taxpayer Protection within the Exchange of Information Procedure Between State Tax Administrations*, Intertax (2000),, at 468.

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tool of safeguard may turn into an instrument abusively used by the taxpayer in order to block any form of cross-border administrative assistance related to its own position. On the other hand, it has been underlined how, due to lack of specific provisions in most jurisdictions, the possibility for a taxpayer to control thelegality of exchange of information are limited by the fact that Tax Administrations will likely possess extensive discretionary powers enabling the latter to reject access to information files on the account that, as already mentioned, such participation can harm the proper functioning of the tax administration or the effectiveness of the very examinations[477].

4.3.3.2 Timeliness of the reply

As it has been acutely observed, the time consuming procedure relative to the international exchange of information seems to represent in itself a sufficient discouragement to the proliferation of unnecessary requests for information.[478] Besides this possibly positive side-effect, the circumstance according to which exchange of information procedures may come out as excruciatingly lengthy, can substantially threaten the effectiveness of information exchange and, in the more extreme cases, frustrate the work of the requesting Tax Administration altogether.

According to Term of Reference C.5, an effective implementation of the standards would imply that information should be provided in a timely manner. In the perspective of the Global Forum, timely administrative co-operation would be ensured whereas the following are met:

- jurisdictions should be able to respond to a request within ninety days from the receipt of the request for assistance. Whereas the requested information is not available yet, an update on the status of the request shall be provided within the same term;

- jurisdictions should have appropriate organisational processes and resources in place to ensure timely responses;

- assistance in exchange of information should not be subject to unreasonable, disproportionate or unduly restrictive conditions.

As it can be observed, while the latter two criteria are mainly qualitative, the former one introduces a specific qualitative benchmark. The aforementioned ninety days prescriptive deadline is however not found in any of the “sources” of the

[477] Williams P., *UK National Report*, *Protection of Confidential Information in Tax Matters*, in *Cahiers de Droit Fiscal International*, vol. LXXVIb, Barcelona, 1991, at 533.

[478] Gangemi B., *General Report*, *International Mutual Assistance through Exchange of Information*, in *Cahiers de Droit Fiscal International*, LXXVb, Stockholm, 1990, at 33.

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international standard and thus qualify as an innovation set forth by the same Global Forum.

As a matter of fact, the last Paragraph of Art. 5 of the OECD Model T.I.E.A. only foresees that “if the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal”, without however foreseeing the ninety day term as a binding deadline within which the applied State should reply to the request for information, moreover, the related Commentary especially foresees that there might be acceptable reasons for not having provided the information as promptly as otherwise required; among such situations the Commentary foresees those where a judicial or administrative process required to obtain the information has not been completed.[479]

A further source of confusion in this area would seem to stem from the recent amendments to the Commentary to Art. 26, according to which an optional additional clause may be included into the treaty provision governing exchange of information.[480]The optional clause seems however to depart from the prescriptive benchmark of timeliness incorporated in the terms of reference and simply recommends that the Contracting States should agree on the time limits for the provision of information. While the proposed optional provision does not specify how such an agreement should be reached, it seems reasonable to assume that the instrument of choice should be either a protocol to the Convention or a separate Memorandum of Understanding negotiated within the framework of a mutual agreement procedure. In the lack of a specific agreement in this regard, the proposed optional clause introduces some default time limits, according to which information should be forwarded:

- within two months of the receipt of the information request if the Tax Authorities of the requested Contracting State are already in possession of the requested information;
- within six months of the receipt of the information request if the Tax Authorities of the requested Contracting State are not already in possession of the requested information.

As it can be observed, the proposed default deadlines are not consistent with the ninety day “best practice” conveyed in the Terms of Reference and against which jurisdictions have and will be assessed within the framework of the peer review process.

[479] See Para. 65 of the Commentary to the OECD Model T.I.E.A..

[480] The optional clause is included in Para. 10.4 to 10.6 of the 2012 Commentary to Art. 26.

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Moreover, the same proposed optional clause goes further in conveying the non-binding nature of the stipulated deadlines and explicitly foresees that "provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits." In particular, this clause would seem to convey the meaning that no objection to the use or admissibility of information exchanged under the relevant provision can be grounded on the circumstance that the information was exchanged after the time limits agreed to by the Competent Authorities or the default time limits provided for in the paragraph.

In the view of this author, the issue of the timeliness of a reply is directly linked to the safeguard of the rights of the involved taxpayers understood in a broader perspective, i.e., beyond the mere observance of a standard of confidentiality and the respect of informational self-determination but including implications linked to the specific guarantees provided under the procedural tax law of the requested State, either in the audit phase or in the contentious phase. In this regard it might be observed that, somewhat disappointingly and inconsistently with the alleged centrality of the safeguard of taxpayers' rights to the standard, the Global Forum had originally taken a stance almost favouring the ensuring of a speedy supply of information and in any case specifying that safeguard measures foreseen by the requested jurisdiction should not be applied in such a way to be detrimental to the prompt forwarding of the requested information.

It then appears encouraging that, at the OECD level, a different view was implicitly upheld upon the 2012 update of Art. 26 of the OECD Model and its related Commentary. In particular, the 2012 version of the Commentary, while introducing the above discussed optional clause setting elective or default time limits for replying to a request of assistance, also introduced an important specification, stating that if the requested Contracting State is unable to supply the requested information within the prescribed time limit due to legal impediments, such as, for instance, ongoing litigation regarding a taxpayer's challenge to the validity of the request or ongoing litigation regarding a domestic notification procedure, it would be in violation of the prescribed time limits. [481] Even though the Commentary only mentions judicial situations, there should reasonably be no doubt that the same waiver to the prescribed deadlines may be invoked in relation to other situations, such as, for instance, the fulfilment of the notification to the concerned taxpayer or the expiry of the appeal terms for the same concerned taxpayer. The position most recently endorsed by the OECD in its Commentary thus effectively appears to award precedence to domestic safeguards over the swiftness of information exchange: preferences seem to have shifted but the

[481] See Para. 10.6 of the OECD Commentary to Art. 26.

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dilemma seems not to having been solved in a harmonious way. In the view of this author, a possible solution in this regard could have been, similarly to what has been done in relation to minimum retention periods for accounting documentation,[482] to put a cap on the statutory terms foreseen on the head of the concerned taxpayer for exercising its right of appeal or, upon the head of the Tax Administration of the requested State, for performing the thereby prescribed notification rights.Not unlike what has been anticipated in relation to the introduction of minimum retention periods for accounting documentation, the need to revise domestic provisions concerning the abovementioned statutory terms might be justified in the light of the international legal obligations to execute treaties in good faith: whereas a jurisdiction agreed to enter a treaty foreseeing a default deadline for following up to a request of information, it should ensure that, also in this specific regard, its own domestic laws are not at odds with the obligations deriving from the conclusion of the treaty, among which, whereas a clause such as that under scrutiny be introduced, it would be possible to include a commitment to transfer information upon request in the timeliest possible way.

In this regard, Luxembourg appears as one of the most forward looking Countries in addressing such an issue. The new set of rules introduced by Luxembourg for complying with the international standards of transparency and exchange of information ensures notification[483] and appeal rights on the head of the concerned taxpayer in relation to the forwarding of information regarding its tax position. However, in order to reconcile the exercise of such rights with the need to prevent delays in complying with information exchange requests, it has been foreseen[484] that in case the concerned taxpayer intends to object to the information exchange requests, it can exercise its rights within the framework of a summary proceeding. In particular, the taxpayer would have a binding term of one month, starting from the notification of an exchange of information procedure, to oppose to the gathering of information regarding its tax position for the purpose of being forwarded to another State. Similarly, the number of defences that can be filed by the taxpayer and is capped so to allow the Court to issue its judgment within the binding term of one month from the filing of the complaint. Following the decision, the parties are entitled to an appeal, which is subject to same binding terms. Thus, once it has been decided by the competent judicial authorities that information can be exchanged, it would be ensured that, under normal circumstances,

[482] See Para. 19.7 of the 2012 version of the OECD Commentary to Art. 26 of the OECD Model.

[483] It is interesting to remark that, in relation to information held by banks, notification is incumbent on the financial intermediary, which is however not bound to any specific obligation but may decide on a case by case basis whether or not to notify its clients. See in this regard Steichen A., *Information Exchange in Tax Matters: Luxembourg's New Tax Policy*, Rust A., Fort E., Exchange of Information and Bank Secrecy, Alphen aan den Rijn, Wolters Kluwer, 2012, at 28

[484] See Articles 2 to 7 of the *Loi du 31 mars 2010 portant approbation des conventions fiscales et prévoyant la procedure y applicable en matière d'échange de renseignements sur demande*, Journal Officiel du Grand-Duché de Luxembourg, 6 april 2010, p. 82.

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information could legally be exchanged at most after three months since the notification of the information exchange procedure to the taxpayer.

4.3.4 *Treaty Policy Elements*

4.3.4.1 Choice of the Most Suitable International Legal Instrument

While none of the essential elements unto which the Terms of Reference used to assess compliance with the international standard expressly mentions that the international standard can be conveyed only through the signing of a specific legal instrument, it can indirectly be desumed from the work of the Global Forum that such a preference actually exists. In particular, the initial benchmark for being admitted into the white list was found in the signing of at least twelve “information sharing agreements”. Empirical evidence suggests that the only suitable options for meeting the above mentioned target consisted in the conclusion of either a general tax treaty including an exchange of information provision on par with Art. 26 of the OECD Model or, more commonly, in relation to the spur observed in the course of the last three years, with the conclusion of a tax information exchange agreement based on the OECD Model T.I.E.A..

Even though the Global Forum has more recently become one of the main supporters of the revised multilateral Strasbourg Convention on administrative assistance, the mere signature of the Convention does not appear to having been considered as sufficient by the Global Forum, despite the circumstance that, starting from it would have implied access of an exchange of information network composed of more than twelve jurisdictions.

The assessors appointed by the Global Forum also seem to having disregarded regional instruments, even whereas the latter carry about standards of co-operation more demanding than those commended by the Global Forum, such as automatic exchange of information. A typical example in this respect is the way subscription to the exchange of information based “version” of the Interest Savings Directive was not specifically factored in when assessing jurisdictions.[485]

4.3.4.2 Amplitude and Perimeter of the Treaty Network

The initial benchmark for being admitted into the white list was found in the signing of at least twelve “information sharing agreements”.However, once the peer

[485] An interesting case in this regard was that of Belgium, which was found lacking in relation to the access to bank information, even though it is currently bound by the Interest Savings Directive imposing automatic exchange of information in relation to interest savings income.

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review process was started, one of the assessment criteria, namely essential element C.2 foresaw that "the jurisdiction's network of information exchange mechanisms should cover all relevant partners". Thus, it was specified that the mere numerical threshold of the conclusion of twelve legal instruments enabling effective exchange of information could not to be considered a sufficient indicator of compliance with the international standards.[486] Namely, while the conclusion of at least twelve agreements has not been disavowed as a starting point, the key factor is to be found in the conclusion of exchange of information instruments with "relevant partners", defined as those jurisdictions that are interested in entering into an information exchange agreement with the assessed jurisdiction and that bear some "economic significance"[487]. The conclusion of agreements only with or, mostly with, partners that do not feature such a "relevance" may on the contrary possibly prove counterproductive, as it may be perceived as a lack of commitment to effectively implement the international standard.

Even though reference to the "economic relevance" of the treaty counterparts may be interpreted otherwise, it seems reasonable to hold the view that what the Global Forum really meant was that non-cooperative jurisdictions could not meet the prescribed threshold by concluding agreements with other non-cooperative jurisdictions.

As it has been widely published, since the year 2000, 590 T.I.E.A.s were signed, of which, an overwhelming majority starting from the second half of 2009. The sheer number of concluded agreements indeed stands out as a readily perceivable success. Since 555 of the concluded agreements see an offshore jurisdiction as one of the partners, it may be argued that these jurisdictions may downplay the effect of the enlargement (or set up) of their information exchange network by signing agreements with other offshore jurisdiction or, more subtly, with Countries whose residents typically do not cater to them as offshore investment destinations. At a first glance, empirical evidence would however seem to convey that such a pessimistic scenario has not concretised. In particular, of the 555 agreements signed to date, only 33 see two offshore jurisdictions as signatory parties. At the same time, besides signing agreements with other offshore jurisdictions, there would be a subtler approach to circumventing the threshold, that is, as anticipated, by concluding agreements with Countries that are unlikely to file a request for tax information due to the lack of portfolio investment ties or other similar economic links. The conclusion of a T.I.E.A. is largely neutral to high tax Countries, unless the offshore jurisdiction counterpart to the

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[486] It can however be observed that the twelve agreements threshold was still relevant for the purposes of removing jurisdictions from the grey list of jurisdictions that, while having committed to the international standards had not substantially implemented them. The case of Uruguay is interesting in this regard as, even though it had reached the twelve agreements thresholds by concluding negotiations with Nordic Countries, that likely do not qualify of economically relevant partners for Uruguay, it was nonetheless granted ascension to the white list.

[487] See *Terms of Reference*, 8, footnote No. 26

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agreement requires some specific benefits.[488] In this specific case, where emphasis was put on the number of signed agreements such a scenario seemed unlikely, as the main interest of the concerned offshore jurisdictions was to conclude as many treaties as possible (or at least, to reach the highly sought after twelve agreements threshold) with high tax Countries. Thus, it can be assumed that this kind of mutually beneficial yet substantially unproductive deals might have come out as prevalent.

As it can easily be imagined, the Global Forum did not provide any working definition of economic relevance nor the OECD seems to having published official statistics in this area. A recent empirical study[489] however provided some very interesting findings in this very fleeting area of enquiry. The study concluded that, on average, stronger economic links, such as foreign direct investment and trade, increase the likelihood of signing information exchange agreements while a lesser correlation can be recorded in relation to the flows of portfolio investments.

These results suggest that tax havens do not systematically avoid signing TIEAs withcountries to which they have strong economic links. The analysis also suggested that the activity of signing T.I.E.A.s slows down after countries have reached the twelve agreement threshold.

With regard to the conclusion of treaties it can also be observed that some regional groupings have started acting jointly on the plan of negotiations. This is in particular the case of Nordic Countries that have been carrying forth parallel joint negotiations. A similar stance has recently been endorsed also by the Countries belonging to the Southern African Development Community.[490]

4.4 Assessing the Implementation of the International Standards

4.4.1 The Global Forum and its Institutional Design

4.4.1.1 Creation, Consolidation and Development of the Global Forum

As it has been anticipated in Part 2 of this work, the origins of Global Forum directly stem from the OECD initiatives in the area of the monitoring of harmful tax competition; at the same time, the Global Forum has acquired an allegedly distinct

[488] This is the case with original T.I.E.A.s concluded between the ‘80s and the ‘90s by the United States with Caribbean offshore jurisdictions. As an implicit incentive to co-operation, the United States agreed, *inter alia*, not to limit the deductibility of expenses, such as training and conference expenses in relation to conferences held in the same jurisdictions.

[489] Fuest C., Bilicka K.A., *With which Countries do Tax Havens Share Information?*, EUI-RSCAS Working Papers 6, European University Institute (EUI) (2012).

[490] Inter-governmental regional organisation established in 1992 involving fifteen Countries of the Southern Africa region.

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configuration and autonomy from the OECD[491]. While it is indeed true that the Global Forum features some distinctly novel peculiarities, its development needs to be put into context. This Paragraph thus aims at providing the necessary background for a thorough inquiry of the core of the present Chapter, which revolves around an "assessment of the assessors" or, in humbler terms, of an enquiry aimed at investigating the peculiar critical issues related to the peer review process started by the Global Forum in 2010.

The Global Forum originally defined itself in broader terms as the "Global Forum on Taxation" at least until the Fall 2009 Mexico City Meeting. From the Mexico City meeting onwards, the Global Forum has re-branded itself as the a Forum on Transparency and Exchange of Information for Tax Purposes thus stating to adhere to a more restricted and focused mandate.

Thus, the Global Forum is not a new entity which was purportedly created in the aftermath of the milestone commitments undertaken by the G20 and by other international fora in 2009 but rather it is the result of a restructuring project of an already existing framework. In particular, drastic structural amendments affected the existing framework following the Mexico City meeting. In this respect, saying that only a rebranding of the Forum occurred would be incorrect.

At first, the way the Global Forum defines itself in the documents it issued before and after the Mexico City meeting in 2009 appears consistent and qualifies the Forum as a "framework" having a multilateral nature where OECD and no-OECD member economies participate. However while, the pre-Mexico City documents always make reference to the Global Forum as "a multilateral framework where "the OECD carries out its dialogue on tax issues with non-OECD Economies", the documents that have been issued subsequently refer to the Forum as "a framework within which work in the area of exchange of information and tax transparency is carried out by over ninety jurisdictions which participate in the work of a Global Forum on an equal footing" .

What immediately appears is that the new incarnation of the Forum has committed itself to a more circumscribed and focused mandate.

More subtly, however, it can also be noticed that while in the pre-Mexico City documents the Global Forum defined itself as framework where the OECD would interact with non-member economies, in the new formulation there is no trace of such an asymmetry (OECD dialoguing on tax issues with non-member economies) but rather a working framework open to both OECD-member and non-member jurisdictions.

It may then be argued whether the role and relevance of the OECD in providing such a framework for discussion and setting the agenda thereof has been somewhat restricted and whether, when compared to the Global Forum on Transparency and

[491] The informative and policy documents issued by the background information brief Global Forum very much stress such an independence from the Global Forum.

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Exchange of Information should be considered as a separate entity, operating under the sponsorship of the OECD but provided with functional autonomy.

In this respect, it can be observed that, as per the consensus reached after the Mexico City meeting, the Global Forum has been provided with a permanent Secretariat which, although based in the premises of the OECD Centre for Tax Policy and Administration, is defined as “self standing”. Similarly, the Secretariat is open to experts from both OECD and non-OECD jurisdictions. The consensus also asserts that the purpose of locating the Global Forum in Paris at the OECD premises is a way to ensure that the former can benefit from the Organisation’s experience in this area.

All these organisational choices seem to be aimed at pursuing a peculiar equilibrium, whereas the Global Forum is not to be seen as an articulation of the OECD Centre for Tax Policy and Administration, which is comprehensible, as it aims at hosting both OECD Members and non-members putting them on an equal footing. At the same time, the OECD provides the Global Forum with the necessary support from a technical and logistical point of view. On the other hand, it should be borne in mind that, from a financial point of view, the Global Forum is a self standing institution as it financed directly by its members , i.e., by OECD and non-OECD jurisdictions.

By defining itself as a “framework”, the Global Forum further blurs the issue. Namely, if the notion of “framework” is taken in its specific meaning, i.e., as a support structure within which certain objectives can be pursued, then it becomes very difficult to say how the Global Forum differentiates from the OECD, as said functions are carried out based on the support provided in turn by the OECD. At the same time, the fact the Global Forum has endowed itself with an autonomous and permanent Secretariat, drawing officials also from non-OECD Members may suggest that the Forum is trying to emancipate itself from the very International Organisation that bred it.

The question may seem as theoretical one, or worst, as some exercise of conspiracy theory but since the results of the peer review activity conducted by the Global Forum will be far reaching in their implications for many tax jurisdictions that are not members of the OECD and the mandate by virtue of which the Global Forum operates has been originally set forth by the G20, it is important to understand to which extent the Global Forum can be considered really “global”.

In this respect, it should be underlined that the number of jurisdictions accessing the Global Forum is constantly expanding .

Admittance into the Global Forum[492] is however a selective process as prospective member jurisdictions need to:

- commit to the internationally agreed standard of transparency and exchange of information for tax purposes;

[492] Whose membership currently includes more than 110 drawn from advanced and emerging economies, offshore centres but also developing Countries.

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- agree to be peer reviewed;
- pay the association fee .

A major share of new accessions in this regard is represented by traditional offshore jurisdictions or by developing Countries, thus, from constituencies that appear to be fairly detached from the traditional incubators of the standards. As there is no central transnational tax authority with the capacity to enforce the standards it may be argued which drivers can be found on the head of these jurisdictions behind their endorsement of the standards and, following involvement in the Global Forum, presumably, their commitment to comply with the standards. Although such a commitment and participation may appear contrary to the apparent national interest of the concerned States and territories, it could be explained in the light of what has been defined as "compliance pull", that is, the capacity of a regime[493] to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms.[494] In this regard, it can be observed that the compliance pull of the current international information exchange regime is fairly pronounced and might be based on the availability of long-term implicit incentives[495] connected to participation to the regime that prospectively off-set any related short-term burden.[496]

Further insights as far as the mechanics of the peer review process is concerned can be drawn from the governance structure of the Global Forum itself. The Global has defined itself primarily as a "decision making body" in which a compromise between the need to adopt decisions and issue reports in a timely fashion avoiding obstructionism and the circumstance that the Forum is designed to operate on a consensus basis. As such, the Global Forum is bound to a best effort obligation in order to ensure that all Members jurisdictions approve the issued reports; whereas this is not the case, the publication of a report is not halted but, rather, each jurisdiction is entitled to have its remarks and observations thoroughly published along with the concerned report.

The actual governance of the Global Forum as far as its institutional design is concerned is chiefly carried out by a Steering Group comprising of fifteen members drawn from the rooster of the almost ninety participating jurisdictions.

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[493] In this case, also in the light of the policy considerations exposed under Part 2 of this study, it can be argued that the consolidations of the international standards has indeed brought along the emergence of a "regime" in the krasnerian sense.

[494] See Franck T.M., *Legitimacy in the International System*, 82 American Journal of International Law (1988), at 713

[495] In this regard it can be observed that endorsement of the standards and participation to the Global Forum have been promoted leaving aside the inclusion in the relevant legal basis of any form of monetary incentives; the incentives that provide the current international tax information exchange regime of its "compliance pull" are then to be found in the non-monetary incentives analysed under Part 2 of this work and, in particular, to positive reputational repercussions deriving from compliance as well as from the possibility of enlarging the respective treaty networks by concluding, where possible, not only T.I.E.A.s but also more enticing (at least from the perspective of the likely more reluctant-to-comply offshore jurisdictions) general tax treaties.

[496] For a theoretical framing of such a dynamics see Kelly C.R., *Realist Theory and Real Constraints*, 44 Virginia Journal of International Law (2004), at 547.

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As it will outlined in the further section, the actual peer review process is however overseen by a Peer Review Group composed of selected national representatives of the involved jurisdictions, the Peer Review Group is in turn assisted by a Secretariat which, as anticipated, operates at the OECD premises and which is in charge of the actual technical and drafting work.

4.4.1.2 The Peculiar Role of the Secretariat and of the Peer Review Group

As earlier mentioned, within the activities of the Global Forum, which generically consist in "work in the area of tax transparency and exchange of information" the Global Forum has a specific three-year mandate whose purpose is "an effective global implementation of the standards of transparency and exchange of information"[497].

The means through which the Global Forum intends to pursue this mandate is by means of "in depth" monitoring and peer review.

The practice of "peer reviewing" is not a technical term and the same documents issued by the Global Forum do not offer an all encompassing definition thereof. The expression "peer review" is drawn directly from the legal scholarship vocabulary whereas it indicates the assessment of a piece of scholarly writing at a pre-publication stage by a group of peers, in this case, of academics active in the same disciplinary sector of the author.

On the other hand, even though the expression used in the context of the Global Forum may sound rather unusual, the idea of monitoring the actual degree of commitment and implementation of standards by jurisdictions that have committed to do so is not new in other intergovernmental bodies that have originally been promoted by or that operate to a different extent under the aegis of the OECD. This applies in particular to the FATF, the Financial Action Task Force, an intergovernmental body aimed at promoting policies curbing money laundering and terrorism financing, which was promoted in 1989 by the G7 and currently administratively based at the OECD Headquarters. Within the FATF, the degree of adherence to the internationally agreed standards in the aforesaid domain by the Member jurisdictions is pursued and kept into place by means of a system of "mutual evaluation" which has originally been designed in 2001.

Similarly, a Working Group internal to the OECD, the OECD Working Group on Bribery monitors the effective adhesion and implementation of the anti-corruption standards set forth by the 1997 OECD Convention on Combating Bribery of Foreign

[497] Global Forum, *Mexico City MeetingSummary of Outcomes*, 2009, at 1.

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Public Officials in International Business Transactions by means of periodical reviews, conducted by national representatives of the States party to the aforementioned Convention on the juridical and administrative framework of other signatory States.

Moreover, when considering the European experience, it could be argued whether the whole "Code of Conduct" agenda and the individuation of the harmful regimes could not be considered as an exercise of peer reviewing even though such a wording was not deployed at the time.

Leaving aside the EU, it may argued what represents the common core of a peer reviewing exercise in fostering the adoption of some agreed standards on an international forum. As much as bodies that previously embarked in a peer review procedure may definitely be problematic to frame within the common conceptualisations of public international law, what they have in common is their intergovernmental nature and the inherently intergovernmental nature of the methods they have chosen to adopt in their reviews, which is directly reflected in the fact that the reviewers will also be reviewed and *vice versa*. At the same time, in each of the aforementioned bodies, a specific comitology is foreseen so that there is always some secretariat, chiefly endowed with a technical competence, whereas national affiliations of the officials are transcended in favour of the concerned intergovernmental body.

In the case of the Global Forum, this role would seem to be played by the Global Forum Secretariat. In particular, the Secretariat is entrusted with the task of providing an interface between the work of the assessors and that of the reviewed jurisdiction focusing on practical issues such as the co-ordination of schedules and the "project management" of peer review activities. More remarkably, it should be underlined that the Secretariat carries out activities that lie at the core of the whole peer review process as every peer review team includes also an expert from the Secretariat. The Secretariat has also played a crucial role as, even though the broad methodological outlines of the prospective peer review process had been defined already in the outcomes of the Mexico City 2009 Meeting, the actual drafting of documents that are of crucial relevance to the whole peer review process, such as the "Handbook for Assessors and Jurisdictions" had been entrusted thereto. In this respect, officials from the Secretariat cooperate with the assessors to review all relevant information and provide supplementary questions to the reviewed jurisdiction acting as an interface. Once the crucial fact finding step of the peer review is concluded, the Secretariat also plays a very concrete role in overseeing its main output by co-ordinating the early drafting of the reports and by including therein the inputs of both the assessors and the reviewed jurisdiction.

As every peer review report needs to be examined and approved by the Peer Review Group before it is released under the aegis of the Global Forum, the Secretariat

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plays a role consisting in "facilitating"[498] such an assessment and approval. It appears however, that while the liaison, fact finding[499] and drafting roles are well defined and eminently "technical", the Secretariat contributes, in a way that seems to be defined in rather vague terms, to the actual approval of the reports, i.e., in what appears as an eminently "political" step in the peer review pipeline. It is too early to tell whether this overlap of technical and (potentially) political role may affect the peer review process. It could be argued, that in an overall "soft context" whereas a "soft" assessment is carried out by a "soft" body based on terms of reference that derive from "soft law" one of the elements of "firmness" may be represent by the Secretariat, which is the only permanent dedicated body devoted to the cause of peer review and which, as such, is among the few directly accountable entities involved in the whole process.

Besides the role of the Secretariat , further "texture" and "firmness" to the otherwise "soft" nature of the peer review exercise is added by the Peer Review Group, which, bearing in mind the earlier cited internal governance framework of the Global Forum, acts as the organ specifically overseeing peer review activities carried out within the Global Forum.

Although the peer review process is designed in order to be as more standardized as possible, since it is based on a commonly agreed methodology, inconsistencies, criticism and need for reconsideration may always arise and these need to be solved before a report is actually published as the Global Forum has committed itself to operate by consensus minus one. Such a mediation role with regard to the standard peer review activity is chiefly attained at the level of the aforementioned Peer Review Group, whose institutional design aims at being inclusive of the different categories of member jurisdictions.[500] Moreover, within the Peer Review Group, a substantial decisional power is held by the Chair and the Vice-Chairs[501] as they set forth the actual schedule of the peer reviews, nominating the jurisdictions that should provide the assessors for each peer review as well as the related time tables.

On the other hand, outside of the technical and political supervision of the peer review process, broader political issues that may impact the Global Forum as resulting from the peer review activity as a whole are addressed by and discussed within a more

[498] See *Methodology for Peer Reviews*, 7.

[499]Not directly but in an oversight capacity.

[500] The jurisdictions represented in the Peer Review Group are, among OECD Members, Australia, France, Germany, Ireland, Italy, Japan, Denmark, Korea, Luxembourg, Mexico, Switzerland, the Netherlands, the United Kingdom and the United States; among non –OECD affiliated G20 members we can find Argentina, Brazil, China, India and South Africa; in the number of offshore jurisdictions and financial centres, we count Singapore, Jersey, the British Virgin Islands, the Cayman Islands, Mauritius, St. Kitts and Nevis, Samoa and the Bahamas; among EU member States not belonging to the OECD we find Malta which arguably acts as a representative drawn from the number of traditional financial centres.

[501] In particular, the Chair of the Peer Review Group is drawn from France, while vice-chair each represent one the of the (informal) partitions mentioned under the previous footnotes. In particular, vice-chairmanship has been awarded to representative from India, Japan, Singapore and Jersey.

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restricted Steering Group.[502] For example, the need to address the so-called horizontal issues, i.e., the objective to ensure a consistency with regard to how different jurisdictions are evaluated in the assessments, even though raised by some individual jurisdictions and discussed at the level of the Peer Review Group was later demanded to the Steering Group which, once an agreed solution was found, provided the Secretariat with the task to draft a confidential note on horizontal issues and to propose amendments to the peer review methodology.

4.4.1.3 The Appointment of the Assessors

The actual peer review activities are based on the work of fairly small teams of assessors. In particular, the typical peer review team consists of two officials drawn from the jurisdictions participating in the Global Forum, even though it is foreseen that the primary basin for selecting assessors should be found among jurisdictions that are part of the Peer Review Group. The peer review team is constantly liaised with the Secretariat which provides, as anticipated, logistical and drafting support. It should be observed however that there is no binding limit on the number of assessors to be included in a peer review team. In particular, in situations where a complex mix of specific competences is required, it is generally deemed appropriate to involve a higher number of officials from diverse backgrounds.[503]

The assessors drawn from two different jurisdictions do not necessarily need to work together on each aspect of the peer review, so that different sections of the peer review may result being the work of a single assessor. Objectivity is then not necessarily achieved by having two different assessors carrying out the same review activity in parallel but, rather, it would seem to be ensured by the co-ordinating role carried out by the Secretariat and by the adhesion to a pre-defined and very detailed common methodology.

Furthermore, it is expressly foreseen that the same assessors be appointed as reviewers of more than one jurisdiction whenever possible and that parallel reviews ought to be carried out. The need of conducting parallel reviews is not only based on

[502] The composition of the Steering Group is also designed to be expressive of the different constituencies of the Global Forum. The Chairmanship of the Steering Group has been awarded to Australia, while vice-chairmanships have been attributed to Bermuda, Germany and China. Other members of the Steering Group are drawn from Brazil, the Cayman Islands, France, India, Japan, Jersey, Singapore, South Africa, Switzerland, the United Kingdom and the United States.

[503] The main areas of specialisation informally required by the Peer Review Group can be inferred to be the following: familiarity with procedural issues in tax law (it may be argued that assessors drawn from jurisdictions having systems similar to those of the target jurisdictions may be particularly desirable) , with accounting regulations, with the keeping of commercial registers, with interpretation of tax treaties and with exchange of information.

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efficiency concerns but it also encouraged in view of the goal of providing assessors with a broader comparative perspective.[504]

As far as issues regarding the appointment of assessors are concerned, it should always be borne in mind that the basic assumption is that each participating jurisdiction agrees to both be a potential assessor and a potential assessee. Based on such a background, each jurisdiction party to the Global Forum would be theoretically expected, although not obliged, to provide at least one assessor drawn from their tax administrations and other relevant public administrations;[505] nonetheless, not all participating jurisdictions may have a sufficient capacity in this respect, as such, it currently results that not all involved jurisdiction have supplied an assessor while, in turn, some of the jurisdictions concerned have set forth extensive roosters of candidate assessors.[506] In this latter respect, participating jurisdictions may also offer differentiated assessor profiles, i.e., officials that have earned experience and acquired competence in specific areas; such a differentiation becomes particularly relevant in the light of Phase 2 reviews or combined reviews, where only officials that have acquired practical experience with tax information exchange can be appointed.

Each Global Forum member jurisdiction intending to provide assessors is required to designate a "central point of contact"[507] whose primary role is to indicate potential assessors and provide the Secretariat with their qualifications.

This step, which occurred in the first half of 2010, was functional to the creation of a roll of assessors from which the Chair or a Vice-Chair of the Peer Review Group can allocate assessors to the different target jurisdictions.[508]

In setting forth the designation of the prospective assessors, the Chair of the Peer Review Group are expected to take in consideration the following factors that would mainly seem to reflect practical concerns:[509]

- expertise and background of each assessor;[510]
- language of evaluation;
- nature of the legal system;

[504] See *Methodology for Peer Reviews* , Para. 9.
[505] As counterintuitive a sit may appear, representatives from Tax Administrations may not always be those in the better position to assess whether a certain legislative and administrative framework (in the perspective of Phase 1 Reviews) or certain administrative practices (in the perspective of Phase 2 Reviews). In particular some of the Terms of Reference focusing on the "Availability of Information" refer to the quality of the accessible accounting documentation and to the existence of well functioning Commercial Registers, areas of activity that within many jurisdictions may more often fall within the competence of Chambers of Commerce.
[506] See *Methodology for Peer Reviews*, at 4
[507] See *Methodology for Peer Reviews*, at 4
[508] It is however foreseen, for obvious reasons of conflict of interest, that the Chair or the Vice-chair be exempted from designating assessors in relation to their own jurisdiction. See *Methodological outline*, at 8.
[509] See *Methodology for Peer Reviews*, at 3.
[510] A slight inconsistency would seem to appear here, as the Chair of the Peer Review Group should only indicate the jurisdictions from which the assessors should be drawn with respect to the composition of a specific assessment team, while it would be a matter for the concerned nominated jurisdiction to set forth a suitable candidate for partaking into a specific assessment team.

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- geographic location of the jurisdiction;
- the need to avoid any conflict of interest.

It is explicitly foreseen[511] that each jurisdiction whose reviewers are selected for an assignment can object to such an appointment in case it reputes that reviewing a specific jurisdiction may not be appropriate.[512] The same option is open to the prospectively assessed jurisdictions, that can object to being assessed by reviewers drawn by a certain jurisdiction. Any possible reservations of this kind, either set forth by the prospective reviewers or reviewees, are handled directly by the Secretariat, in consideration of its liaison role. Moreover, each member jurisdiction of the Peer Review Group can submit observations on the allocation of assessors as conducted by the Chair of Vice-chair of the Peer Review Group.[513]

It is explicitly foreseen in the methodological framework of the Global Forum that, once appointed and allocated to target jurisdictions, assessors should be stripped off of any national label as they are required to carry out assessment in their personal capacity[514]. Such a clarification is particularly meaningful and, in the Methodological outline, it is explained on the grounds of objectivity reasons. At the same time, while this clarification may seem intuitive, the notion of objectivity as enshrined in the document "Transparency and Exchange of Information for Tax Purposes: A Proposed Framework for In-Depth Monitoring and Peer Review, and for Restructuring the Global Forum" (Final Draft 27 August 2009) should be concerned with the objectivity of the criteria used to conduct the assessment and with the consensus behind the methodology adopted by the Global Forum in conducting peer reviews rather than as a matter of being free from any national conditioning. As the appointment procedures should already be designed to avoid that conflicts of interest occur, it then may be concluded that having assessors act in their personal capacity would not appear as being a thoroughly justifiable approach.

The selection, appointment and allocation of assessors is among the areas of the whole peer review process whereas a tension between the pursuit of methodological transparency, the consensus basis of the whole framework and the need to preserve the confidential nature of some steps of the procedure emerge. In the case of the composition of the assessors' teams such a tension is somewhat resolved by a complex comitology work in which the coordination role of the Secretariat appears as essential and a remarkable decisional autonomy would seem to be awarded to the Chair (or Vice-Chair) of the Peer Review Group.

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[511] See *Methodology for Peer Reviews*, at 8.
[512] It may be argued that the most common reason for refusing to carry out a review in relation to a certain jurisdiction shall lie in some conflict of interest. Even though information concerning any possible such refusal is not disclosed to the public, it could be foreseen that one of the possible hypotheses of conflict of interest may lie in the pending negotiations over a double taxation convention or a tax information exchange agreement.
[513] See *Methodology for Peer Reviews*, Para. 8.
[514] See *Methodology for Peer Reviews*, Annex 1, Para. II.C.

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Considering that the basis on which the reviews are conducted are grounded in a peculiar form of soft law whose ultimate sources are international recommendations issued by an international organisation, the OECD, to which only a small minority of the member jurisdictions of the Global Forum belong to, it may be argued from which sources the Global Forum, the Peer Review Group (and in particular its Chair and Vice-Chair) and the Steering Group draw their legitimacy.

Legitimacy is the cornerstone of any international body. A useful distinction in this regard is the distinction between the gaining of legitimacy and its maintenance. Borrowing from definitions elaborated by US international trade policy literature, the former can be defined as "input legitimacy", which is ultimately derived from the accountability of a given institution while the latter could be defined as "output legitimacy", which in turn is ultimately derived from the effectiveness of a given institution in pursuing its mandated goals.[515]

In relation to "input legitimacy", it can be observed that in the lack of a binding Charter, the Global Forum then derives its legitimacy as a body which conducts evaluations on its member chiefly by being transparent in carrying out its tasks. In this respect, it may said that the Global Forum is endowed with a functional legitimacy, i.e., its prerogatives, although deriving from a soft law basis, may lead to outcomes that are binding on the assessed jurisdictions, even though the latter can always object to the results of the reviews and set forth their feedback); such a legitimacy, under the specific circumstances thereby considered, is however only linked to the carrying out of peer reviews in the strict adhesion to the methodology and the terms of reference the Global Forum has provided itself with.

It should also be observed that input legitimacy concerns not only the mandate of a given institution to pursue a certain mandate but also reverberates on the perception of the activities of the same institution and, in this case on the peer review activity, since, as it has aptly been observed in broader theoretical terms, the perception of legitimacy of a certain rule[516] on the part of those to whom it is addressed is based on the perception that it has come into being in accordance with right process .[517]

As for "output legitimacy", i.e., the effectiveness of an institution to pursue its stated objectives it might be early to tell whether the Global Forum can claim such a characteristic. The main issue in this regard consists in the circumstance that the Global Forum plays a monitoring role rather than a governance one: monitoring is

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[515] See Keohane R.O., Nye J.S. Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, Porter R.B. et al (Eds.), Efficiency Equity Legitimacy. The Multilateral Trading System at the Millenium, Washington, Brookings Institution, 2001, at 265.

[516] While peer review reports do not constitute rules in the proper sense, indeed they postulate acceptance by the final addressees.

[517] See Thomas Franck T.M., *Legitimacy in the International System*, 82 American Journal of International Law (1988), at 706.

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indeed one of the key constituents of governance; [518]however, indicating the Global Forum as the responsible for a possible unsatisfactory level of implementation of the international standards would probably not be fair as such a body is deprived of any direct leverage to punish non-compliant jurisdictions.

It should also be reminded that experiences from other peer reviews initiatives prompted by the OECD tells that even though the parameters of the review are soft, the outcomes may be hard. For instance the "Mutual Evaluation" conducted by FATF in the field of money laundering then resulted in the provision of sanctions (under the form of additional disclosure burdens) towards jurisdictions that performed poorly. In this respect, it would seem that the traditional distinction between soft and hard law may be somewhat blurred in circumstances such as those under scrutiny or, more appropriately, a continuum can be detected: namely, the "*internationally agreed tax standard*" is derived from soft law sources but, in order to be effectively implemented, significant elements thereof need to be transposed into "hard law" through the conclusion of international agreements: whereas the goal shall not be reached, adverse consequences on the head of non-complying States may then not be much unlike of those deriving from "hard law" provisions. In any case, it would be remarked that such a phase would fall outside of the scope of the mandate of the Global Forum which does not seem to be concerned by any means by the consequences its own findings may have in soliciting the application of sanctions (as threatened by the G20[519]) against those jurisdiction that result having fallen short of the standards of transparency and information exchange.

4.4.2 Working the "International Standard" into the Terms of Reference Endorsed by the Global Forum

4.4.2.1 An Outline of the Terms of Reference

The standards are by their very nature formulated in a qualitative, broad and programmatic fashion but the peer – review is conducted very analytically and in phase

[518]Morrow J.D., *Modeling the Forms of International Co-Operation: Distribution Versus Information*, 48 International Organization 3 (1994), at 387.

[519] In the more recent declarations, the G20 has seemed to have adopted a more inclusive approach. Instead of threatening jurisdictions with possible sanction, it would seem to encourage them to take the advantage of the opportunity of fixing their weaknesses on the domestic and the international plan. In particular, one excerpt of the Declaration rendered at the end of the Seoul meeting held in November 2010 set forth that: "Reviewed jurisdictions identified as not having the elements in place to achieve an effective exchange of information should promptly address the weaknesses. We urge all jurisdictions to stand ready to conclude Tax Information Exchange Agreements where requested by a relevant partner."

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2, ratings are even awarded. It is then important not only to identify the actually relevant criteria but also to ascertain how they are "weighted" in the peer review process.

The gap between the need to provide an objective and consistent rating and the open wording of the items constituting the five pronged standard of information exchange has been filled by the Global Forum resorting to a methodology that had been previously experimented also by the mutual reviews conducted within the FATF framework[520], that is, by individuating some circumscribed terms of reference to be separately assessed.

Having a critical understanding of how the Terms of Reference have been elaborated and how they could be classified is then crucial to the whole assessment of the peer review process.

In particular, the five items constituting the international standard of transparency and exchange of information have been expanded into ten terms of reference which can in turn be reconnected to one or more items in the standard and have been aggregated into three areas:

a) availability of information;
b) access to bank, ownership, identity and accounting information;[521]
c) exchange of information.

The area dealing with availability of information is broken down into three terms of reference:

1. availability for competent authorities of ownership and identity information for all relevant entities and arrangements (Element A.1);
2. keeping of reliable accounting records kept for all relevant entities and arrangements (Element A.2);
3. availability of banking information for all account holders (Element A.3).

The area dealing with access to bank, ownership,[522] identity and accounting information is broken down into two terms of reference:

1. obtaining and providing information requested for information exchange purposes from any person within their territorial jurisdiction who is in possession or control of such information, irrespective of any legal obligation on such person to maintain the secrecy of information (Element B.1);

[520] See FATF, *Evaluations and Assessments: Handbook for Countries and Assessors*, Paris, 2009, at 62.
[521] In the light of the assessment of the term "transparency" we could say that areas a) and b) are to be included into such an umbrella term.
[522] It seems appropriate to underline that reference is broadly made to "ownership" information and not specifically to "beneficial ownership". The possibility of identifying in a straightforward manner who are the beneficial owners of a given undertaking does not seem to be an essential requisite in the light of the assessments carried out in the course of the peer review activity.

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2. compatibility of rights and safeguards applying to persons in the requested jurisdiction (e.g., notification and appeal rights) with effective exchange of information (Element B.2).

The area dealing with exchange of information ("C") is broken down into five terms of reference:

1. the provision for effective exchange of information mechanisms (C.1);
2. the extension of the assessed jurisdiction's treaty network to all "relevant partners" (C.2);
3. incorporation of adequate provisions ensuring the confidentiality of information received in the jurisdiction's mechanisms for exchange of information (C.3);
4. the tutelage by exchange of information mechanisms of the rights and safeguards of taxpayers and third parties (C.4);
5. ability to provide information under exchange of information mechanisms in a timely manner (C.5).

Each essential element is then broken down into "enumerated aspects" that, despite not having been subject to any individual assessment, have been taken into account by assessors as relevant indicators in view of the fulfillment of the objectives set by the concerned terms of reference. There is then no disclosure concerning how different jurisdictions perform when it comes to specific "enumerated aspects". On the one hand, the view sustained by the Global Forum according to which an evaluation of each single "enumerated aspect" would have proven not only cumbersome but also counterproductive to a global assessment of a jurisdiction's performance, as the single enumerated aspects are often not suitable to be considered on a stand-alone basis[523] seems to be comprehensible; on the other hand, the fact that only synthetic judgments are made available to the public with regard to terms of reference subtracts the whole "openness" or transparency of the procedure, which is recognised by the same Global Forum as one of the two hallmarks of a peer review process, along with a clear statement of the standards against which subjects are been reviewed.[524] This gap is partially filled by recommendations directed to assessed jurisdictions, as said recommendations are very detailed they refer directly to specific enumerated aspects; in this way, possible best practices in relation to specific aspects are set forth even though not in the same consistent fashion as it would have been achieved by assessing them individually.

[523] See *Note on Assessment Criteria*, Paris, 2010, 2
[524] See *Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes*, Paris,2010, 3 (hereinafter, *Terms of Reference*).

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4.4.2.2 Possible Alternative Enumeration of the Terms of Reference

From a legal perspective, a fundamental distinction that may be applied in order to (re)-aggregate the different terms of reference used in the peer reviews is the following:

- "public Information" (information which is immediately retrievable by anyone. This kind of information has great procedural relevance as public information is not subject to proof *per se*);
- information made publicly available;
- information that could be made publicly available.

Particular attention shall be devoted to the relationship between the domestic dimensions of availability of public information and information gathering powers of Tax Administrations (powers in acquiring information while conducting tax audits) on the one hand and the international dimension of exchange of information on the other hand.

The two former dimensions, which could be joined under the umbrella term "transparency" are covered by Terms of Reference A and B respectively, while the third dimension is covered by Term of Reference C which can be split up in effectiveness of exchange of information (Terms of reference C.1 and C.2), efficiency of exchange of information (Term of Reference C.5, limited to phase 2 reviews) and safeguard of taxpayers' rights (Terms of Reference C.3 and C.4).

It is also appropriate to remark that, between the availability of public information and the edge of information gathering powers of Tax Administrations, there is a complementary relationship; namely, whereas the former is high the latter can be less pervasive and more proportional in their action. It would then seem that, in particular, in a good tax governance perspective,[525] preference should be awarded to the former, i.e., to fostering greater availability of public information.

4.4.2.3 The Benchmarking Relevance of the "Enumerated Aspects"

As anticipated, even though peer review reports only address "terms of reference" in their "essential elements", the actual indicators taken into consideration

[525] The possible good tax governance spill-over s that may derive from the peer reviewing procedure are addressed further on in this work.

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by assessors when conducting their reviews are the enumerated aspects into which terms of reference are broken down.

With regard to element A.1, concerning the availability of ownership and identity information, the key aspects are found in the availability of ownership information for competent Authorities, including the identification of holders of bearer shares, the identification of partners in partnerships and the identification of settlers, trustees and beneficiaries of trusts, founders and members of foundations. It is also expressly foreseen, as a separate element, that jurisdictions should have in place effective enforcement provisions to ensure the availability of information, one possibility among others being sufficiently strong compulsory powers. With regard to the territorial scope of application of such powers, it should extend to potentially covered all the relevant entities, defined as those that are formed under the laws of the jurisdiction or with a sufficient nexus to it, including tax residence.

With regard to element A.2, concerning the reliability of accounting records for all relevant entities and arrangements, the key aspects are found in the suitability of accounting records to correctly explain all transactions, to enable that the financial position of an entity can be correctly determined at any time and to allow for the preparation of financial statements. Another relevant aspect in this respect is that the supporting documentation (such as invoices and contracts) be kept and made available so that details concerning the sums of money received and expended, the sales and purchases carried out, the assets and liabilities of the relevant entity or arrangement can easily be traced. It results from peer reviews that a best practice in this area is to be found when accounting documentations fulfilling the aforementioned requisites be kept for at least five years.

With regard to element A.3, concerning the availability of banking information for all account holders, the key aspect is found in the circumstance that banking information includes all records pertaining to the accounts as well as to related financial and transactional information.

With reference to element B.1, centered on the ability for competent Authorities to have the power to obtain and provide information that is the subject of a request from any person within their territorial jurisdiction, the key aspects are found in the following:

- the power to obtain and provide information held by banks, other financial institutions and any person acting in an agency or fiduciary capacity;

- the power to obtain and provide accounting records for all relevant entities and arrangements;

- the determination to use all information gathering measures to obtain the information requested, even if the absence of a domestic tax interest;

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- the applicability of effective enforcement provisions to compel the production of information;

- the determination not to turn down a request of information based on secrecy provisions.

With regard to element B.2, according to which the compatibility between rights and safeguards domestically awarded to taxpayers and effective exchange of information should be ensured, no specific underlying aspects are provided but some exemplifications are set forth instead: in particular, whereas rules demanding the prior notification to the taxpayer of requests for assistance affecting its own tax position are in place, said rules should foresee some specific waivers "in case of emergency" or whereas such a notification may undermine the chance of success of the investigation conducted by the requesting jurisdiction.

The underlying aspects to element C.1, which deals with the provision of effective exchange of information, are particularly relevant as they outline the actual core factors of an "effective (and efficient) exchange of information" mechanism. Said key factors are individuated in the following:

- broad exchange of information clause prompting exchange of information whereas it is foreseeably relevant to the administration and enforcement of the domestic tax laws of the requesting jurisdictions;

- extension of the personal scope of application of information exchange to all persons, including non residents;

- prohibition of turning down a request for assistance on the ground that the concerned information is held by a financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to an ownership interest in a person;

- prohibition of turning down a request based on the lack of a national tax interest in the requested information;

- prohibition of applying a "dual criminality" requisite in order to restrict exchange of information;

- the commitment to provide information related to both civil and criminal matters;

- the commitment to provide, as allowed by its own domestic legislation, information in the form specifically requested by the applying

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jurisdiction (e.g., deposition of witnesses, production of authenticated copies of original documents);

- bringing signed agreements commanding exchange of information into force expeditiously;

- enacting legislation that makes it possible to comply with the commitments undertaken in the field of exchange of information.[526]

Element C.2, concerned with the breadth of the exchange of information network of the relevant partners is not broken down into further aspects; nonetheless, it is specified that the mere numerical threshold of the conclusion of twelve legal instruments enabling effective exchange of information is not to be considered sufficient. Namely, the key factor is to be found in the conclusion of exchange of information instruments with “relevant partners”, defined as those jurisdictions that are interested in entering into an information exchange agreement with the assessed jurisdiction and that bear some “economic significance”.[527] The conclusion of agreements only with or, mostly with, partners that do not feature such a “relevance” may on the contrary possibly prove counterproductive, as it may be perceived as a lack of commitment to effectively implement the international standard.

Element C.3, concerning the confidentiality regime to be applied to the exchanged information, requires not only that the standards of confidentiality set forth by the second Paragraph of Art. 26 of the OECD Model Convention and Art. 8 of the OECD Model T.I.E.A. be observed, but also that the same regime be applied to requests for information, background documents to such requests and all communications between the involved competent Authorities.

Element C.4, according to which exchange of information should respect the rights and safeguards of taxpayers and third parties, is ultimately centered on the safeguard of trade, business, industrial, commercial or professional secrets and on the respect of the limit of *ordre public*.

Finally, element C.5, which deals with the issue of efficiency of information exchange and requires that information be provided in a timely manner, is broken down in the following aspects:

- jurisdictions should be able to respond to a request within ninety days from the receipt of the request for assistance. Whereas the requested

[526] The first five items of this list are, as expected, wholly covered by the current version of Art. 26 of the OECD Model Convention as well as by the OECD Model T.I.E.A.. The following items are not directly included in the wording of the aforementioned provisions but are exclusively a matter of implementation. As such, it may be argued that having exchange of information clauses compliant with Art. 26 of the OECD Model Convention may represent a necessary yet not sufficient condition for being thoroughly compliant with the internationally agreed standard as framed in the terms of reference used by assessors.
[527] See *Terms of Reference*, 8, footnote 26

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information is not available yet, an update on the status of the request shall be provided within the same term.

- jurisdictions should have appropriate organisational processes and resources in place to ensure timely responses.

- assistance in exchange of information should not be subject to unreasonable, disproportionate or unduly restrictive conditions.

4.4.3 The Peer Review Process

4.4.3.1 Methodological Implications

In a context where the normative framework of reference is represented by soft law sources and where assessments are not conducted by a third body but by the same jurisdictions that will in turn be subject to assessment, having a generally agreed, structured and transparent methodology appears as a key factor in providing the peer review process with legitimacy both at the internal level, i.e., in the perspective of the participating jurisdictions and at the external level, i.e., in the perspective of those jurisdictions that have not yet joined the Global Forum or that have not submitted themselves to review as non-members.

The Global Forum is conscious of this necessity and it has then devoted remarkable efforts to define a methodology to be applied to all peer reviews whose terms have been incorporated into a specific document that has recently been revised. The documents providing a methodological outline of the peer reviews serve a double purpose, on the one hand they form an integral part of the handbook assessors are provided with; on the other hand, they are functional to providing legitimacy to the whole process. As such, methodological guidelines do not only outline the procedure to be carried out throughout the peer review and in view of the objective of issuing a report but they also contain a fairly developed core of principles that should guide the peer review activity.

In particular, the principles on which the peer review activity shall be based are the following:

- effectiveness: based on indications found in the “Methodology for Peer Reviews”[528], effectiveness in the context of peer review activities actually means a systematic approach to peer review that shall enable an objective and coherent assessment of whether a jurisdiction has implemented the standards;

[528] Confirmed also in the *Revised Methodology* , at 1 et seq.

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- fairness: based on indications found in the "Methodology for Peer Reviews"[529], fairness in the context of peer review activities actually means ensuring an equal treatment for members, based on the assumption that jurisdictions act on an equal footing within the Global Forum. With regard to non member reviews, that have not been carried out to date, fairness should be ensured based on the circumstance that they can also participate to the works of the Global Forum on par with members even though only for the purposes of their own review;

- transparency: based on indications found in the "Methodology for Peer Reviews"[530], transparency in the context of peer review activities is primarily meant as "external transparency" and consists, in particular, in providing general information to the public on the Global Forum work and activities and on the implementation of the standards. At the same time, the Methodological Outline also sets forth the need to preserve confidentiality on some issues so that, for instance, working drafts or the minutes of the meetings of the Peer Review Group or of the Global Forum discussing the draft peer review reports are not available to the public. Such an approach may be the subject of some criticism as they set forth some sort of "conditional" transparency, so that the work can be disclosed only when issues have been solved in the competent *fora*. At the same time, since the very purpose of the peer review activity is ensuring that peer jurisdictions can evaluate each other in total frankness, such a veil of confidentiality shall be meant to ease such a result;

- objectivity: based on indications found in the "Methodology for Peer Reviews",[531] objectivity in the context of peer review activities is primarily meant as the use of objective criteria when conducting assessments both in terms of the standards against which assessments are conducted as well as on the grounds of the methodology adopted. In the case of the peer review activities of the Global Forum, objectivity should then be ensured as long as the assessors adhere to the Terms of Reference as the only relevant parameters for conducting reviews and carry out said reviews based on the methodology agreed by the Global Forum and outlined in the relevant manuals;

- cost-efficiency: based on indications found in the "Methodology for Peer Reviews",[532] cost-efficiency in the context of peer review activities is primarily meant as conducting the peer review activity in an efficient way;

[529] Confirmed also in the *Revised Methodology* , at 1 et seq.
[530] Confirmed also in the *Revised Methodology* , at 1 et seq.
[531] Confirmed also in the *Revised Methodology*, 1 et seq.
[532] Confirmed also in the *Revised Methodology*, 1 et seq.

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namely, while very in depth reviews would be desirable, they may also come as extremely burdensome both in terms of human capacity of the assessors (and the administrations of the member jurisdictions seconding the assessors) and of the autonomous financial resources of the Global Forum (e.g., travel expenses for multiple on site visits);

- co-ordination with other organisations: based on the indications found in the "Methodology for Peer Reviews",[533] a corollary of the efficiency (or cost-effectiveness) principle is the need to use and take into account existing resources, either internal to the Global Forum or derived from external sources. As an example of the former, the consultation of the reports already issued by the Global Forum appears as one of the primary sources of reference for the designated assessors in the course of Phase 1 reviews. As an example of the latter, it could be foreseen that reference may well be made to the findings of the FATF both in terms of substantial issues, since in the area of transparency and the availability of reliable accounting information, the scope of enquiry of the Global Forum and of the FATF somewhat overlap, and methodological and procedural issues, since the works of the FATF serve as one of the primary terms of comparison when it comes to the mechanics of the peer review activities.[534]

These basic principles serve as the foundation to the whole peer review activity and are enucleated in specific procedures that guide the activity of the assessors as well as of the Peer Review Group and the Global Forum when adopting Peer Review Reports.

In the following section the actual procedures supporting the peer review pipeline from the formulation of questionnaires directed to assessed jurisdictions to the adoption of reports will be outlined and assessed critically in its key articulations against the guiding methodological principles exposed above.

[533] Confirmed also in the *Revised Methodology* , 1 et seq.

[534] At the same time, since a shared and clearly outlined methodology constitutes one of the essential factors ensuring that the peer review exercise is transparent and objective, it would not seem appropriate that assessors may fill any unforeseen methodological gap by making reference to the experiences gained by the FATF. Namely, as the adoption of a "Revised Methodology" testified, the Global Forum has adopted a very formalized approach towards methodological and procedural issues, which constitute the only hard references of an otherwise fairly loose normative backing; as a result, even slight inconsistencies or gaps in the methodology need to be discussed at the level of the Steering Group, approved by the Peer Review Group, adopted by the Global Forum, the actual outcome being amendments to the existing manual which are taken care of, at a drafting and technical level by the Secretariat.

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4.4.4 Procedural Implications

4.4.4.1 Different Phases and Related Procedural Implications

The Peer Review activity is arranged in two distinct phases:

- Phase 1, which addresses the legal and regulatory framework for transparency and exchange of information for tax purposes;
- Phase 2, which addresses how the above defined standards are implemented in practice.

It is possible for the assessed jurisdictions to opt for a combined Phase 1 and Phase 2 review, whereas both the legal and regulatory framework and the implementation of the standards in practice are addressed. To date, phase 1 reports and phase 1 with phase 2 joined reports have been issued, the former being the large majority. Namely, the joining of phase 1 and phase 2 reviews is typically opted for by OECD Member jurisdictions, while non OECD Members have typically opted for handling the two phases separately, subjecting themselves only to Phase 1 reviews[535].

Phase 1 of the Peer Review procedure could be defined as an integrated interactive desktop review. Namely, the assessment team can refer to collections of legal and regulatory materials of the assessed jurisdictions, including information exchange provisions contained in tax treaties concluded by the assessed jurisdiction. As anticipated, the two official languages of the peer review activity are English and French, as such, it lies upon the assessed jurisdiction to have the relevant materials translated in one of the official languages[536].

Such a desktop approach also takes into consideration, where available, documents issued by "sister" intergovernmental bodies such as the FATF. This practice is in line with the spirit of co-ordination with other organisations that is numbered among the key principle of the peer review activity.

The desktop review approach in Phase 1 reviews is a remnant of the methodology originally adopted by the Global Forum on Taxation in drafting "Towards a Level Playing Field" reports and "Progress Reports". The Peer Review perfects such an approach in a very significant manner by introducing primary sources of information such as questionnaires as well as the possibility of interacting, through the interface of the Secretariat, with the assessed jurisdiction; in this respect it would seem that the peer review process constitutes a remarkable leap forward from a methodological standpoint.

[535] A few notable exceptions to this general rule can be found, for instance, the Isle of Man and Mauritius opted for being subjected to a combined Phase 1 – Phase 2 Review while Belgium has so far subjected itself only to a Phase 1 Review.
[536] See *Revised Methodology*, Para. 5, at 22

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The key document of Phase 1 reviews is represented by a questionnaire[537] which is prepared by the OECD Secretariat and directed to the assessed jurisdiction. The questionnaire has a modular structure and a standardized outline[538] but it is customized on a case by case basis in order to address any peculiar issues that are critical to a specific jurisdiction. In this respect, a major contribution is provided by the inputs that other jurisdictions may be willing to set forth with regard to the ones under assessment. Said inputs are maintained confidential and are incorporated into the questionnaire directed to the assessed jurisdiction. From a methodological viewpoint, it may be argued whether there is a tension between the principle of fairness and the principle of effectiveness that are numbered among the basic principles of the peer review exercise. Namely, on the one hand, keeping the questionnaires as standardised as possible is needed in view of ensuring that all jurisdictions are treated on an equal footing as well as to enable a horizontal comparison and, in the view of phase 2 reports, the laying down of a ranking; on the other hand, only through partially customized questionnaires, jurisdiction-specific issues can be thoroughly addressed and reviews can be truly accurate.

It may be a possible object of concern that basing the review on answers provided directly from the assessed jurisdiction may be prone to some form of "window dressing" or even worst manipulation; at the same time, having the chance to take into account information and data provided directly by the addressee of the review makes it possible to go much deeper than it could be achieved when resorting exclusively to external sources, that, as anticipated, are not done without by the assessors. Moreover, such concerns shall definitely be overcome when considering that, if one of the pillars of the peer review process is the involvement and active participation of the assessed jurisdiction, the other key element of the process is cross-checking, which basically consists in examining sources not provided by the assessed jurisdiction and obtaining feedback on a specific jurisdiction under scrutiny by other jurisdictions.

It should further be remarked that, in order to avoid any possible conflict of interest, even though assessment teams are composed of members chosen primarily on the basis of their national affiliation,[539] assessors actually operate in their personal capacity and not as representatives of their Country of origin. Moreover, in order to

[537] The model questionnaire is considered a confidential document so that is appears particularly arduous to set forth speculations in this regard. Apart from any practical concern dealing with the suitability of such questionnaires to depict the key features of the ossesse jurisdiction in a thorough fashion, a more theoretical yet not relevant issue in view of an analysis of the legitimacy of the whole peer review process would consist in framing the legal nature of such questionnaires and what kind of obligations the assessed jurisdiction holds when being submitted the questionnaire.

[538] Even though different basic "versions" are foreseen in order to cope with the different legal traditions of the assessed jurisdictions.

[539] The choice being in turn primarily driven, in a way akin to other institutions providing technical assistance in tax matters (in this respect, experience by the International Monetary Fund can be considered relevant), by "objective factors" such as the languages spoken in the Country of origin of the assessors and the legal system to which the Country of origin of the assessor belong.

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avoid any possible interference at the stage of the desktop review, all communications between the assessed jurisdiction and the assessment team are arranged and carried out by the Secretariat.

In pursuance of the principle of efficiency, work by both the assessment team and the assessed jurisdiction needs to be conducted under remarkable time pressure. Namely, once it has received the questionnaire, the assessed jurisdiction has only up to four weeks[540] to provide answers as well as translated legal and regulatory documentation which is relevant for conducting the review. On the other hand, assessment teams have to examine dossiers and note down a draft report of each jurisdictions in forty eight hours. Overall, a phase 1 review, from the formulation of the questionnaire directed to the assessed jurisdiction to the adoption of the peer review report by the Global Forum by means of written procedure[541] takes indicatively twenty weeks.[542]

Phase 2 reviews also start from a questionnaire, which is directed to the assessed jurisdiction and drafted by the Secretariat. It would seem that in a phase 2 review, issues concerning the need to "customise" the questionnaire should be fairly limited as the latter shall chiefly focus on quantitative data regarding the handling of requests for assistance by the assessed jurisdiction and the timing within which a reply is provided.[543] On the other hand, it would seem that phase 2 questionnaires shall also address more qualitative issues such as the reliability and the relevance of the replies to requests for assistance provided to the requesting parties.

The qualifying moment of phase 2 reviews is to be found in the on-site visits the assessment team conducts in the assessed jurisdiction. In this phase the veil that separated the assessed jurisdiction and the assessors, whereas the Secretariat acted as an interface. In the course of on-site visits interactions between the assessment team and representatives from the competent Authorities of the assessed jurisdiction are encouraged in view of avoiding subsequent discussions at the moment of the adoption of the resulting report by the Global Forum.[544]

The areas of investigation that will be covered by the assessors in the course of an on site visit cover chiefly, with regard to elements A ("availability of information") and B ("access to information") of the Terms of Reference, the actual powers of Tax Administrations and other competent authorities of the assessed jurisdiction to gather and maintain information and, with regard to element C ("exchanging information") of

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[540] Six weeks in combined reviews.

[541] That is, assuming that sections of the report are not challenged within the Peer Review Group or later at the time of approval by the Global Forum.

[542] See *Background Information Brief*, 2 May 2011, 11

[543] See *Revised Methodology*, Para. 19, 4

[544] See *Revised Methodology*, Para. 26, 6. This would seem to suggest that the on site visit does not only fulfill the need of a more detailed enquiry but also constitutes one of the inevitable "political moments" of the peer review activity.

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the terms of reference, focus is placed on implementation issues such as the adequacy of the organisational structure and resources having regard to the requests for information received by the jurisdiction; the application of rules safeguarding the confidentiality of exchanged information and the timeliness of the jurisdiction's responses.

At the level of phase 2 reviews, cross-checking is ensured by consultations with exchange of information partners of assessed jurisdictions. This consultation seems to be meant also as a way to circumscribe the responsibilities of the assessed jurisdiction, since as result of such a double-check it may be found out that unsatisfactory replies may also depend from some deficiencies in the requests.[545]

As anticipated, pure phase 2 reviews have not been carried out so far, as jurisdictions that have opted for phase 1 reviews are under ongoing scrutiny while other Countries have only opted for combined phase 1 – phase 2 reviews; combined reviews do not consist in having a phase 2 review following up to a phase 1 review but, rather, a somewhat "hybrid" methodology applies in order to maximise efficiency. In particular, a single questionnaire, consisting of both "phase 1" and "phase 2" questions is addressed to the assessed jurisdiction and, subsequently, an on-site visit which is the defining moment of phase 2 reviews is scheduled.

4.4.5 The Drafting and Adoption of Peer Review Reports

The draft of what will then take the form of a peer review report is penned by the Secretariat which develops the replies of the assessed jurisdiction within four weeks from their receipt.

The "Revised Methodology" explicitly foresees that in this step, the Secretariat shall also cross-check that other assessment reports to ensure a consistency of evaluation as well as consistency across assessments.[546]

The draft elaborated by the Secretariat is examined by the assessors, which shall provide comments within two weeks from receipt.

Draft reports, incorporating comments by assessors are to be sent to the assessed jurisdiction along with an executive summary drafted by the assessors; in

[545] It would seem however dubious whether assessors can actually have access to requests for information as well as to the replies based on the secrecy clause which should normally be contained in the exchange of information provisions of the assessed jurisdiction, mirroring the second Paragraph of Art. 26 of the OECD Model Convention. In this respect, by the time when Phase 2 reviews will become the main activity of the assessors, any such possible conflict between the possibility to access specimens of requests and responses and the secrecy regime governing the latter may be overcome by virtue of a specific agreement which shall waive such a ban in favour of assessors. The draft of such an agreement is on the agenda of the peer review but it has not been drafted yet. Excluding some peculiar exceptions, it would then seem that phase 2 reviews that have been conducted so far (typically as a part of a combined review) have not taken into account actual examples of requests for assistance nor of replies thereto by the assessed jurisdiction.

[546] *Revised Methodology*, Para. 34, at 7

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turn, the assessed jurisdiction shall provide its comments to the Secretariat and to the assessors. In particular, the assessed jurisdiction has, at this step, the opportunity to provides clarifications with regard to identified weaknesses as well as to outline the plans it has to address such outstanding issues.

Based on the draft report elaborated by the Secretariat and the inputs set forth by the assessed jurisdiction, the assessment team finally reviews the draft report which will constitute the version to be submitted to the Peer Review Group for further comments and approval.

The Draft Peer Review Report as resulting from the procedure outlined in the previous Paragraph is transmitted to the Peer Review Group members.

The default procedure foreseen for the adoption of reports by the Peer Review Group is the so-called "written procedure" according to which if no comments or objections are set forth by any Peer Review Group member within three weeks from their receipt of the draft report, the draft is considered to be adopted by the Peer Review Group.

In case any issue is raised, the Peer Review Group shall meet in order to examine the draft report and the attached executive summary issued by the assessors. Members of the Peer Review Group setting forth any comment shall communicate it to the assessors as well as to the assessed jurisdiction. As a result of such feedback, a revised draft report along with a cover note and a note drafted by the assessed jurisdiction will circulate among members of the Peer Review Group and constitute the basis of the discussion for the aforementioned meeting of the Peer Review Group.

The meeting of the Peer Review Group consists of two readings, the former aimed at fostering discussion on the draft report and the latter tending at the approval of an agreed text. If no agreement by consensus minus one is reached upon the second reading then the approval of the draft report is deferred to a following meeting of the Peer Review Group until consensus minus one is reached. If the report is not approved after two consecutive meetings of the Peer Review Group, then the matter is demanded to the Steering Group which shall include the issue on the agenda of the next meeting of the Global Forum.[547]

The adoption of the draft by the Peer Review Group is a crucial step as, only following such an adoption, it is possible to refer to a "Report" (and not a mere draft); the key difference is that, once the Peer Review Group approves a report, the report is considered a document authored by the whole Peer Review Group without any further mention to the Secretariat which laid down the first draft or to the original assessment team.

[547] Such a situation has not manifested itself yet.

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The Report as adopted by the Peer Review Group will then have to be approved by the Global Forum. Also in this case, the default procedure is the so-called “written procedure” according to which, whereas no remarks are raised by any of the Global Forum members within three weeks from the receipt of the Report, the Report is considered to be adopted. If there are objections, the Steering Group of the Global Forum shall decide whether to refer the report back to the Peer Review Group for consideration at its next meeting or to include discussion of the report in the agenda for the next Global Forum meeting. In such a case, the Report is adopted based on the “consensus minus one” methodology, according to which, even though the desired target is adoption by unanimity, no single jurisdiction is put into such a position to block the adoption or publication of a Report.

In pursuance of the principle of transparency which constitutes one the pillars of the whole peer review methodology, the Peer Review Reports as adopted by the Global Forum are published and made freely accessible on the Global Forum website. At the same time, all intermediate materials, from the questionnaire directed to the assessed jurisdictions and its replies to the intermediate drafts of the reports, are not disclosed and kept under strict confidentiality.[548]

4.4.6 The Structure of Peer Review Reports

In pursuance of the principle of objectivity, not only jurisdictions have to be confronted with substantially homogeneous questionnaires; such an homogeneity should be reflected also in the final output of the peer review process. In this respect, the Secretariat has ensured that Peer Review Reports follow a largely standardised structure.

It is explicitly foreseen that the outline of the Reports can be modified in the future but this option has not been taken into consideration on the occasion of the revision of the peer review methodological guidelines. Homogeneity should moreover also result from the from the length of the reports, for which however, unlike under the original methodological orientation, no maximum length has been established.

Additionally, in adherence to the principle of transparency, peer review reports have to meet some are drafted in non-particularly technical terms since they are directed to a general readership encompassing possible different subject within civil society. In this respect, it appears that the issue of transparency and exchange of information somewhat transcends the tax policy debate and, due to its specific sensitivity, appears being directly linked to other areas of global governance.

[548] Moreover, assessors are bound by a confidentiality duty and cannot share documents related to the review they are performing outside the assessment team.

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The outline of a peer review report consists, in particular, of the following sections:

- an "Executive Summary", which is drafted directly and solely by the assessors;
- an "Introduction" consisting of a presentation of some background information concerning the review: identification of the assessors, logistical information and an overview of the assessed jurisdiction, in terms of its political and economic framework and legal system classification as well as an historical overview of the jurisdiction's commitment to comply with the standards of transparency and information exchange;
- a section where the actual findings of the peer review are presented and arranged under the different "essential elements" constituting the Terms of Reference. In particular, the compliance with the essential elements is evaluated and recommendations for remedial action are set forth where relevant. The opinion of the assessed jurisdiction is also to be reflected in the report, as well as its planned actions to implement any recommendations made. Recommendations are provided only in cases where the element is perceived as not being in place or needing some improvements, while no comments are set forth, not even in the perspective of defining best practices, whereas a jurisdiction fulfills the test so that an element is deemed to be "in place".

Each Report ends with a table compiling the assessment of the jurisdiction for each essential element and their possible associated recommendation(s). The report concludes with the presentation of the next steps for the jurisdiction in the peer review process, including a timetable for providing follow-up reports to the Peer Review Group.

4.4.7 The Attribution of Ratings in Phase 1 and Phase 2 Reviews

Each Phase of the reviews is functional to the issuance of a final report. Each final report is not a mere recollection of the strengths and flaws of the framework of transparency and information exchange of the reviewed jurisdiction but, rather, as anticipated, it also contains recommendations. Namely, the perspective of the whole peer review activity is quite different from the list-based approach previously adopted by the Global Forum and goes in the direction of prompting improvement and, to some extent, provide technical assistance to the assessed jurisdiction in view of achieving the required standard.

Phase 1 and phase 2 reviews are to be seen as complementary; namely, phase 1 reviews address only the legal framework of the jurisdiction, while the peer review activity is ultimately concerned with the effectiveness of the relevant measures, i.e., with their actual implementation; as such, it can be held that the successful completion of a

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phase 1 review can be considered as a necessary yet not sufficient condition for effectively meeting the international standard of transparency and exchange of information. This is the reason why, whereas actual ratings will be provided with respect to phase 2, no similar cardinal evaluation system is foreseen with reference to phase 1 but, rather, a set of determinations: namely, for each of the ten essential elements making up the terms of reference, phase 1 reviews conclude by setting forth "determinations" (and not "evaluations" or "rating") stating whether each concerned element is "in place", "not in place" or whether it is "in place but certain aspects of the legal implementation of the element need improvement"; in addition to determinations, the report also contains recommendations for improvement, that assume a particular relevance when elements are deemed to be only partially in place or not in place. This type of qualitative rating has been deemed appropriate in the light of the stated objective of Phase 1 reviews that consist in assessing the extent to which a jurisdiction has in place the elements that would allow it to effective transparency and effective exchange of information in practice[549].

Whereas a jurisdictions does not have some "crucial" elements in place with respect to the goal of ensuring effective exchange of information, it is foreseen that no phase 2 review will be carried out until it has acted on recommendations to achieve an improved legal and regulatory framework. In particular, a key relevance is awarded to the detailed written report that the concerned jurisdiction has to submit to the Peer Review Group within the twelve months following to the adoption of the original report by the Peer Review Group.

Even though not all elements need to be perfectly in place in order to access to the second phase of the peer review process, it is then however necessary that the necessary elements are present. The methodological guidelines provided to assessors do not set forth for an actual enumeration of the essential elements but some examples of failures that would prevent a jurisdictions from accessing phase 2 are the following: an absent or limited availability of reliable accounting information; a lack of access to bank or ownership information; a lack of agreements enabling effective exchange of information with "relevant jurisdictions", i.e., as anticipated, with partners having economic significance.[550]

With regard to phase 2 reviews, it is by contrast foreseen that an actual rating be awarded to the assessed jurisdictions. In particular, phase 2 reviews will amount to an actual "rating": both a specific rating for each essential element and an overall rating will be provided.

Rating will be awarded based on the following four brackets:

- "Compliant": whereas a given element is fully implemented;

[549] See *Assessment Criteria*, Para. 8, at 2.
[550] See *Assessment Criteria*, Para. 1, at 3.

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- "Largely compliant": whereas despite a proper overall implementation of a given element, minor shortcomings have been detected;
- "Partially compliant": whereas only a partial implementation of a given element has been detected;
- "Non-compliant": whereas substantial shortcomings in the implementation of a given element have been detected.

Based on the ratings attributed to single elements, an overall rating will be derived, even though it appears that said rating should not merely result from an arithmetic average of the single ratings.

On the other hand, it seems appropriate to remark that, even though the rating system for phase two appears as more squared than that foreseen with respect to phase 1, it is nonetheless still an exquisitely qualitative exercise: i.e., it definitely lays on the assessment team to decide whether, for instance, a jurisdiction is largely compliant or partially compliant. A possible back up to these possibly slippery nuances could maybe be found in the extent of recommendations for improvements set before the assessed jurisdiction along with the rating; in particular, the more the recommended jurisdictions appear as objectively burdensome and pervasive, the farthest a jurisdiction may be deemed from having reached full compliance.

Moreover, not unlike phase 1 reviews, horizontal issues between different jurisdictions may emerge. At a phase 2 such a problem, which has been dealt with under phase 1 reviews only in the revised methodology, had already been foreseen by the Secretariat when drafting the assessment criteria. Namely, it is explicitly foreseen that, while assessors act in their personal capacity, the responsibility for handling horizontal issues at a phase 2 level ultimately lies on the Peer Review Group, which is entrusted with the task of ensuring that "similar cases are treated similarly and that real distinctions in the effectiveness of the system for exchange of information in different jurisdictions are reflected in the assessment given to each".[551]

Moreover, in view of ensuring a more meaningful comparative perspective a more horizontal consistency among reports, it had been foreseen from the start of the peer review activity that the actual awarding of ratings be postponed until a subset of jurisdictions that are representative of a given economic and geographic cross section of the Global Forum is completed.[552] For this specific reason, phase 2 peer review reports have been issued without including such ratings.

An interesting feature of awarding jurisdictions a global rating consists in the circumstance that, once an overall rating will be attributed to each jurisdiction, it will possible to order them cardinally, thus individuating the jurisdictions that put "best

[551] See *Assessment Criteria*, Para. 15, 4
[552] See *Assessment Criteria*, Para. 19, 5

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practice" into place at the upper pole and jurisdictions that fall short of the international standard of transparency and information exchange at the bottom.

4.4.8 Concluding Critical Remarks Concerning the Adoption, Drafting and Contents of Peer Review Reports

It should be remarked that the goal for each jurisdiction is to ensure transparency and effective exchange of information for tax purposes; it is however not yet clear where the actual threshold will be situated in terms of the aforementioned "cardinal ranking" which will result from phase 2 reviews and what actual degree of compliance will be associated with such threshold. It seems that there are a few difficulties in this respect that do not seem to have been addressed yet by the Peer Review Group. [553]

As anticipated, a first background difficulty in this perspective is given by the need to translate a vast number of qualitative and quantitative findings into a single synthetic indicator represented by the final rating .

A second difficulty is represented by the circumstance that it is not clear whether the ranking should be adjusted in order to take into consideration the overall performance of the reviewed jurisdictions with respect to the predefined standard: namely, whereas even the jurisdictions that rank relatively high should demonstrate not to be carrying real "best practices", it may be argued whether jurisdictions showing some more structural deficiencies shall be measured with a relatively milder meter.

Additionally, it is not clear how, once the final ratings are awarded, it will be possible to monitor the evolution displayed by each jurisdictions: the peer review process is a huge investment of physical and human resources and it is not clear whether, once the main goal of its current mandate, i.e., the definition of a ranking of jurisdictions in terms of transparency and effective information exchange, will be achieved, it will continue its activity in the same way, thus ensuring a proper "maintenance" of the ranking or whether less burdensome yet likely less effective approaches will be adopted. It will also be interesting to evaluate how "latecomers" to the Global Forum[554] will be assessed once a system of final ranking has already been put into place and how this circumstance will impact the review procedure to which they will be subject.

With regard to both phase 1 and phase 2 reviews, issues have emerged concerning the equal horizontal treatment of the reviewed jurisdictions. Namely, as a number of reports has been issued, some jurisdictions that have obtained negative or

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[553] It should also be borne in mind that the Peer Review Group is working at a very sustained pace, so the handling of problems that are not deemed urgent yet is postponed; on the other hand, the Peer Review Group appears as a very dynamic body in addressing its own internal methodological shortcomings, so that procedures for conducting peer reviews have already been revised in order to address possible criticalities.
[554] Or non member jurisdictions that will opt for being reviewed.

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partially negative assessments in respect to some essential elements have compared their results with other jurisdictions they deemed being roughly at the same level of (non) compliance with the international standard of transparency and exchange of information and found they received a more favourable judgment. Based on such alleged findings, the issue has been submitted to the Steering Group on whose input the Global Secretariat has drafted a confidential "Note on Horizontal Issues". Although this note is confidential, traces thereof can be inferred from the amendments incorporated in the revised methodology issued on June 1st 2011: in particular, it is foreseen that any issue raised by the assessed jurisdiction shall be addressed in the course of the assessment as far as possible, so to avoid the prompting of debate concerning the finalization of a report within the Peer Review Group. Moreover, it is also stressed in the "Revised Methodology" that the Peer Review Group should give careful consideration to ensure consistency between reports.[555]

In general terms, it could be said that the first batches of peer reviews served as a test for the Peer Review Group in order to assess the previously agreed methodology. Namely, at the beginning of June 2011, a document setting forth a "revised methodology" for conducting peer reviews was issued. The more innovative aspects of the new methodology with respect to the previously adopted one chiefly concern the circulation of the draft reports within the peer review group after the assessors have concluded their analysis and the laying down of guidelines for handling follow up reports, i.e., reports documenting the improvements achieved by assessed jurisdictions that had been found wanting in some of the essential elements constituting the Terms of Reference.

With regard to the circulation of the draft report among the Peer Review Group for comments, it was foreseen, also with regard to the first version of the methodology, that, whereas there is agreement concerning the findings of the report, the latter is meant to be approved by the Peer Review Group if no comment or objection is received by any member of the latter (so called "written procedure"). Since the adoption of reports has however probably involved in some cases more dialectics than expected, the alternative "oral procedure" has been foreseen in cases of issues raised by the assessed jurisdiction or by members of the Peer Review Group.

Based on the revised methodology, it is foreseen that, on the one hand, members of the Peer Review Group setting forth comments or objections are required to clearly outline the background of said comments or objections; on the other hand, the assessment team is expected to act in coordination with the assessed jurisdiction in order to address comments by the members of the Peer Review Group and issue an amended draft report. In case some further issues remain outstanding, they will be

[555] See Revised Methodology, Para. 44.iii, at 9

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highlighted by the Secretariat in a "cover note" as well as in a note prepared by the assessed jurisdiction addressing outstanding issues with the draft report. In this latter respect, it is even foreseen that the assessment process be reopened as the assessed jurisdiction is entitled to support its note on outstanding issues with further supporting materials (e.g., copies of legislation of guidelines) that had not been previously taken into account by the assessing team.

Peer Review Reports adopted with the "oral procedure" are subject to two "readings"; namely after a first explanatory reading, issues raised by the Peer Review Group members are incorporated into the draft report. A revised version of the draft report will then be circulated for a "second reading"; in this phase, it will be possible for the assessed jurisdiction to further challenge the second version of the Draft report even though the final decision in this respect lies on the members of the Peer Review Group (excluding the representative from the assessed jurisdiction shall it have a seat in the Peer Review Group) that, as laid down also in the previous version of the methodology, must adopt the Report by "consensus minus one", according to which "no one jurisdiction can block the approval of the report".[556] Once the report is adopted by consensus within the Peer Review Group, it is transmitted to the Global Forum under the aegis of the Peer Review Group and not as the work of the assessment team. It is foreseen under the revised methodology that any outstanding remark by the assessed jurisdiction be incorporated in a specific and separate Annex, drafted under the sole responsibility of the same assessed jurisdiction; in said Annex the assessed jurisdiction can also make reference to recent or planned amendments to its own transparency and exchange of information framework.

The second main amendment incorporated in the Revised Methodology is the establishment of more articulated guidelines concerning the issue of the follow up reports. Without a proper management of follow up reports, the possibility of prompting jurisdictions to address their deficiencies would be vanified as being awarded a positive evalutation would constitute a mere matter of timing of the publication of the reports, that, by their very nature cannot be but mere snapshots of an existing situation; on the contrary, the Global Forum is concerned with the evolution of the reviewed jurisdictions, both in terms of their legal and implementation framework. As a matter of fact, the findings of a Report may quickly result being outdated as jurisdictions implement to various extent the recommendations included therein; in particular, elements previously not in place may be considered in place or, even though the latter occurrence seems to be less likely, a jurisdiction may lower its level of commitment and make its legal and regulatory less adherent to the standard of transparency and exchange of information for tax purposes.

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[556] See *Revised Methodology*, 9, footnote 8.

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In this respect, the Revised Methodology foresees that within one year[557] of the adoption by the Global Forum of a review report, the assessed jurisdiction is required to provide a detailed written report to the Peer Review Group of the steps it has taken or it is planning to take to implement any recommendations set forth in the Review. Such a structured schedule does not however prevent the possibility for the assessed jurisdiction to submit a written report to the Peer Review Group when it adopts measures that may be such to upgrade the performance under one or more of the essential elements of the Terms of Reference in order to prompt the - of the assessment and the issue of a supplementary report. On the other hand, whereas a given jurisdiction is perceived as having lapsed back from its commitments, the Peer Review Group may autonomously decide to startle a follow up procedure. The latter circumstance appears as a very delicate one and it is not thoroughly clear on what grounds the Peer Review Group may decide to act in such a way. Namely, the general follow up procedure is tailor-made for cases where jurisdictions achieve progress while no similar framework is actually foreseen in the opposite scenario.

Follow up reports imply in any case that the assessed jurisdiction provides to the assessment team a detailed report concerning its actual or planned implementation of the recommendations included in the original report. The assessment team is in turn required to draft a supplementary report where it addresses the developments showed by the assessed jurisdiction and it may set forth revised determinations concerning the essential elements evaluated in the course of the original review. In case the assessed jurisdiction does not prove to have satisfactorily amended its deficiencies, the assessment team may be engaged in a subsequent follow up procedure enabling the assessed jurisdiction to assess the outstanding issues in the meanwhile. Any follow up supplementary report will be subject to the same approval procedure foreseen with regard to the original reports and, in particular, it will have to be approved by the Peer Review Group members by consensus minus one and then submitted to the Global Forum for adoption.

4.5 Key Findings of the Peer Review Process

This Paragraph will be devoted to a critical recollection of the main outcomes to date. As a first step, the quantitative proportions of the peer review efforts will be presented along with a survey summarising the terms of reference of the international standards in relation to which partial or total non-compliance has been highlighted by the assessors.The recollection will be included within the context of available theoretical characterisations deriving from policy analysis as well as juxtaposed to the main

[557] In case the Report addressed some issues that were not in place, the assessed jurisdiction is required to issue an intermediate note after six months from the adoption of the Report by the Global Forum.

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critiques set forth in relation to the work of the Global Forum by scholarship and voices from civil society.

So far[558], the Global Forum has launched ninety six peer reviews[559] and adopted seventy-nine reports. Of the seventy-nine reviews completed, fifty-nine constitutePhase 1 reviews and twenty are combined Phase 1 – Phase 2 reviews).

The reports adopted and published by the Global Forum to date have given rise to seven hundred ten determinations. Of the determinations made, in the vast majority of cases, namely in four hundred ninety five observations, elements have been found to be "in place", while, in relation to one hundred fifty observations elements have been found to be in place but needing amendments; on the other hand, only sixtyfive observations have led to elements being evaluated as "not in place" .

From the perspective of single jurisdictions, the above reported observation translated in only seventeen jurisdictions, out of the scrutinised ninetysix, that were found to feature such shortcomings that were prevented an access to Phase 2 of the peer review process.[560]

Out of the first seventy-nine peer reviews, thirty-two jurisdictions were found to have one or more elements not in place. Out of the remaining forty-seven jurisdictions, thirty-five had elements which needed improvements.

In considering the results of the peer reviews it is of paramount importance to consider the assessments in a dynamic way, given that many jurisdictions have many years of experience of implementing the standard while others have little or no experience in engaging in effective exchange of information. Ultimately, the true test of whether the Global Forum is achieving its goal of effective exchange of information will only be assessed at the end of Phase 2 reviews. Moreover, some jurisdictions have been scheduled for peer reviews earlier than others, giving them the opportunity to follow up on their review and to make further progress.[561]

At the same time, the provisional results of the peer review process reveal, both on aggregated and on an individual basis some interesting tendencies.

A first interesting observation to be drawn from the provisional outcomes of the peer review process is to be found in what could be defined as the "whitest list", that is, the group of Countries that appear to having effectively implemented the international standards having concluded both phases of the Peer Review process without remarks: Australia, China, France, Ireland, Isle of Man, Italy, Japan, Norway, Qatar, and the Seychelles.

[558] The reference date is December 15th 2012

[559] On the other hand, there are thirty member jurisdictions that have not yet undergone the peer review process.

[560] The reference date is December 15th 2012.

[561] Global Forum, *Progress Report to the G20*, June 2012, at 9.

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On the other hand, it is possible to point out at jurisdictions that have reached analogous results although, to date, only in relation to the first phase of the peer review process, namely, India, Malta, Qatar and Seychelles. Of these four jurisdictions, the latter two Qatar and Seychelles, following remarks at the time of the original assessment, underwent supplementary reviews and addressed and implemented the recommendations set forth by the assessors.[562]

Among jurisdictions that received recommendations, the more crowded fold is represented by jurisdictions that were subject to a minimum number of remarks and received up to two recommendations, namely, Belgium, Bermuda, Brazil, Canada, Cayman Islands, Denmark, Estonia, the Former Yugoslav Republic of Macedonia, Germany, Greece, Guernsey, Republic of Korea, Mauritius, Mexico, the Netherlands, New Zealand, Saint Kitts and Nevis, Spain, Turks and Caicos, and the United States.

Eleven jurisdictions have received recommendations for improvement in relation to three or four elements, namely, Bahrain, Chile, Curacao, Ghana, Hong Kong, China, Jersey, Macao China, the Philippines, San Marino, Singapore and Slovak Republic.

Four jurisdictions could be defined as borderline as, although admitted to the second Phase of the peer review, they received up to five recommendations for improvement: the majority of these jurisdiction, namely Andorra, Aruba, Barbados and Malaysia is made up of traditional off-shore centres.

Jurisdictions in relation to which one or more elements were found not to be in place include the following. In particular,Antigua and Barbuda and The Bahamas, the British Virgin Islands, Cook Islands, Gibraltar, Montserrat and Saint Vincent and the Grenadines, Monaco, Saint Lucia, Anguilla Cyprus and Grenada have all found non to be compliant with the standards in the area of availability of accounting information; Luxembourg, Czech Republic and Hungary have been found to be non-compliant with the standards in the area of availability of ownership information and identity while the Austrian domestic framework was found to be substandard in the area of the availability of ownership information. Finally, the United Kingdom and Indonesia were found not compliant with the standards in the area of access to information. (access to information). It is possible to remark that even jurisdictions member of the European Union were still found to be non-compliant with some elements of the standard.

The position of the United Kingdom stands out in particular due to the circumstance that is currently the only jurisdiction having undergone a combined peer review that was found to feature elements “not in place” as well as “needing improvement” (in particular, with regard to Term of Reference A1 concerning the availability of accounting information and Term of Reference C1 concerning the

[562] Ibidem.

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conclusion of legal instruments providing for exchange of information in line with the international standards).

While all jurisdictions mentioned so far have been able to access Phase 2 of the Peer Review process, a real cleavage can be observed in relation to jurisdictions that have received two negative remarks. Namely, while some of the jurisdictions that have scored these results have been admitted into the second phase of the peer review process, such as Jamaica;[563] other jurisdictions that had scored similar results in terms of "elements not in place" were admitted to Phase 2 only subject to conditions. This fold is made up of one of three European jurisdictions, among which one stands out as one of the most "controversial" jurisdictions in Continental Europe, namely Liechtenstein, one appears as the most proactive jurisdictions in providing complementary (or, it may be argued alternative) solutions to the international standards, Switzerland and, the third one, Belgium, appears, among the three Member States that had originally opted out of the automatic information exchange provided for by the European Interest Savings Directive, to be the only one having subsequently opted in. It can then be perceived that although the three concerned jurisdictions share geographic proximity, they appear extremely detached in terms of outlooks and approaches to the issue under scrutiny.

In the case of Liechtenstein two elements, concerning respectively the availability of ownership and identity information and the availability of accounting information), not in place and three other elements, concerning respectively, the rights and safeguards of taxpayers within the purview of access to information by Tax Authorities (Element B.2), Element C.1 concerning the availability of suitable exchange of information instruments and Element C.2 concerning the suitability of the relevant information exchange treaty network, were found to be needing of improvement. Liechtenstein has indicated that it has changed its legislation on accounting requirement and intends to amend it on some other issues since its Phase 1 review and requested a supplementary report.[564]

With reference to Switzerland, two elements, namely, availability of ownership and identity information and the conclusion of exchange of information mechanisms in line with the international standards, found not to be in place, while three other elements, namely the access prerogative of the Tax Administration to relevant information and the safeguard of the rights of taxpayers within the framework of information gathering as well as the current breadth and quality of the Swiss tax information exchange network were found to be needing improvement. In the case of Switzerland, admission into the second phase of the Peer Review process was set to be conditional upon bringing a significant number of its agreements into line with the

[563] Which was found to be sub-standard in the area of "access to information" and in the area of availability of suitable instruments for exchange of information.

[564] Global Forum, *Progress Report to the G20*, June 2012, at 10.

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standard and adoption of an interpretation of all its new treaties in line with the international standard. In particular, the original peer Review Report covering Switzerland, issued in June 2011, found that the Swiss approach to exchange of information were too restrictive. In particular, the treaties concluded by Switzerland following its official endorsement of the international standards of March 13th 2009[565] included rules concerning the identification of taxpayers and third parties affected by exchange of information that were found to be excessively restrictive: in particular, Swiss treaty negotiators required that the name and address of the holder of information be provided.In order to comply with the remarks raised in the first peer review, on February 2011 the Swiss Federal Council announced a change of treaty policy with specific regard to this specific aspect. In this regard, Switzerland has committed not only to relinquish such specifications in view of future treaties but also to review by means of exchange of notes all agreements bearing the aforementioned specifications that have been signed but not ratified; on the other hand, an adaption procedure which, from a Swiss perspective, will have to be validated by the Parliament will have to be activated in relation to the agreements that had already been ratified by the Swiss Parliament.[566] On the other hand, as far as transparency is concerned, Switzerland was found not to be compliant with the standards with reference to the A.1 Term of Reference; this was mainly due to the circumstance that some of the corporate types available under Swiss company law, namely, the *société anonyme* and the *société en commandite par actions*.

In the case of Belgium, the initial Peer Review Report found out that two elements, namely, access to information [567]and availability of exchange of information mechanisms on par with the standard,[568]were not in place, while two other elements, were found to be needing improvement. Progress to the Phase 2 review was conditional on the recommendations being addressed. Subsequently, Belgium has put an end to its domestic bank secrecy meaning that its extensive treaty network[569] now conform to the international standard. This move has been acknowledged by the Global Forum and

[565] A follow up to the declaration of March 2009 was represented by the adoption of an ad hoc Administrative Assistance Ordinance, which entered into force on October 1st 2010. From a legal perspective, a Federal Law was adopted by the Swiss Parliament on September 2012; see Message of the Federal Council of July 6th 2011, FF 2011, at 5571. Already in 2009 Switzerland started concluding agreements based on the standard, leaving aside the issues identified in the 2011 Peer Review Report.

[566] Namely, the agreements with Austria, Denmark, Finland, France, Luxembourg, Mexico, Norway, Qatar, the United Kingdom and the United States.

[567] In particular, Belgian Tax Authorities were found not to have any access to banking information. At the same time, it seems interesting to remark that Belgium had in the meanwhile engaged in automatic exchange of information concerning interest income within the framework of the EU Interest Savings Directive.

[568] The finding can however be considered as circumstantial as, at the time of the review, Belgium was momentarily deprived of a government in office and could not proceed to take the necessary actions in view of the entrance into force of the agreements.

[569] Involving seventy partner jurisdictions.

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Belgium now has all elements in place (but with improvements still needed in one element); this is reflected in Belgium's supplementary report.

In the case of eleven other jurisdictions (Botswana, Brunei, Costa Rica, Guatemala, Lebanon, Liberia, Panama, Trinidad and Tobago, United Arab Emirates, Uruguay and Vanuatu), two or more than two elements were found to be not in place and it was determined at the time of their Phase 1 reviews that critical elements necessary to achieving an effective exchange of information were not in place. Therefore these jurisdictions could not move to Phase 2 review until they act on the recommendations to improve their legal and regulatory framework. Initially, an additional six jurisdictions (Antigua and Barbuda, Barbados, the British Virgin Islands, the Seychelles, Turks and Caicos Islands and San Marino) were also in this category. Each of these six jurisdictions has however subsequently introduced improvements that have been assessed in supplementary reports, and may now move to a Phase 2 review.[570]

In the case of Liberia, it was determined that two elements were not in place (availability of ownership information, and accounting information), with no other elements that need improvement.

In Uruguay, two elements were not in place (availability of ownership information, and a network of exchange of information with relevant partners), with five more elements that need improvement. In Trinidad and Tobago, three elements were found not to be in place (power to access information, exchange of information mechanisms to the standard and a network of exchange of information mechanisms with all relevant partners), with two other elements that need improvement.

In the United Arab Emirates, three elements were found not to be in place (accounting information, power to access information and exchange of information mechanisms to the standard), with three other elements that need improvement.

In Lebanon, four elements were found not to be in place (availability of ownership information, power to access information, exchange of information mechanisms to the standard and a network of exchange of information mechanisms with all relevant partners) and one element that needs improvement.

In Vanuatu, four elements were found not to be in place (accounting information, power to access information, exchange of information mechanisms that meet the standard, and a network of exchange of information mechanisms with all relevant partners) and one element that needs improvement. In Guatemala, four elements were found not to be in place (availability of ownership information, power to access information, exchange of information mechanisms to the standard, and a network of exchange of information mechanisms with all relevant partners) and one element that needs improvement. In Botswana four elements were found not to be in place (access

[570] Global Forum, *Progress Report to the G20*, June 2012, at 7.

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to information, exchange of information mechanisms to the standard, a network of exchange of information mechanisms with all relevant partners, and measures to ensure the confidentiality of information exchanged), with two other elements that need improvement.

Finally, Brunei, Costa Rica and Panama were each found to have five elements not in place (the availability of ownership and identity information, accounting information, powers to access information, exchange of information mechanisms that meet the standard, and a network of exchange of information mechanisms with all relevant partners), and in Panama's case one other element needs improvement. In the case of Panama, a supplementary review has been launched and the action taken by this jurisdiction will be considered in the supplementary review. Botswana, Brunei, Trinidad and Tobago and Uruguay have provided follow-up reports to the Peer Review Group indicating the changes they are each preparing to make. Follow-up reports are due to be provided by Costa Rica and Guatemala in September 2012, and by Lebanon, Liberia and United Arab Emirates in December 2012.

The conclusion of Phase 1 of the Peer Review process offers the opportunity to set forth an assessment of the outcomes not only from a Country perspective but also, on an aggregated basis, by determining which terms of reference exemplifying the international standards of transparency and exchange of information have been the object of more frequent remarks by the assessors.

With regard to the elements relating to the availability of information it is possible to remark that these specific areas stand out as the most critical as they have received the most negative or partially negative assessment in absolute terms. In particular, the deficiencies identified in these areas have resulted in determining that ownership information was not in place in thirteen jurisdictions and accounting information was found not to be in place in nineteen jurisdictions. In particular, it resulted that in a number of jurisdictions, there are no obligations to maintain information on offshore activities. In a number of jurisdictions, offshore activities are not covered by any obligations to ensure the availability of information. Other shortcomings identified include the fact that bearer shares, which as already mentioned, result being incompatible with the international standards of transparency, are a common feature in many jurisdictions. Moreover, nominees are used in some jurisdictions where deficiencies exist in identifying on behalf of which person a nominee acts. Also, the obligations to hold identity and accounting information in respect of trusts are not consistently ensured in legislation.

On the other hand, access powers granted to competent authorities for exchange of information purposes have been found to be adequate in most cases as these specific elements were found not to be in place in only twelve jurisdictions. The main issues are the retention of a domestic tax interest requirement, a lack of power to

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access offshore business information, and domestic restrictions on access to bank information. In particular, the Global Forum has clearly stated that jurisdictions should not insist on being provided with the name and address of the taxpayers for a foreseeably relevant request to be satisfied, provided the taxpayer can be identified through other means. Jurisdictions where such a restriction has been identified are introducing new legislation or amending their treaties to bring them into line with the standard.

The key deficiencies identified in respect of exchange of information chiefly concern lack of legislation in place to give legal effect to these mechanisms (e.g. arising from deficiencies in the competent authority's access powers) and not completing the necessary ratification procedures to bring the signed exchange of information agreements into force.

A somewhat more controversial aspect of the whole peer review exercise concern the circumstance that elements pertaining to the confidential treatment of the exchanged information and the existence of sufficient rights and safeguards for taxpayers have generally been found to be in place; at the same time, as it has already been remarked on multiple occasions in this work, the lack of a comprehensive approach to the safeguard of taxpayer rights constitutes, to date, one of the most perceivable blank areas within the international standards.

As with regard to the size and relevance of the treaty networks, major progress has been made with more than 800 tax information exchange agreements and double taxation conventions signed since 2008. Besides sheer numerology, it seems worth underlying that, based on recent surveys conducted by the Global Forum, cases where a request to negotiate an information exchange agreement has not been responded to positively qualify as marginal.[571]In this regard, emphasis has been shifted from the very issue of concluding an exchange of information instrument and the choice between the different available instruments, with possible contrasts between the intention to negotiate a T.I.E.A. and that of concluding a general tax treaty.

Based on the above reported findings, a number of tentative conclusions would seem drawable.

First, it seems that information exchange has increased dramatically in recent years, primarily reflecting the implementation of international legal instruments such as T.I.E.A.s that provide a legal basis to exchanges of information upon request. Second, the resulting data would seem to suggest that patterns have remarkably changed; namely, while in the past information exchange was more frequent between neighbouring Countries roughly featuring the same characteristics, reflecting, for instance variables such as the cross-border traffic of labour, it is now possible to

[571] Reported by Global Forum, *Progress Report to the G20*, June 2012, at 14.

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observe a dematerialization of information exchange so the Countries most likely to be bound by information exchange agreements are those tied by significant flows of capital and, in particular, portfolio investment. Against such a background and within such a newly defined context, there are potential determinants that may positively affect the amount of information exchanged such as the presence of a common language and the conclusion of treaties by neighbouring Countries of either Contracting States.[572]

One of the more laudable features of the peer review procedure administered by the Global Forum consist in the follow up dynamics to peer review reports.

Namely, reviewed jurisdictions are expected to report within twelve months following their review on how they have addressed any deficiencies to support this process of change. Where a jurisdiction has made significant progress in addressing deficiencies which were identified in the initial Phase 1 Report, the Global Forum may issue a supplementary Phase 1 Report to reflect the progress. To date, thirteen supplementary reviews have been completed and another two have been launched upon request from the reviewed jurisdictions. Out of the thirteen completed supplementary reviews, sevenconcern jurisdictions which initially could not move to Phase 2, namely Antigua and Barbuda, Barbados, Belgium, British Virgin Islands, San Marino, Seychelles and Turks and Caicos Islands. In each case, the Global Forum approved that the jurisdiction had reached a level of compliance that rendered it suitable to move to a Phase 2 review

[572] These latter findings, that are derived from qualitative observations of the author have partially been foreseen by Keen M., Lighthart J.E., *Information Sharing and International Taxation. A Primer*, International Tax and Public Finance12 (2006), at 100. It may however be observed that, since the vast majority of traditional off-shore jurisdictions are Anglophone, the correlation between language and the number of concluded agreements may be biased due to the English language the most widespread worldwide, not only in terms of numbers of speakers but also in relation to the absolute number of Countries that adopt English as their official language.

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5 PART 4: BEYOND THE CURRENT INTERNATIONAL STANDARDS

5.1 Introductory Remarks

The previously conducted analysis could lead, *inter alia*, to corroborating the conclusion according to which the international standards of exchange of information substantially adopt the OECD Model T.I.E.A. as a primary basis[573]; more correctly it could be argued that, while the international standards do not impose the OECD Model T.I.E.A. as the sole legal instrument suitable to ensuring effective exchange of information, the same Model T.I.E.A. serves as a minimum common denominator so that when administrative co-operation is carried out on the basis of other legal arrangements, it should be made sure that the exchange of information prescriptions and conditions laid down in the OECD Model T.I.E.A. are reproduced therein.

In this regard, the international standards of transparency and exchange of information represent only a fraction of the full potential currently offered by other model legal instruments as well as by some national and regional items of legislation.

These enhanced forms of co-operation involve other forms of exchange of information practices and assistance in the carrying out of tax audits. Due to their proximity, yet externality to the currently defined international standards and due to the circumstance that recent policy papers issued by the OECD point in the same direction, these forms of administrative co-operation could aptly be defined, on the one hand, as standards beyond the (current international) standards, on the other hand, assuming an evolutionary perspective, they may be pointed out as new standards in crystallisation.

While it cannot be excluded that some of forms of assistance analysed hereinafter will actually be implemented, also taking into consideration that some of them are actually already being implemented on a bilateral or regional scale, their actual consolidation into internationally agreed standards will ultimately depend on the consolidation of a widespread political will, not unlike what happened in relation to the current international standards, which, although having been in place for almost a decade, came to topical prominence only in 2009, following the now famous G20 April 2009 declaration.

The policy options analysed in the following sub-chapters can be grouped in three main groupings. The first grouping revolves around alternative forms of exchange of information, in particular, the highly debated automatic exchange of informationand the less debated yet probably even more critical, in the light of the chiefly narrow

[573] See Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions, at Para. 5, where it is mentioned that "the principles of transparency and effective information exchange for tax purposes are primarily reflected in the 2002 OECD's Model Agreement on Exchange of Information on Tax Matters (the OECD Model TIEA)".

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bilateral form through which exchange of information is currently carried out, form of exchange of information usually defined as "spontaneous exchange of information". These forms of exchange of information formally fall outside the scope of the OECD Model T.I.E.A. and, while abstractly mentioned in the OECD Commentary to Art. 26 of the OECD Model Convention, are not specifically commanded in the concerned model provision. The only legal bases for automatic exchange of information fall outside the scope of the so-defined sources of the international standards; in this regard it cannot be denied that an apparent cleavage can be found before the international standards can be expanded in these directions.

An even more peculiar form of exchange of information would consist in information sharing, which, to date has chiefly been promoted by networking efforts carried out by Tax Administrations.

The second block of administrative practices somewhat go beyond the dematerialisation that constitutes one of the key aspects of administrative co-operation based on exchange of information. Instead of exchanging an object such as information, tax administrations would directly interact in the form of simultaneous tax examinations, tax examinations abroad and industry wide examinations.

The third line of enquiry does not address specific forms of administrative co-operation but, rather, its institutional design; namely, whereas administrative assistance is chiefly supplied within the context of bilateral forms of exchange of information, a policy orientation advocating a more widespread dissemination of multilateral instruments as a basis of administrative co-operation can be observed.

The following sub-chapters will analyse initiatives outside those blossomed within the European experience, as the latter follow different logics and are typically grounded on different legal basis and pursue different objectives; the "European way" to administrative co-operation will instead be analysed in the following Part of this study.

5.2 Automatic Exchange of Information

Automatic exchange of information consists in a systematic flow of information about one or various categories of income. The flow of information is typically established at set times and generally carried out on an aggregated basis: thus, the expression "routine" exchange of information[574]would seem to be a more careful description of this specific administrative practice since it is not carried out in a contemporaneous fashion, as the word "automatic" would instead apparently suggest.

[574] Which was used in earlier scholarship and policy documents.

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Some voices from civil society[575]refer to automatic exchange of information as the most advanced form of exchange of information; at the same time, as previously illustrated in this work,[576] it can be observed that automatic exchange of information was conceived as a policy option in the earlier days of the League of Nations work in the area of international taxation and, from an implementation perspective, was explicitly featured in the 1939 between Sweden and the United States.

The first coherent outline of an automatic exchange of information mechanism is however to be found in the London Model Treaty of 1946, whose Art. 3 explicitly calls for automatic exchange of information in relation to some specific categories of income. The function pursued by automatic exchange of information was to facilitate residence taxation of the income and to ensure that the persons benefitting from the treaty actually qualified as residents of either Contracting States.

However, the automatic exchange models was later discontinued based on the circumstance that, since administrative assistance had to be reciprocal in nature and that not all States would have the facilities to provide such information so that the only reference to be found in the OECD Commentary to Art. 26 of the OECD Model chiefly serves a taxonomic purpose, where automatic exchange of information is juxtaposed to the mainstream exchange of information upon request and to spontaneous exchange of information.[577]

On the other hand, the OECD has been a happening meeting point for tax administrators who, in some cases, have started to establish programmes for automatic exchange of information. In this regard, the OECD played a remarkable role as a discussion forum which led to the issuing of some recommendations concerning the adoption of a common transmission format.[578]

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[575] One of the strongest statements came from Indian Prime Minister Manhoman Singh, who suggested that “G-20 countries should take the lead in agreeing to automatic exchange of tax related information with each other . . . in the spirit of our London Summit [declaration] that 'the era of bank secrecy is over'.” PM Sends Strong Message to Stop Tax Evasion, IBN LIVE (Nov. 3, 2011), http://ibnlive.in.com/news/sendstrong- message-on-tax-evasion-pm-to-g20/198996-2.html. The Tax Justice Network has been particularly active and effective in encouraging civil society to focus

on the issue of automatic exchange of tax information.

[576] See in particular the work by the earlier cited Tax Justice Network.

[577] See Para. 9

[578] See OECD Council Recommendation C(81)39, dated 5 May 1981, entitled *Recommendation ofthe Council concerning a standardised form for automatic exchanges of information underinternational tax agreements*, the OECD Council Recommendation C(92)50, dated 23 July 1992, entitled *Recommendation of the Council concerning a standard magneticformat for automatic exchange of tax information*, the *OECD Council Recommendation onthe use of Tax Identification Numbers in an international context* C(97)29/FINAL dated 13 March 1997, the OECD Council Recommendation C(97)30/FINAL dated 10 July 1997 entitled *Recommendation of the Council of the OECD on the Use of the RevisedStandard Magnetic Format for Automatic Exchange of Information* and the *OECDCouncil Recommendation on the use of the OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes (C(2001) 28/FINAL),*

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Even more remarkably, a recent Survey published by the OECD[579] which found echo also in an OECD Progress Report by Secretary General Gurría,[580] appears to having adopted a much more supporting view of this specific administrative practice than what seemed to be the case when the current internationally agreed tax standard. In particular, the new OECD documents underlined the specific contributions automatic exchange of information can offer and it also provided previously unavailable data on the dimension of this particular phenomenon, suggesting that automatic exchange of information is more widespread than what might ordinarily be perceived.

As a tool to counter offshore non-compliance automatic exchange has a number of benefits. It can provide timely information on non-compliance where tax has been evaded either on an investment return or the underlying capital sum. It can help detect cases of non-compliance even where tax administrations have had no previous indications of non-compliance[581]. Other benefits include its deterrent effects, increasing voluntary compliance and encouraging taxpayers to report all relevant information.[582] Automatic exchange may also help educate taxpayers in their reporting obligations, increase tax revenues and thus lead to fairness: in this regard, as it has convincingly been argued, automatic exchange of information sorts a distinctly positive effect on the overall tax morale, defined as the voluntary willingness by taxpayers to co-operate.[583]

Automatic exchange of information would also appear to provide materials suitable to be uploaded to a database accessible for the purpose of risk analysis, thus, not only making ex ante observation swifter and more accessible but also contributing to more targeted ex post investigations.

One the other hand, one string of problem that might be related to the effective implementation of a routine exchange mechanism is essentially practical: that of how to make effective use of information that is or could be received. It seems clear that, in the past, much of the information that tax authorities have received automatically from others has gone essentially unused. Finding ways to utilize the mass of information received under automatic sharing agreements is a significant technical challenge. In frameworks enabling the provision of information on request, the key challenge would seem to be to develop audit selection methods that have the appropriate disciplining effects on taxpayers whilst still meeting the prohibition of fishing expeditions. Not least, ways will need to be found to make it clear to taxpayers that information is not only

[579] OECD, Automatic Exchange of Information: What it is, How it works, Benefits, What Remains to be Done, Paris, 2012

[580] OECD, *Tackling Offhore Tax Evasion The G20/Oecd Continues To Make Progress, Report By Secretary-General Gurría Of The OECD*, Paris, 2012

[581] See OECD, Automatic Exchange of Information: What it is, How it works, Benefits, What Remains to be Done, Paris, 2012, at 19.

[582] Ibidem

[583] Grinberg I., *The Battle Over Taxing Offshore Accounts*, 60 UCLA Law Review (2012), at 355 et seq.

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shared, but also used effectively. This may require rather more transparency in these matters than is normal at present.

In particular, international co-operation calls for some answer to the problems of distribution of the benefits arising from the regime and monitoring of compliance with the foundations of the same regime. Multiple solutions are possible in this regard and actors have divergent preferences over those solutions. Because economic and political issues are complex, actors cannot always have clear preferences over which courses of action produce the most desirable outcomes. Communication can help to

alleviate the collective problem of lack of knowledge of the consequences of different actions. In this regard, a properly designed coordination body, a first expression of which could be found in the Global Forum for Transparency and Exchange of Information plays a pivotal role in addressing these different issues jointly.

Although Art. 26 of the OECD Model Convention typically does not provide for a specific set of rules concerning routine exchange of information, such a treaty instrument typically constitutes the relevant legal basis; however, due to the specific peculiarities inherent to automatic exchange of information, the actual terms and conditions of said form of administrative co-operation are defined in an ad hoc Memorandum of Understanding. Such a Memorandum of Understanding typically sets forth the types of information to be exchanged automatically, details about the procedures of sending and receiving information and the appropriate format to use. specifically requires an agreement between the Parties willing to provide each other information automatically.

In this regard, the most developed model for supporting automatic exchange of information is to be found in the Memorandum of Understanding developed in 2001, in pursuance of Art. 6 of the 1988 Strasbourg Convention. This Memorandum of Understanding appears as particularly meaningful as recent attempts to institutionalise routine exchange of information in some regional legal instruments, such as Directive 15/2011/EU have been inspired by the 2001 Memorandum of Understanding.

In particular, said Memorandum of Understanding foresees the routine transfers from the source State to the State of residence of concerned taxpayers of information concerning the following areas:[584]

- transfer of residence from one State to another;
- the ownership of real estate in either Contracting State;
- items of investment income such as dividends, interest, royalties;
- capital gains;
- directors' remuneration;

[584] See Art. 2 of the Memorandum of Understanding.

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- income from dependent services;
- income earned by artists and sportsmen;
- pensions;
- government;
- VAT refunds, commissions and other analogous payments.

The Standard Magnetic Format[585] developed by the OECD in relation to the Memorandum of Understanding requests that, along the information regarding the specific items of income listed above, some specific data are transmitted. In particular, in relation to both the paying agent and the beneficial owner of the income the following identification details must be provided:

- the name;
- the date of birth;
- the address;
- the tax identification number.
- Specific tracking information are also to be provided in relation to the:
- fiscal year;
- date;
- payment mode;
- payment currency;
- payment amount (gross);
- applicable withholding tax rate in the source State;
- applied tax in the source State;
- tax refund regime (in relation to refunds, for instance to VAT refunds).

The foreign source information received on magnetic media or in digital form can be input into the recipient tax data base (often using bridging programs to capture the relevant information) and automatically matched against the income reported by the taxpayer. This possibility for cross-checking appears as being the key feature of automatic exchange of information; thus the existence of effective and commonly shared transmission formats is essential to the well-functioning of this administrative practice and surpasses in importance the mere circumstance that information is transferred on a routine basis.

[585] The OECD has recently introduced a more advanced standard using XML language (“STF”). As currently the SMF and STF both exist depending on the tax administration, bridging programmes have been developed to achieve conversion between the two formats, thus enabling treaty partners to engage in bilateral automatic exchange notwithstanding that they might each use a different standard format.

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The use of a common format (which will likely increasingly be geared towards a digital rather than a magnetic one) is not only considered the most cost-effective way to process the exchanged information but also carries the merit of enabling a more effective and efficient distribution of the information across different segments of the receiving Tax Administration or, shall it prospectively be allowed on the grounds of the 2012 amendments to Art. 26, among Tax Authorities and other regulatory authorities in the receiving State.

From an administrative point of view, the procedure underlying routine exchange of information can be broken down in some key steps.

The first step concerns, as for exchange of information upon request, information gathering. In this regard, although neither the legal bases providing for automatic exchange of information nor the 2001 Memorandum of Understanding explicitly mentions the involvement of some private intermediaries; however, when analogies are made with similar analogous situation, that is, when Tax Administrations are engaged in observations, it can intuitively be concluded that private intermediaries and, in particular, in relation to investment income, financial intermediaries, shall likely play a prominent role. This assumption is confirmed also by empirical evidence, as it can be remark that the only major scale mechanism providing for automatic exchange of information, namely the European Savings Directive, lies on the existence of an institution acting as paying agent, gathering information about beneficial owner and then transmitting it to its Tax Administration of reference which, in turn, would be entrusted with implementing the automatic exchange of information. This would imply that the information gathering pipeline and information gathering prerogatives would be arranged in a totally different way from the one foreseen in relation to exchange of information upon request.

The different pipeline implied by automatic exchange of information when compared to exchange of information upon request is also illustrated by the steps into which automatic exchange of information is typically articulated based on a recent survey issued by the OECD (hereinafter, also “the Survey”).[586]

Namely, according to the earlier cited survey, the basic process of automatic exchange of information can be divided into seven steps:

1. the payer or paying agent collects information from the taxpayer and/or generates information itself.
2. the payer or paying agent reports information to the tax authorities.
3. Tax authorities consolidate information by country of residence.
4. Information is encrypted and bundles are sent to residence country tax authorities.
5. Information is received and decrypted.

[586] OECD, *Automatic Exchange of Information: What it is, How it works, Benefits, What Remains to be Done*, Paris, 2012, at 9

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6. Residence country feeds relevant information into an automatic or manual matching process.

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

Throughout the entire process feedback can be given from the receiving to the sending country, but also from the country collecting the information to the reporting payers or paying agents. Feedback to the sending country is essential to improve the efficiency of automatic exchange of information. Feedback from the receiving country on information exchanged automatically (not purely from an IT perspective) is crucial to make better use of what is exchanged. Feedback may also be useful to tax administrations for justifying resources for exchange of information. Feedback includes comments on the accessibility, accuracy, and completeness of the data received as well as comments on the percentage of records that have been matched, the usefulness of the data etc. [587]

While the circumstance that, although there are different legal bases that could support automatic exchange of information, there are very few recorded ad hoc legal instruments regulating it, the results of the same recent survey by the OECD show that the use of routine exchange of information is more widespread than it could be presumed.

In particular, of the thirty-eight Countries covered by the survey, all of them receive information automatically from treaty partners while 85% of the examined Countries is also active in providing information on an automatic basis. Denmark, as the country with the largest number of automatic exchange relationships sends information automatically to seventy countries.

The Survey also explores the qualitative dimension of routine information exchange; namely, it is not only a matter of volume of exchanged information but rather of whether Tax Administrations can take advantage of the information exchanged automatically in order to enhance compliance among the fold of its taxpayer. Empirical evidence provided by the 2012 OECD Survey would seem to be comforting also in this regard, even though retrieved data concern Nordic Countries that may not be fully representative of an overall trend. In particular, it is reported that, in 2009, Norway received automatic exchange of information from a number of its treaty partners. Files above a certain threshold were verified against the returns of income filed by taxpayers in Norway. Results of the investigation disclosed that in 38.7% of the cases incomewhich was taxable in Norway had not been reported.[588]

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[587] A standard format for feedback has been developed by the OECD under the name of “automatic exchange of information toolkit”.

[588] OECD, *Automatic Exchange of Information: What it is, How it works, Benefits, What Remains to be Done*, Paris, 2012, at 20.

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In some cases, the deterrence effect on international tax evasion, that is typically an objective associated with any form of exchange of tax information, can be further enhanced when information is exchanged automatically. For instance, widespread notification of incoming automatic flows of tax information carried out by the Danish Tax Authorities led to an additional 40% of taxpayer to report foreign income which had been undeclared in the previous Fiscal Year.[589]

While the work on automatic exchange has shown that automatic exchange can be an effective tool for compliance it has also identified some challenges and areas where more work needs to be done on both the practical and policy sides.[590] The true measure of success is not the quantity of information exchanged but the compliance that is achieved. Also important is to reduce as much as possible related compliance costs, through, for instance, common standards and processes, for third parties and tax administrations. Finally, a cost/benefit analysis in respect of the different types of information exchanged and the level of detail needed to support it may allow Countries to focus on further efficiencies.

In order to ensure concrete results from automatic exchange it is essential that the receiving country is able to match the information received and use it within their tax administration. Given that the information is “bulk” information a process of automatic matching will often be essential. Thus, if the information collected in one country is aligned with the information needed in the other countries, a common standard of what is collected and what is used in matching and compliance can greatly improve effectiveness of automatic exchange. Standardisation of reporting and due diligence will also reduce compliance costs.

For instance, the OECD survey indicates that when the residence country receives information which contains a Tax Identification Number (TIN), the matching rate is increased significantly and as a result the identification of the taxpayer. For example, the results of the survey indicate that on average the matching rate increases by 30% if the residence country TIN is provided. Absent a TIN, the data items most frequently required by the residence country to identify its taxpayer are name, address

[589] Ibidem.

[590] In relation to past US experiences with routine exchange of information, it has been observed that some key issues with this form of exchange of information consist in volume of exchanged information that may subject the receiving and providing Tax Administrations to considerable stress and in the timing of the exchange, which may very detached from the filing dates of the related tax return, thus making the earlier mentioned cross-checking activity more arduous. Overall, previously encountered challenges met with regard to automatic exchange of information referred to it as “difficult, time consuming and expensive”. See Zagaris B., *The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots?*, 35 George Washington International Law Review (2003) at 349. For a critique of automatic exchange of information as a tricky one-size-fits-all solution see also, with specific regard to the European experience in the area of the taxation of savings, Aujean M., *Savings Taxation: Is Automatic Exchange of Information Becoming a Panacea?*, EC Tax Review 1 (2010)

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and date of birth, with almost all countries already requiring the capture of name and address.

Another major issue in relation to automatic exchange of information concerns the possibility to reconcile such an administrative practice with the framework for ensuring effective safeguard in relation to taxpayers affected by exchange of information. The first issue would clearly concern ensuring that information which is received on a routine basis be subject to a rigorous confidentiality regime. A more subtle issue concerns the possibility to reconcile automatic exchange of information with specific rights granted by the domestic laws of some Countries such as the right to be informed about information concerning its tax position be exchanged.

In conclusion, it can be argued that the one between routine exchange of information and other forms of exchange of information, such as exchange of information upon request, is somewhat of a false dichotomy from a policy perspective: namely rather than alternative, the two practices should be seen as complementary in the sense that they fulfil different functions within the framework of the transnational information gathering activity of tax administrations.

The real policy question should then not be whether automatic exchange should be adopted but how and in which context.

A first remark concerning implementation is that the most burdensome administrative implication of routine exchange of information would lie in the gathering of great amounts of information on a systematic basis rather than in the actual routine transfer of said information. In this regard, it may be argued that, considering that automatic exchange of information is typically focused on items of income earned by non- residents that are however earned through the intervention of intermediaries (financial intermediaries for investment income and corporations and public bodies as far as employment income is concerned), it might be argued that a direct involvement of said intermediaries in information gathering activities, as it is typically the case also within a purely domestic context, appears as the best policy option to make routine exchange of information more sustainable.

A further difficulty to be addressed would be how to make the exchanged information targeted and manageablein the hands of the recipient State to carry out cross-checks. In this regard, a major role, not to be underestimated, would be played by the format in which information is exchanged on a routine basis

On the other hand, from a policy perspective, the most delicate challenge would be to reconcile the guarantee of certain taxpayers’ rights, such as for instance, notification rights for taxpayers concerned by exchange of information with a practice such as that under scrutiny. In this regard it may however also be argued that such rights may be contractualised, in the sense that, for instance, once a foreign investor sets up an account at a bank in a Country which has committed to provide information

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on a routine basis to its Country of residence, it should be foreseen that the client be made sign a declaration of consent and be notified at the end of each relevant period with the kind of information which has been transmitted by the financial institutions to the local Tax Authorities and that would be subsequently forwarded at set intervals to the residence State of the investor.Thus, it may be concluded that automatic exchange of information can only be considered suitable in relation to categories of income that are earned through the involvement of an intermediary and should then reasonably be limited to investment income and employment income.

5.3 Spontaneous Exchange of Information

Spontaneous exchange of information, not unlike automatic exchange of information, is not explicitly foreseen by Art. 26 of the OECD although it is mentioned, along exchange of information upon request and automatic exchange of information, as one of the possible forms of exchange of information.

Based on the OECD Commentary to Art. 26 of the OECD Model, information may be exchanged spontaneously when a State, having acquired through certain invetigations, information which it supposes to be of interest to the other State, forwards the same information to the other State upon an autonomous initiative.[591]

This form of exchange of information appears as particularly interesting and potentially innovative from at least two perspectives.

From an institutional stand point, spontaneous exchange of information is form of administrative co-operation which more clearly depicts the already mentioned trend towards increased cross-border networking between Tax Administrations of different Countries.[592]

A second peculiarity of spontaneous exchange of information is that, even though there would seem to be no doubt that the reference contained in the OECD Commentary to Art. 26 is firmly grounded on the bilateral structure embedded in double tax treaties, such a form of administrative co-operation appears as the most suitable channel through which it would be possible to overcome these strict bilateral boundaries, and their connection with an apparently outdated view of the principle of reciprocity in the international relations between Tax Administrations, in favour of a

[591] See Para. 9 of the OECD Commentary to Art. 26 of the OECD Model.

[592] The great policy relevance of spontaneous exchange of information in fostering dialogue between Tax Administrations has been perceived also by the OECD, according to which "*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. Because of its nature, spontaneous exchange of information relies on the active participation and co-operation of local tax officials (e.g. tax auditors, etc.). 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 tax investigation.*" See OECD, Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – Module 2 on Spontaneous Exchange of Information, Paris, 2006.

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more fertile pattern of multilateralisation. In particular, although information transmitted on a spontaneous basis, typically derives, even in the earlier recalled definition provided by the OECD Commentary, from the carrying out of investigations by the forwarding State, once the outdated reciprocity framework and the deriving corollary in terms of non-divulgability of information received by another Contracting State be removed, there would be no reason for a State which has received certain items of information from another State to forward to a third State some of the items of information that may be of concrete relevance to the latter State.

There have been clear recent examples of such a practice in relation to information illegitimately acquired through tax intelligence operations by some Countries, such as Germany and France and transferred to other European Countries, as said information referred also to residents of the latter.[593] These transfers of information have been carried out without a proper legal basis other than that providing for spontaneous exchange of information, based on the somewhat hypocritical assumption that the forwarded information had been obtained through "domestic" investigations. In this regard, there would seem to be no reason to deny that similar outcomes may be reached in relation to analogously extraterritorial information which has however been obtained as the result of an exchange of information procedure with a third Country.

In this regard, it could be argued that the spreading of spontaneous exchange of information within such a context may be the key to opening up tax law to an implicit most favoured nation clause.[594] Such a form of dynamic multilateralisation of bilateral legal instruments has somewhat been anticipated by the "multilateral version" of the OECD Model T.I.E.A.s, that, once implemented, would actually result in a bundle of bilateral agreements, which has however not been implemented in practice to date. This approach would probably be most suitable one to ensure a smooth transition out of the current dichotomy between the multilateral substance that appears to be inherent to the international standards and the bilateral form into which they have mostly been conveyed so far.

At the same time, in order to be sustainable both for the supplying and the supplied State, spontaneous exchange of information should take place only when specific circumstances occur. Based on administrative guidelines provided by the OECD, this form of information exchange may take place in particular when one of the following situations come into being:

[593] The reference is clearly to the LGT Bank and HSBC Geneva affairs.

[594] For an introduction to the specific opportunities and challenged offered by the most favoured nation clause within an international tax law (bilateral) setting, reference can be made to Kofler G.W., *Most-Favoured-Nation Treatment In Direct Taxation: Does Ec Law Provide For Community Mfn In Bilateral Double Taxation Treaties?*, 5 Houston Business and Tax Law Journal 1 (2005), at 1.

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a) the competent authority of a Member State has grounds for supposingthat there is a loss to the tax authorities of another Member State;

b) transactions between a taxpayer of a State and a taxpayerof another State are conducted through one or more countries in a way that a tax savings could be achieved to the detriment of one or more Countries;

c) the competent authority of a Member State has grounds for supposingthat a saving of tax may result from artificial transfers ofprofits within groups of enterprises;

d) there is a likelihood that "tax avoidance or evasion schemes" are been put in place by a taxpayer.[595]

According to OECD guidelines,[596] the Tax Administration providing information spontaneously, should include the following details in the transfer:

- the identity of the personsto which the information isreferred;
- the identity of the person from which the information has beenobtained and, if relevant, the relationship with the person to which the information relates;
- if the transaction involves an intermediary, data relating to the latter;
- the reasons which led the transmitting administration to believe that the transmitted information is relevant for the receiving administration;
- the source and mode of acquisition of the provided information.

In addition, the transmitting authorities should inform the receiving administration also of the following:

- whether concerned the taxpayer has been informed about the exchange ofinformation;
- whether there are causes that prevent the disclosure of information.

Not unlike other forms of exchange of information, feedback mechanism constitute a very important tool to further develop co-operation. Due to the relevance of spontaneous exchange of information to the tackling of forms of international tax avoidance and evasion, the recommendation issued by the OECD, according to which, feedback by the supplied State should in particular encompass '"additional tax revenue raised" and detected "tax evasion methods” appears particularly worthy of mention.[597]

[595] OECD, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – Module 2 on Spontaneous Exchange of Information*, Paris, 2006

[596] Ibidem

[597] Ibidem

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5.4 Data Sharing

The three modes of exchanging information analysed so far, namely, upon-request, automatic and spontaneous, should not be considered exhaustive either because these three different approaches can be mixed or because brand new system are also admissible even according to the Commentary .[598]

Among the possible alternative forms of information-based administrative co-operation, a prominent role appears to be played by could be defined as “data sharing”, which would consist in the setting up by two or more Tax Administrations of a common platform for sharing tax relevant information.

An example in this regard could the one under which some national Tax Administrationshave developed informal cooperative networks, such as the Joint International Tax Shelter Information Centre (J.I.T.S.I.C.), established by a Memorandum of Understanding between Australia, Canada, the United States, the United Kingdom and Japan (China is an observer). The legal basis to these enhanced forms of co-operation typically lie in the same bilateral treaties that enable other forms of information-based administrative co-operation.

J.I.T.S.I.C. was formed in 2004 as a distinct international unit established under a Memorandum of Understanding between Tax Administrations. It is staffed by delegates seconded for extended periods with the simple remit: to supplement the work of their tax administrations in identifying and curbing cross border tax avoidance by operating more effectively through double taxation agreements.

The purpose of J.I.T.S.I.C. is to:

- provide support to the parties through the identification and understanding of abusive tax schemes and those who promote them.
- share expertise, best practices and experience in tax administration to combat abusive tax schemes.
- exchange information on abusive tax schemes, in general, and on specificschemes, their promoters, and investors consistent with the provisions of bilateral tax conventions.
- enable the parties to better address abusive tax schemes promoted by firms and individuals who operate without regard to national borders.

Since 2009, J.I.T.S.I.C.'s work programme has expanded to reflect issues of interest in other international groupings such as the OECD Forum on Tax

[598] See Para. 9.1 of the Commentary on Article 26 concerning the Exchange of Information.

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Administration. These have included issues arising from the economic crisis, offshore arrangements, transfer pricing administration and high net worth individuals.

More generally, in addition to case specific exchanges of information, participants regularly exchange anonymised details of new avoidance schemes and trends. This is very valuable in keeping everyone up to date with reference to "real-time" developments as they are seen on the ground. We may have to live with the fact that we are always going to lag behind tax planners but this does help to level the playing field, shortening the time between schemes being put into play and member countries becoming aware of them.

Finally, J.I.T.S.I.C. members share developments in case law and tax legislation, along with a wide range of administration and policy issues.

J.I.T.S.I.C.appears a particularly meaningful example of enhanced co-operation among Tax Administrations centered upon knowledge sharing. In this regard, it seems interesting to remark that the OECD has recently activated a tax arbitrage database accessible to member Tax Administrations and in general terms it is the view of this author that similar fora should become increasingly prevalent not only because they would add a new dimension to the consolidating standards of transparency and exchange of information but also because they fit naturally in the increasingly networking pattern that has started involving Tax Administrations. In this regard, while there is no doubt that such a form of co-operation postulates a multilateral approach, there might be different takes on the subject. For instance, by admission of its members, “J.I.T.S.I.C. seems to be close or probably already be at its optimum size”[599]. In this regard it may be argued that the optimal approach may be constituted by the networking of several small regional fora in order to ensure that earlier referred “optimal size” is met.

5.5 Enhanced Forms of Administrative Assistance

5.5.1 Tax Examinations Abroad

When putting the juridical framework of the exchange of information into a historic perspective, the notion of “auditing”, i.e. examining business accounts has steadily increased in importance.

Compared to the version of 1963, the 1977 version of the OECD Model Convention was extended in the sense that exchanging data was no longer restricted to data that tax administrations already possessed (available to them in an orderly fashion). The treaty partners are obliged, if necessary, to institute special investigations

[599] See interview on JITSIC to Dave Hartnett, Permanent Secretary for tax, HM Revenue and Customs. Retrievable at the following website: http://www.businessifc.com/articles/Dave-Hartnett-Interview-JITSIC-six-years-on.htm

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or special examinations of the business accounts in order to be able to provide the requested information.[600]The goal of instituting and carrying out such an examination is gathering information and is purely a national matter.

A type of mutual assistance that reaches further than exchanging information is providing assistance in person, or officials being present at an examination. In 1977, Art. 6 of the Mutual Assistance Directive created the possibility for officials of the tax administration requesting information to be present at an examination of business accounts in another Member State. This possibility was given to tax officers instead of the competent authorities of the state.

The Commentary on Art. 26 of the OECD Model tax Convention points out that the (traditional) forms of the exchange of information referred to in the Commentary on Art. 26, i.e. on request, spontaneous and automatic, can be combined, and that Art. 26 does not restrict the possibilities for exchanging information to these three forms. In addition, countries can use other instruments to gather information, such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information.

Two of these instruments are relevant within this context, notably “simultaneous examinations” and “tax examinations abroad”.[601]

In simultaneous examination, each tax auditor involved in principle operates in his own territory. In the second instrument, tax examinations abroad, tax auditors from one state are allowed to be present in the territory of the other country. Reciprocity generally is a requirement for the latter type of cooperation, though. Moreover, national legislation and administrative practice may impose restrictions. Some countries rule out active participation in examinations by tax auditors from another country, or allow such participation only with the consent of the taxpayer involved.

Presence of officials in the other Country/Member State should not be confused with a tax examination abroad due to relocation of business accounts. In both cases the tax auditor enters the territory of the other country. In the case of the “presence of officials”, this always occurs within the context of a request for information to another state. This means that a form of mutual assistance is provided: due to the request for information of state A, an examination in state B is made by an official of state B in the presence of an official of the requesting state A.

A tax examination abroad is not a form of mutual assistance, but its procedures are performed in another country because (part of) the business accounts of the company or group of companies to be audited are retained in another state.

[600] Commentary 16 on Art. 26, Para. 2 of the Model Tax Convention, version 1977.
[601] Which will be more specifically addressed in the following Paragraph.

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Occasionally such an examination is indeed made upon request (of the taxpayer), and in all cases the consent of the taxpayer involved is required. Official A performs his own examination using his own legal competences for tax auditing, but does so in the territory of the other state, as it is there where the business accounts of the company are present.

Somewhat confusingly, in 2005 the Commentary on Art. 26 of the OECD Model Convention was extended to the effect that “presence of officials” is linked to “examinations abroad because of relocated business accounts”, and is directly referred to under the heading “tax examinations abroad”:

To the extent allowed by its domestic law, a Contracting State may permit authorised representatives of the other Contracting State to enter the first Contracting State to interview individuals or examine person's books and records, - or to be present at such interviews or examinations carried out by the tax authorities of the first Contracting State - in accordance with procedures mutually agreed upon by the competent authorities. Such a request might arise, for example, where the taxpayer in a Contracting State is permitted to keep records in the other Contracting State.[602]

The Commentary to Art. 26 of the OCED Model Tax Convention, though, refers to Art. 9 of the Convention on Mutual Administrative Assistance in Tax Matters. However, this article provides for one possibility of “tax examinations abroad” only, i.e., officials being present within the context of a request for information .

This form of mutual assistance is comparable with the “presence of officials” (Para. 2 of Art. 6) on the understanding that here, these foreign officials present take an "active" position. The Commentary states as the underlying reason for such an “active” variant of being present that, considering the fact that many jurisdictions and smaller Countries have limited capacity to respond to requests for information, this regulation might be a useful alternative to gathering information using the requesting party's own capacity. From the same Commentary it may be inferred that a foreign official can gather information independently by means of interviews and examining business accounts. The requesting country having the initiative can also be deduced from the wording of the Para. 1 of Art. 6, which lays down that the requesting (applicant) party should inform the requested party of the time and place of the meeting with the individuals concerned.

The Commentary to Para. 1 of Art. 6 describes the scope of the examination, that is interviewing individuals and examining books and records after having obtained written consent of the individuals concerned. The same Commentary includes a sentence from which it can be inferred that the requested party keeps “full control of the

[602] Commentary on the OECD Model Tax Convention, Art. 26, 9.1.

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process", but is relieved of the costs and human resources normally incurred in gathering such information.

It has been argued that reference to full control should reasonably encompass the following conditions:[603]

- the requesting party only being permitted to carry out such an examination if it has the consent of the requested party and complies with the conditions of the requested party;
- the requesting party not having the competence to enforce disclosure of any information.

While the condition of being "(...) freed from the cost and resource implications" should mean that the official of the requesting party may actively gather information from persons, possibly without officials from the requested country being present.

Furthermore, the Commentary states that such a procedure would not only be to the advantage of the requesting party and the requested party, but that the taxpayer, too, would benefit because he now does not have to copy large numbers of documents. From the above, it should be possible to draw the conclusion that under T.I.E.A. provisions based on Art. 6, Para. 1 of the OECD Model T.I.E.A., under the heading "tax examinations abroad", an "active variant" of the "presence of officials" is possible with respect to direct taxes. "Active" means in any case asking questions and examining books and records abroad independently. The competences to be invoked depend upon the conditions set by the requested Country.

5.5.2 Simultaneous Tax Examinations

Historically, the first legal basis for simultaneous tax examinations was provided within the context of a multilateral instrument such as the 1988 Strasbourg Convention. However, due to the very limited number of States that ratified the Convention in the subsequent decade, the provisions governing simultaneous tax examinations contained therein, such as the related Art. 8, did not have the chance to be translated into practice. In particular, Para. 2 of the concerned provision foresees that: "For the purposes of this Convention, a simultaneous tax examination means an arrangement between two or more Parties to examine simultaneously, each in its own territory, the tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain." Para. 1 of this article outlines the general conditions for simultaneous tax examinations: these would involve consulting, determining cases and establishing procedures. In addition, fiscal

[603] See van der Hel L., *Intra-Community Tax Audit*, Amsterdam, IBFD, 2007, 58.

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sovereignty is stressed again: each of the parties involved decides in each case whether it will, or will not participate in a simultaneous tax examination..

The expression “simultaneous tax examination” was then popularised only in the amendments included in the 1995 version of the OECD Commentary to Art. 26 of the OECD Model. However, unlike tax examinations abroad, this specific form of administrative co-operation did not find its way in the 2002 OECD Model T.I.E.A Despite such a limited echo in international recommendations issued by the OECD and other international organisations, the practice of simultaneous tax examinations constitutes a further brilliant example of the cross-border networking dynamics between Tax Administrations as it can be gathered that a great number of Memoranda of Understanding regulating this specific form of administrative co-operation have been concluded. In this regard, the 1995 update of the OECD Commentary would same to have played a relevant role, given the circumstance that most of the concerned Memoranda directly refer to double taxation conventions as their legal basis and have been blossoming especially in the course of the ‘00s, thus only after the 1995 Commentary update.

5.6 Multilateral Approaches to Administrative Assistance

5.6.1 Regional Legal Instruments

5.6.1.1 The “Nordic Convention” on Mutual Administrative Assistance in Tax Matters

The Nordic Treaty represents one of the best examples of administrative co-operation carried out on a regional basis, and, ultimately, a strong example in support of regionalism. Even though its success in ensuring effective administrative assistance has mostly been attributed to its regional dimension, and thus, to the homogeneity of its Signatory States, it should also be underlined how the strong motivational drive of States that have adhered to it, also represents a major success factor. Nordic Countries came out with the idea of integrating their Tax Authorities much before the Eighties.

The first attempts in this direction date back to 1964, when the Nordic Council[604] decided to initiate negotiations for the drafting of a regional convention concerning administrative assistance in tax matters. The project was interrupted in 1965 when EFTA, an Organisation to which all the Member States of the Nordic Treaty adhered, decided to promote an agreement in the same field on a European level. The EFTA

[604] The Nordic Council is a co-operation forum for Nordic Countries established in 1952. Its Member States are Danemark, Finland, Norway and Sweden.

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project proved however to be ill-fated and in 1972 a multilateral convention of twenty-four articles, eventually named Nordic Treaty, was drafted and approved the following year.

The Nordic Treaty has clearly exerted a major influence on the Strasbourg Convention of 1988. First of all, it affirmed the principle, later welcomed by the Strasbourg Convention, that not only the taxpayers residents or citizens of the Member States should be affected by the conventional provisions but also taxpayers who are residents of third countries.

Moreover, the Nordic Treaty extended its scope of application well beyond the limits of the 1977 version of the OECD Model Convention on Income and on Capital, by including both direct and indirect taxes, inheritance and gift taxes and even social security contributions.

The Nordic Treaty was also the first legal instrument, in absolute terms, to call for a co-operation among tax administrations even beyond information exchange, by encompassing service of documents and assistance in the notification and recovery of tax claims.

The content of the provisions of the Nordic Treaty is very similar to that already examined with reference to the Strasbourg Convention. The main differences lie in its practical implementation, which, as already mentioned, is made easier by the relative homogeneity of the Signatory States' Tax Systems. On a content level, the main difference from the framework of the Strasbourg Convention can be found with reference to the interpretation of the so-called "reciprocity principle". The reference criterion for reciprocity is grounded only on the differences among internal legislations[605], so that the Applied State has to co-operate only when the Applicant State has the legal instruments to gather the same kind of information when asked by the other State. Unlike what happens under Art. 26 of the OECD Model Convention and under Art. 21 of the Strasbourg Convention, the existence of effective administrative practices in this respect is not considered relevant for the possibility of declining a request.

[605] See Art. 21 of the Nordic Treaty.

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5.6.2 Non-Regional Legal Instruments

5.6.2.1 The Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters

5.6.2.1.1 Historical Background

On January 25th 1988 the Council of Europe and the OECD adopted a multilateral Convention aimed at fostering co-operation between Tax Authorities of Member States of the two Organisations. It should be noted that, although its impact cannot be denied, the Convention cannot be considered as a pioneering document, due to the fact that a multilateral approach to administrative assistance, both with reference to the exchange of tax related information and the assistance in the collection of claims, had already been endorsed at a regional level by Scandinavian Countries through the adoption of the Nordic Treaty[606] in 1972, a multilateral Convention consisting of twenty-four articles and primarily aimed at setting a common set of procedures. This document eventually led to the adoption of a Nordic Tax Convention in 1983,[607] which represents a rather unique example of multilateral double taxation convention and which integrates administrative assistance among the purposes pursued by this Convention, dealing with information exchange to a much wider extent than it normally occurs with double taxation conventions. Both these legal instruments will be addressed in detail further on in this work. Along with the Nordic experience, it should also be noted that the forerunner title in the field of regional co-operation in administrative matters should be awarded to the Andine Pact, dating back to 1971 and aimed at fostering administrative assistance among the Member States of the Andine Pact[608]. This document has a more restrictive approach to exchange of information but it is rather broad in application, due to its extension also to the field of indirect taxation, that represents the main pillar of the tax systems of those Countries.

What can clearly be noticed is that the Council of Europe-OECD Convention (further on, Strasbourg Convention) differs from either convention mentioned above on the grounds of its multilateral nature in contrast with the regionalism which characterises

[606] Nordic Treaty, 1972, signed in Copenhagen by Denmark, Finland, Iceland, Norway and Sweden.

[607] Nordic Tax Convention, 1983, signed in Copenhagen by Denmark, Finland, Iceland, Norway and Sweden. The Tax Convention was modified in 1989 so to conform also to the provisions of the Convention on Mutual Administrative Assistance.

[608] The Member States of the Andine Pact, signed in 1971,are Bolivia, Chile, Ecuador and Peru.

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both the Andine Pact and the Nordic Treaty. As we have already said, the signature of the Convention is open to the Member States of the OECD and of the Council of Europe. At the moment, eleven States have signed and ratified the Strasbourg Convention. The first Countries to sign the Strasbourg Convention were Scandinavian Countries, back in 1989[609], which is no surprise due to their role of staunch promoters of the Strasbourg Convention[610] and to their previous experience achieved in the field. Along Scandinavian Countries, the United States adhered to the Strasbourg Convention from the very beginning, although with some reservations, namely they discarded assistance in tax claims and limited adoption to the sole section dealing with exchange of information. The Netherlands came immediately thereafter, signing the Strasbourg Convention in 1990. Belgium signed it in 1992 with a reservation concerning access to information held by banks, which was deemed as a threat to its banking secrecy regulation[611]. Two subsequent waves of ratifications took place in 1996 and in 2003 respectively, with the adhesion of Iceland and Poland and that of Azerbaijan and France. Eventually, in 2004 Canada and Ukraine also signed the Treaty. As it will be highlighted further on, the number of States ratifying the Convention has steadily increased following its amendment in 2010 and, in particular, by virtue of the opening up of the Convention to signatory States that are not members of the Coucil of Europe or of the OECD.

Although the final version of the Convention text was approved only in 1988, the efforts of the two promoting Organisations started at least ten years before, when the OECD put forward a Recommendation in 1977[612] and the same was done, although independently by the Council of Europe with Recommendation no.833 in 1978. The Council of Europe, also thanks to the activism of the Scandinavian delegations, set an agenda aimed at dealing with the increasing phenomenon of cross-border tax evasion and invited the OECD to join a Committee aimed at drafting an ad hoc legal instrument. It should be noted that at the time, administrative assistance in general, and exchange of information in particular, were still seen mostly as a functional practice to the application of double taxation provisions. The emerging issues of harmful tax competition and international tax evasion were mostly approached at the time with a call for an harmonisation of tax rates, aimed at reducing the room for tax arbitrage[613]. On the contrary, the Committee drew the conclusion that enabling Tax Administrations to

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[609] Iceland is not included in this party, on the contrary it signed and ratified the Convention on Mutual Administrative Assistance in 1996.

[610] See Mattsson N., *Is the Multilateral Convention a Solution for the Future?- Comments with Reflection to the Nordic Experience*, Intertax (1985), at 214.

[611] Vanistendael F., *General Reporton the Interest Savings Directive*, in *EATPL Annual Conference Materials*, Budapest, 2006, at 16.

[612] OECD Recommendation of the 21st September 1977.

[613] Keen M., Lighthart J.E., *Incentives and Information Exchange in International Taxation*, CenTER Discussion Paper, Tilburg University, 2004,at 3.

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co-operate on an almost worldwide basis could prove to be much more effective than a hard approach requiring harmonisation efforts. In this respect, the main aim of the Strasbourg Convention remarkably differs from that found under Art. 26 of the OECD Model Convention, being the former much more ample. The helpfulness of administrative assistance also in the prevention of double taxation is expressly mentioned even in the Preamble of the Strasbourg Convention[614], however the Preamble insists more decidedly on two issues, namely, the aforementioned need to tackle tax avoidance and evasion and the improvement of the chances of Contracting States to correctly determine their tax liability also with reference to cross-border income.

The struggle against tax evasion and the fulfilment of the residence principle in taxation[615] are seen as two elements going hand in hand. It has been remarked that such a situation, which envisages a further degree of co-operation between Tax Authorities is also in the taxpayer's interest, as, by enabling Tax Authorities to properly determine tax liabilities on the basis of information obtained from third countries , it ultimately protects taxpayers' rights.[616]

5.6.2.1.2 Structure of the Convention

The Strasbourg Convention consists of a Preamble, stating the Convention's purposes and conceptual framework, which has already been analysed in the previous paragraph, and of six extended paragraphs, which can be divided into three main subjects.

The first part of the Convention, consisting of two Chapters, deals with the scope of the Convention application, in terms of both persons and taxes covered.

In both respects, the scope of application appears as particularly extensive as no specific limitations in terms of residence or citizenship of the person whose tax position has led to a request for assistance; with regard to taxes covered, the Convention is peculiar in that it embraces under a single legal instrument taxes on income and on capital along with general consumption and sales taxes (thus including VAT[617]) and it

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[614] See the *Preamble* of the *Council of Europe- OECD Convention on Mutual Administrative Assistance in Tax Matters*, 1988, where it is stated that " (*…) States should endeavour to protect the legitimate interests of taxpayers, including appropriate protection against discrimination and double taxation.*".

[615] Persano F., *La Cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria*, Torino, 2006, at 91.

[616] See both the Preamble and Loukota H., *Multilateral Tax Treaties versus Bilateral Treaty Network*, Lang M., Loukota H., *Multilateral Tax Treaties,* London, Kluwer, 1998, at 91.

[617] The inclusion of VAT and other similar taxes on sales and consumption appears as one of the more striking features of the Convention. As it is well known, sales and consumption taxes are not covered by double taxation conventions but represent one of the typology of taxes more prone to evasion and fraud (for instance, through the so-called "carousel frauds"). While the issue of VAT fraud has been addressed very staunchly within the European Union, the Convention may provide a very valuable platform for other jurisdictions.

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goes further on to include excise taxes and taxes on motorvehicles and movable property other than motorvehicles. The only taxes that fall outside of the scope of application of the Convention are to be found in customs duties. It is clear that such a wide spectrum of application represents a notable big leap forward when compared to the OECD Model Convention text which used to be in force back in 1988 and which still limited the application of Art. 26 to the perimeter encompassed by Art.2, namely consisting only of taxes on income and on capital. Such a broad approach is however hampered by the fact that domestic laws of most Countries tend to distinguish administrative assistance at least between those channels related to direct and indirect taxation, so that an omni-comprehensive approach risks to be systematically discarded when it comes down to practical application.[618]

Nonetheless, the impact of such an all-encompassing approach in the matter of co-operation between Tax Administrations shall not be diminished. Notably, even though convergence dynamics in legal matters are always tricky to frame within a cause and effect nexus, it is not arbitrary to hold that such an impact was pivotal in fostering administrative practices which eventually led the OECD to update Art. 26 of the Model Convention and allow exchange of information also for taxes normally excluded from the scope of application of the latter.[619]

Moreover, a set of general standard definitions is provided in order to facilitate a possibly uniform interpretation of the conventional text. Such a choice is frequent in multilateral agreements[620] and denotes a will to render the Convention less dependent on the inevitable conflicts arising from national interpretation practices. Such an approach is confirmed throughout the Convention, which is characterised by a degree of detail unparalleled in the field of information exchange provisions, with the exception of the OECD Model T.I.E.A. and, more recently, although limited to an EU environment, to the 2011/16/EU Directive on administrative co-operation in tax matters. For this reason, it may be argued that the Strasbourg Convention qualified, before its amendment by means of a Protocol in 2010, as the missing link between the original version of the OECD Model Convention following the 2000 and 2005 amendments.[621]

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[618] Gangemi B. , *International Mutual Assistance through Exchange of Information*, in *Cahiers de droit fiscal international*, Volume LXXVb, XLIV Congrès international de Droit Financier et Fiscal, Amsterdam, IBFD, 1990, at 45.

[619] Persano F. , *La Cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria*, Torino, Giappichelli, 2006, at 115.

[620] Loukota H., *Multilateral Tax Treaties versus Bilateral Treaty Network*, in Lang M., Loukota H., *Multilateral Tax Treaties,* London, 1998, p. 91.

[621] As it will be further underlined in the following Paragraphs, it can be remarked that the Strasbourg Convention might have served as an inspiration also for the 2012 amendments to Art. 26 of the OECD Model. Namely, the Strasbourg Convention allows, under specific conditions, that exchanged information be used for other purposes, including, for instance, co-operation in high priority matters such as the combat of money laundering, corruption and terrorism financing. See in particular the fourth Paragraph of Art. 22, according to which “information received by a Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use.”

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The second part of the Convention represents its functional core, as it describes, leaving out the practical details, with the two forms of administrative assistance envisaged by the Convention, namely exchange of information and assistance in recovery, which are respectively found under Section 1 and Section 2 of the third Chapter .

The last part of the Convention provides either the general provisions common to both forms of co-operation and the special provisions, dealing with issues related to the implementation of the Convention, such as costs and language. In this way, the concrete enforcement of the content of the Convention is made possible, by adopting whereas appropriate a standardising approach.

Chapter 6, finally, deals with crucial issues such as the coordination (and in some cases, overlap) with other international agreements and also offers the legal tools to put Contracting States in such a position to sign the Convention with reservations. This option has been widely used by Contracting Parties, such as the US and Belgium and, while a feature of many multilateral Conventions, may appear somewhat debatable in the current age characterised by a substantially universal endorsement of "international standards of transparency and exchange of information".

It has already been mentioned how the scope of the Strasbourg Convention is extremely broad when compared to bilateral legal instruments, in terms of both persons and taxes covered, as well as in terms of admissible administrative measures. Namely, the conventional provisions apply to any person who "*is a resident or a national of a Party or of any other State*"[622]. It is then clear that, unlike what happens under Art. 26 of the OECD Model Convention, triangular cases are perfectly admissible and even encouraged, considering that one of the main purposes of multilateral tax treaties is facilitating the solution of cases involving three or even more parties[623]. At the same time, it can be observed in this regard that a somewhat outdated limitation is still foreseen by Art. 22, Para. 4, according to which, the forwarding of information received from a Contracting State to another Contracting State is subject to the prior authorisation of the original source State.[624]

Moreover, when comparing the Convention on Mutual Administrative Assistance with Art. 26 of the OECD Model Convention, another relevant distinction can be found with respect to the issue of the "Response to the Request for Assistance". Namely, the Convention on Administrative Assistance expressly states that the Requested State shall inform the Applicant State as soon as possible with regard to the actions

[622] Art. 1.3 of the Convention on Mutual Administrative Assistance in Tax Matters

[623] Mattsson N., *Multilateral Tax Treaties – A Model for the Future?*, in *Intertax*, 2000, p. 308.

[624] The rationale for such a stipulation provided in the Explanatory Report does also not appear to be thoroughly convincing. Namely, Para. 227 of the Explanatory Report sets forth in this regard that the prior authorisation of the original source State of the information is necessary in order to avoid a situation where the third Contracting State would thus obtain information which it could not obtain directly."

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undertaken and to the outcome of the assistance[625]. Such a provision should also be considered a breakthrough under an implementation point of view, as it fosters a dialectic relationship between Tax Administrations of the Signatory States ultimately aimed at improving the existing standards of tax co-operation.[626] It is clear that such a provision is of paramount interest when it comes to analysing exchange of information under a comparative perspective.

The first Article of the Strasbourg Convention also lists the three ways through which administrative assistance is implemented. Such measures consist of:

- exchange of information;
- assistance in the recovery of tax claims;
- service of documents.

Besides the obvious element of interest represented by its multilateral nature, on the one hand, the Strasbourg Convention features some specific features that set it apart from Art. 26 of the OECD Model or the OECD Model T.I.E.A., especially in relation to enhanced forms of co-operation. The information based forms of enhanced co-operation have however previously analysed in detail in the present Part of this work.

Countries that sign the Strasbourg Convention are likely to have concluded also bilateral agreements with other jurisdictions either in the form of general tax treaties or T.I.E.A.s not to mention EU Member States having access to the relevant EU Directives in the area of administrative co-operation. In this respect, possibilities of assistance provided by the Convention do not limit, nor are limited by, those contained in existing or future international agreements or other arrangements between the Parties, or other instruments that relate to cooperation in tax matters.[627]

A less positive feature of the Convention was that it was not on par with the later developments of Art. 26 of the OECD Model T.I.E.A. with specific regard to reasons for turning down a request of information. However, such a gap was filled when the Protocol of 27th May 2010 was opened for signature. The 2010 Protocol, from a substantive point of view, updated the Strasbourg Convention in the light of the fifth Paragraph of Art. 26 of the OECD Model Convention.

In this specific regard, the main amendments introduced by virtue of the 2010 Protocol are as follows.

With regard to the filing of requests for information, the amended first Paragraph (indent b)) of Art. 18 has introduced wording changes in order to make requests less

[625] See The Commentary to Art.20 of the Convention on Mutual Administrative Assistance, concluded in Strasbourg on 25 January 1988.

[626] See Mattsson N., *Is the Multilateral Convention a Solution for the Future?- Comments with Reflection to the Nordic Experience-*, Intertax (1985), at 218.

[627] See in this regard Art. 27 of the Convention. With specific reference to EU Member States, the Convention as amended by the 2010 Protocol, foresees that “Parties which are member States of the European Union can apply, in their mutual relations, the possibilities of assistance provided for by the Convention in so far as they allow a wider co-operation than the possibilities offered by the applicable European Union rules.”

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cumbersome for the requesting State: namely, while the prior version of the provision required that the requesting State *cumulatively* provided the name, address and any other particulars assisting in the identification of the person in respect of whom the request is made, the new wording provides that either the name or the address or other particulars may be suitable to substantiate a request.[628]

The main objective of the 2010 Protocol was however to include also in the Strasbourg Convention the caveat included in the fifth Paragraph of Art. 26 of the OECD Model so that the fourth Paragraph of Art. 21 includes the following: " in no case shall the provisions of this Convention, including in particular those of paragraphs 1 and 2, be construed to permit a requested State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person." On the other hand, the Protocol does not appear to having included in the Convention particularly innovative features that cannot be found in the OECD Model T.I.E.A. or in Art. 26 of the OECD Model Convention: it may even be argued that the very purpose of the Protocol was to avoid any possible discrepancy between the various model legal instruments conveying the international standard.

If the above mentioned amendments may be welcomed favourably, at the same time, it seems that the post-2010 of the Strasbourg Convention seems characterised by a regression[629] in the area of the general framework for the safeguard of taxpayers whose tax position is affected by exchange of information: namely, while the current version of the Convention appears to focus chiefly on the safeguard of the confidentiality of the exchanged information,[630] the previous version came out as more articulated in linking the safeguard of the rights of the affected taxpayers to a broader human rights agenda.[631]

Another possible criticality of the 2010 Protocol can be found in its amendment of the rules concerning the effective date of the Convention and the possibility of carrying out administrative co-operation with regard to taxable periods preceding the effective

[628] It may observed in this regard that the previous wording of the provision was not very distant from the approach taken by Switzerland in its first treaties concluded after March 2009. This restrictive approach was however subject to criticism when Switzerland first underwent the peer review procedure administered by the Global Forum. In this regard, it is possible to perceive that the international standards are more flexible and evolving that it may be perceived and that the peer review process has played a major role in their shaping.

[629] See in this respect, Dorigo S., *La cooperazione fiscale internazionale dopo il protocollo di modifica alla Convenzione di Strasburgo: qualche luce e molte ombre*, Rivista di diritto tributario 9 (2011), at 172.

[630] See in particular Recital No. 7 of the 2010 Preamble to the Convention, according to which "States should carry out measures or supply information, having regard to the necessity of protecting the confidentiality of information, and taking account of international instruments for the protection of privacy and flows of personal data"

[631] In particular, the following recital of the 1988 Preamble is not present in the post 2010 version: "Considering that fundamental principles entitling every person to have his rights and obligations determined in accordance with a proper legal procedure should be recognised as applying to tax matters in all States and that States should endeavour to protect the legitimate interests of taxpayers."

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date of the Convention.[632] Such a stipulation not only appears to be somewhat inconsistent with the conceptual foundations of the standards of transparency and exchange of information[633] but also introduces a possible friction between different “sources” of the international standards as the default rules concerning the possibility of engaging in retroactive exchange of information is dealt with by default in opposite terms by the Commentary to the OECD Model T.I.E.A.[634]

A major change set forth by the 2010 Protocol and, possibly, even more relevant from a policy perspective, was, as earlier mentioned, the opening up of the Convention to the signing also by Countries that are not members of the OECD or of the Council of Europe.[635] At the same time, accession to the Convention is conditional upon the approval of the Committee, which is composed of Countries that are already members to the Convention. In this regard, the 2010 Protocol also had the merit of bringing back the Strasbourg Convention to the forefront of the administrative co-operation agenda. The new legal instrument was perceived by many jurisdictions as an efficient way to broadening their tax information network, so that the number of signatory States increased by more than 50% in post-2010 period, extending also to many South American Countries and involving most of the so-called “B.R.I.C.S” Countries,[636] although with the notable exception of China.

In this regard a somewhat more controversial aspect of the institutional implications of this opening up of the audience of the Convention is represented by the circumstance that among the prerogatives of the Coordinating Body which is entrusted with the monitoring of the implementation of the Convention, including its possible amendments, lies also the final decision on the invitation and admittance[637] of States that are not members of the Council of Europe or of the OECD. A somewhat critical factor in this regard is that the Coordinating Body acts on a consensus basis.

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[632] Art. 28, Para. 6 of the Strasbourg Convention as amended by the 2010 Protocol foresees that “the provisions of this Convention, as amended by the 2010 Protocol, shall have effect for administrative assistance related to taxable periods beginning on or after 1 January of the year following the one in which the Convention, as amended by the 2010 Protocol, entered into force in respect of a Party, or where there is no taxable period, for administrative assistance related to charges to tax arising on or after 1 January of the year following the one in which the Convention, as amended by the 2010 Protocol, entered into force in respect of a Party. Any two or more Parties may mutually agree that the Convention, as amended by the 2010 Protocol, shall have effect for administrative assistance related to earlier taxable periods or charges to tax.”

[633] Even though jurisdictions refusing to retroactively provide information on the basis of other legal instruments, such as the OECD Model T.I.E.A. and Art. 26 of the OECD Model Convention.

[634] See in particular Art. 114 of the Commentary to the OECD Model T.I.E.A. according to which “the rules of paragraph 4 do not preclude an applicant Party from requesting information that precedes the effective date of the Agreement provided it relates to a taxable period or chargeable event following the effective date.”

[635] See Art. 8, Para 5 of the Protocol of 27th May 2010.

[636] In particular, the most recent signatory Countries are the following: Korea, Japan, Mexico, Moldova, Romania, Slovenia, Spain, Argentina, Russia, Tunisia, Brazil, Canada, Czech Republic, Colombia, New Zealand, South Africa, Turkey and India.

[637] Namely, Countries that are not members of the OECD or of the Council of Europe have to make a request to be invited to sign the Convention. In taking the consensus decision about the admission elements that will be taken in consideration might include the confidentiality rules provided by the legal framework of the co-opted State.

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5.6.2.1.3 Asessment and Possible Evolutionary Perspectives of the Strasbourg Convention

As a conclusion to this analysis of the Strasbourg Convention, the main pitfalls of this legal instrument will be discussed, as opposed to its many meaningful advantages. Among the latter, the following surely have to be mentioned:

- on a theoretical and policy, the Strasbourg Convention has set forth the idea that administrative co-operation could not be limited to bilateral instruments, but by its very nature requires a multilateral approach;
- it cannot be said that the Strasbourg Convention came first, as other examples pre-date it, such as the Nordic Treaty. Moreover, it cannot even be said that the Strasbourg Convention eventually appealed to a large audience, as very few States out of the number entitled to do so[638] eventually ratified its text. Nonetheless, the fact that it was the joint effort of two extremely relevant International Organisations, such as the OECD and the Council of Europe, bestows to the Strasbourg Convention a remarkable visibility and, so to say, a moral suasion role, as many provisions contained therein eventually found their way in later versions of Art. 26 of the OECD Convention on Income and Capital;
- in the area of administrative co-operation geared towards assessment , forms of co-operation such as simultaneous tax examinations and tax examinations conducted abroad are defined in new and more detailed terms. The subject matter of the service of documents, an extremely relevant topic for the actual implementation of information exchange, is addressed in a thorough fashion;
- Brand new forms of administrative assistance are regulated for the first time, such as the assistance in the recovery of tax claims;

When it comes to the Convention's sore points, however, it can clearly be seen that these pitfalls are somehow complementary to the Convention's positive aspects.

First of all, even though it is quite alluring that the Convention might have been eventually ratified by such a conspicuous number of States, such as those that hold a Membership of the OECD and of the Council of Europe, it is at the same time quite apparent that big numbers imply heterogeneity. Heterogeneity creates problems both in terms of comparability among Signatory States, an issue which is particularly sensitive in an environment that has adopted a reciprocity principle as one of its pillars. If Member States differ dramatically in terms of information gathering measures or tax claims recovery procedures, then, a run-to-the-bottom kind of phenomenon could occur.

[638] The Member States of OECD and those of the Council of Europe.

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The Strasbourg Convention has also been questioned with reference to its very conceptual foundation, namely the endorsement of a truly multilateral approach to administrative assistance and to tax matters in general. As opposed to this orientation, some critics have affirmed the opportunity of a regional approach to the problem[639]. In a way, empirical evidence would seem to confirm this preference, as examples of multilateral legal instruments characterised by a regional driver have proven to be extremely effective in reaching their goal, i.e., being used extensively. This is the case of the Nordic Treaty, which will be addressed in its main contents in the following Paragraph, and, also, of the Andine Pact.[640] In the view of this author, this kind of criticism is however ideologically biased more then well-grounded in empirical evidence. It is clear that a legal document restricted to a limited number of States sharing some basic structural similarities will be far easier to implement than an agreement extended to many heterogeneous States.

Critiques that are more specific to the wording of the Strasbourg Convention can be exposed as follows.

Multilateral instruments clearly have the advantage to extend a shared set of rules to the parallel implementation in the Signatory States and to foster, at least to a certain degree, uniformity in the interpretation of the undersigned provisions. In this respect, the Strasbourg Convention has two major problems. First of all, the fact that in many cases the Convention makes reference to the conceptual framework of Art. 26 of the OECD Model Convention on Income and on Capital undermines any attempt of harmonised interpretation. The notions found under Art. 26 are meant to be interpreted with a certain degree of flexibility and in most cases serve as a basis upon which the actual conventional provisions lie, being quite ascertained that each actual bilateral convention represent a different source of international law. It would have then been better to adopt a more restrictive approach for the purposes of the Strasbourg Convention, so to guarantee at least the basic conditions for an interpretation of the Treaty which could be as homogeneous as possible.

Moreover, with Art. 30, a wide range of reservations is made available to Member States upon signing the Convention. As it has already been explained, the chance of introducing reservations was primarily aimed to appeal to the widest number of States as possible. This approach has not proven effective, as very few States have signed the Convention after almost twenty years. At the same time, the possibility of making reservations has been used quite widely by the Signatory States, so to render the actually ratified text remarkably different from one Member State to the other.

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[639] Mattson N., *Is the Multilateral Convention a Solution for the Future?-Comments with Reflection to the Nordic Experience*, Intertax (1985), at 212.

[640] The Andine Pact is an agreement fostering co-operation in tax matters involving the following South American States: Bolivia, Chile, Colombia, Ecuador and Peru.

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Another aspect which should be mentioned is that the subject matter of the Strasbourg Convention borders, in some cases, issues related to criminal justice. In this respect, it should be reminded that a legal instrument aimed at co-operation already exists, namely the European Convention on Mutual Assistance in Criminal Matters.[641] The Strasbourg Convention makes clear that once criminal proceedings have begun, the same Strasbourg Convention will not apply.[642] It should however be remarked that the Convention on Mutual Assistance in Criminal Matters applies also before criminal proceedings actually take place, so that the risk of an overlap is always present. In this respect, the risk is that the application of the provisions of the Strasbourg Convention may collide with the rules concerning the rights of persons who are undergoing criminal investigations.[643]

Further critiques stem from two authoritative organisations, namely the International Chamber of Commerce and the American Bar Association.

The former has underlined many of the pitfalls that have been exposed so far, as well as adding that the Convention proves to be discriminatory towards multinational corporations, as some provisions, such as those concerning simultaneous tax examinations, seem to be designed to specifically control this kind of enterprises. Moreover, the International Chamber of Commerce has reputed that the safeguard of interests such as the right to protect trade secrets is not dealt with in a satisfactory way.[644]

On the other hand, the American Bar Association[645] has remarked how the level of safeguard awarded to taxpayers is not adequate. For instance, the fact that there is no obligation upon Tax Authorities to inform the tax payer about assessment procedures being started to be carried out against it. The lack of any chance for the taxpayer to oppose the carrying out of information exchange related to its position has also been criticised, even though it should seem quite obvious that such an approach would end into hampering quite remarkably any form of administrative assistance.

It then appears that although the 2010 Protocol was instrumental in bringing in line the Strasbourg Convention with the current international standards from a substantive point of view and that it is even more remarkable, although debatable, that the Convention was open up for signature besides its original audience, it appears that the same Protocol came out as a missed opportunity as far as the enhancement of a

[641] European Convention on Mutual Assistance in criminal Matters, signed on the 20th of April 1959.

[642] See. Art. 27 of the Convention on Mutual Administrative Assistance, 1988.

[643] Persano F., *La cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria*, Torino, Giappichelli, 2006, at 93.

[644] See the *Opinion Statement of the International Chamber of Commerce on Draft Convention on Mutual Administrative Assistance in Tax Matters*, in *Rivista di diritto finanziario*, 1987, at 395.

[645] Reported by Fletcher G., *The Convention on Mutual Administrative Assistance on Tax Tax Matters*, Harvard International Law Journal (1989), at 521.

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suitable framework for the safeguard of the rights of the concerned taxpayer is concerned.

At the same time, the Strasbourg Convention constitutes the only example of multilateral instrument providing for administrative co-operation in tax matters. As such, its merits go beyond the possible shortcomings of its wording. In particular, it is the view of this author that one of the most stimulating horizons for the evolutionary perspectives of co-operation between Tax Administrations may be found in the networking between different legal bases and administrative platforms so that , for instance, the Strasbourg Convention may serve as an umbrella for information sharing platforms such as the earlier mentioned J.I.T.S.I.C. arranged at a regional level: the regional dimension of the platform for enhanced co-operation and information sharing may ensure for more reactive and focused co-operation while the existence of a truly multilateral foundations may provide a matching with the increasingly global challenges faced by Tax Administrations worldwide.

5.7 Reflections on the relationships between theInternationally Standards and Good Tax Governance . Two Overlapping Agendas?

It could be argued how useful the whole process of consolidation of the international standards as well as the closely liked peer review process may be in defining a core of good tax governance standards. There seems to be a tendency within OECD sponsored initiatives to reduce good tax governance to a mere adherence to standards of fiscal transparency.[646] Leaving administrative cooperation concerns aside for a moment, it can be said that good tax governance indeed implies that audit powers of Tax Administrations enable the latter to gather factual items of information. At the same time, it may be argued that in the perspective of good tax governance, the "quality" of Tax Administrations should not be measured solely in terms of the pervasiveness of their auditing powers but rather from a broader "good administrative behavior" perspective, which includes but is not limited to nor absorbed by far reaching information gathering capabilities, which, in the end, also directly interact with the rights of taxpayers.

Moreover, an analysis of these issues should not leave out how the effectiveness of tax auditing (or a lack thereof under the form of a laxness in the conduct of tax administrations) impacts with the topic of harmful tax competition.

In a "taxation and development" perspective, which shall be among the key concerns driving the EU good tax governance initiatives, the brand of good tax

[646] In this regard, see Falcão T., *Exchanging Information with the Developing World: A Digression on the Global Forum Exchange of Information's Interaction with Developing Economies*, Intertax 12 (2011), at 603.

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governance international bodies should strive to promote should go beyond the mere ability of a jurisdiction to be a reliable and punctual information exchange partner. This latter dimension is indeed relevant but it cannot absorb the whole "good tax governance" agenda.

Questions that may be asked in this respect can be whether the Global Forum (or, for that matter, the OECD) is actually interested in good tax governance in its broader meaning. In particular, besides a collection of information and data that would have remained otherwise not accessible and the inclusion of the issue of transparency and exchange of information on top of the current tax policy agenda it could be argued to what extent the work of the assessors is to be seen as a form of "technical assistance" producing an advancement in the good tax governance standards adopted by the assessed jurisdictions.[647]

It should be observed that the current initiatives in the field of the promotion of "good tax governance", directed in particular towards developing Countries are part of a broader development co-operation agenda. The incorporation of tax governance topics into said agenda can be traced to initiatives backed by the United Nations.

In 2002, the UN organised a conference in Monterrey addressing the issue of "financing for development". No immediate concrete measures derived from the conference, however, the latter was instrumental to the creation of the so-called "Monterrey consensus" which could be summarised in the following objectives: eradicating poverty, achieving sustained economic growth and promoting sustainable development in the context of the emerging global economic system.[648]

References to taxation in the Monterrey consensus were quite marginal in comparison to the wealth of issues addressed by the Conference. Taxation was in particular taken into consideration in the broader perspective of the issues of "international co-operation", "dialogue among national tax authorities" and "coordination of the work of the concerned multilateral bodies and relevant regional organisations with specific reference to the needs of developing Countries".

In 2008 a follow up conference was organized in Doha. The final declarations resulting from the conference dealt with taxation issues in further detail and addressed, in particular, the need to enhance tax revenues through modernized tax systems, more

[647] While it may be argued whether the Global Forum is concerned with technical assistance in absolute terms, that is, even regardless of the goals of its own agenda but strictly for the benefit of the "assisted" assessed jurisdictions, it cannot be denied that efforts have been taken to provide "intra Global Forum" technical assistance in order to provide all participating jurisdictions with a level playing field, preparing the more "fragile" jurisdictions in view of the prospective assessments. In this specific respect, the Global Forum appears as having been involved in the organisation of training seminars not only for prospective assessors but also for officials that will have to interact with said assessors. Such initiatives have in some cases been organized in co-operation with other institutions such as the International Monetary Fund, the Caribbean Community and the African Tax Administrators Forum. See in this respect the *Background Information Brief* of 2nd May 2011, at 27.

[648] UN, Monterrey Consensus of the International Conference on Financing for Development', 2003, retrievable at: http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf .

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efficient tax collection, the broadening of the tax basis and the effective contrast to tax evasion.[649]

Although apparently vague in its actual contents, the Monterrey and Doha declarations were remarkable because they brought taxation on the development agenda on par with other dimensions of global economic governance such as trade and financial policy.

In particular, the financing for development platform gave the lead to a series of initiatives set forth by other international and regional organisations. At the forefront in this field can be found the work of the European Commission which in 2009 elaborated a Communication on "Good Tax Governance in Tax Matters"[650] and another Communication in 2010 on "Tax and Development: Promoting Good Tax Governance in Taxation as a Part of Development Co-operation".[651]

The main objective of such initiatives is the incorporation of "good tax governance" principles in the development cooperation agreements to which the European Union, the biggest financial aid donor in the world, is party. In this respect, the step that would be prospectively undertaken by the European Union appears as a major one: "good tax governance" has been to date propagated under the form of "soft law", on the contrary, the stipulation of such agreements would incorporate measures promoting good tax governance in binding legal instruments.

Based on references found in the earlier cited policy documents, a working definition of "good governance in tax matters" would seem to be circumscribed to the following elements:

- transparency of the tax system;
- exchange of information;
- fair tax competition.

As such, it would seem that the agenda of the OECD sponsored Global Forum and the European Union tend to converge with good tax governance ultimately being absorbed into the ongoing campaign for achieving a generalized implementation of an international standard of transparency and exchange of information.

The initiatives of the European Commission as stated in the aforementioned policy documents that may be more remarkable in the perspective of the affirmation of the international standard of transparency and exchange of information consist, in

[649] See UN, ‗Doha Declaration on Financing for Development', A/CONF.212/L.1/Rev.1*, Para. 16 and Para. 78, available at http://www.un.org/Docs/journal/asp/ws.asp?m=A/CONF.212/L.1/Rev.1 .

[650] Communication from the Commission to the Council, the European Parliament, and the European Economic and Social Committee: Promoting Good Governance in Tax Matters', *COM/2009/0201final*/, 28 April 2009

[651] Tax and development: promoting good governance in taxation as part of development cooperation', MEMO/10/146, 21 April 2010; Communication from the Commission to the European Parliament, the Council AND THE European Economic and Social Committee - Tax and Development Cooperating with Developing Countries on Promoting Good Governance in Tax Matters SEC(2010)426

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particular, in the enhancement of the participation of developing Countries in the relevant international *fora* and in supporting the adoption and implementation of international standards.

In particular, concrete steps seem to have been taken under the ongoing revision of the Cotonou Agreement to support ACP (African Pacific Caribbean) Countries to participate in international tax cooperation structures and to implement best practices in tax matters, including the principle of transparency and exchange of information.[652]

Moreover, the Commission would intend to provide actual technical assistance to partner Countries with regard to the following issues:

- strengthening of capacities to conclude and implement tax information exchange agreements and, where appropriate, double taxation conventions, fostering in particular the adoption of multilateral legal instruments;
- adapting the legal framework and improving tax administration capacity as appropriate;
- sharing experience in international tax cooperation gained trough applicable instruments such as the EU Savings Taxation Directive in view of the possible adoption, whereas it shall prove feasible, of agreements, even on a multilateral basis, foreseeing automatic exchange of information.

A further yet less formalised area of intervention would be represented by the promotion of the standards set forth in the Code of Conduct.

The issue of transparency and exchange of information does not appear as an end *per se* but appears being linked to the dissemination of best practices and to critical areas of international taxation that may directly affect the tax bases of developing Countries, such as transfer pricing. In this respect, emphasis is put by the Commission on the development of Country-by-Country reporting (CBCR) standards for multinational corporations operating in developing Countries, which would ensure a better access to information by tax administrations in developing Countries.

In this respect, prospective actions by the EU would focus not only on the bilateral (or multilateral) moment of exchanging of information but would also directly address the issue of availability of information and of access to information by Tax Administrations. While the former goal can be better be pursued , on the one hand, by providing the addressed jurisdictions with some form of incentive (which in the case of the EU initiatives would take the form of access to financing for development and the award of preference in the conclusion of commercial agreements) and, on the other hand, by providing said jurisdictions with the relevant technical assistance, the latter two goals can indirectly be pursued by requesting multinational enterprises to engage in

[652] See COM (2010) 163 final of 20th April 2010, 9.

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more pervasive forms of reporting whose outputs would be at the disposal of the tax administrations of the developing Countries where subsidiaries are situated.

Based on such premises, it may be concluded that the European good tax governance agenda does not carry along different standards or different sets of priority but would seem to differ from OECD-sponsored initiatives for the perspective adopted in promoting the aforementioned standards, i.e., the perspective of inclusiveness so to make developing Countries not only reliable information providers by attributing them incentives not in the form of revenue sharing, as sometimes advocated by economists dealing with international tax cooperation, but by making good tax governance one of the points of a broader development cooperation and commercial agenda and, on the other hand, by enabling developing Countries to participate to the benefits of the propagation of said standards of good tax governance for instance in the area of transfer pricing monitoring.

On the other hand, once clarified how the European good tax governance agenda interacts and, to some extent, overlaps with the promotion of the international standard of transparency and exchange of information, it may be asked to what extent and by which approach is the Global Forum concerned with a “good tax governance” agenda.

At the Mexico City Meeting of the Global Forum, whereas the whole peer review activity was launched, it was expressed a concern[653] for finding ways to have developing Countries be further integrated in and benefit from the work of the Global Forum. Participants also noted that beyond the Global Forum, developing countries’ tax administrations could benefit from capacity-building and they welcomed initiatives in this area by the EU, IMF, the OECD, World Bank and regional tax administrations as well as by members of the Global Forum. In particular, the Global Forum recognised that small financial centres may require technical assistance to implement the standards effectively and, in this perspective, it encouraged the OECD to develop concrete proposals in this area, ideally in co-operation with the other relevant concerned institutions. However, no specific action in this respect would seem to have been taken yet.

In this latter respect, it should also be observed that in the whole work of the Global Forum carrying out the peer review process, no use is made of the term “good tax governance”. Besides possible wording inconsistencies it may be argued whether the promotion of good tax governance lies in the mandate that was awarded by the G20 to the OECD and, consequently the Global Forum. In this perspective, the G20 is somewhat ambivalent. On the one hand, it has stated its commitment to set forth proposals to make it easier for developing Countries to secure the benefits of a new co-

[653] See Global Forum, *Mexico CitySummary of Outcomes*, 2009, at 3

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operative tax environment.[654] On the other hand, it cannot be denied that the endorsement of the OECD work on non-co-operative jurisdictions received a boost from the financial crisis which erupted two years ago; in this respect, the work of the OECD was perceived by the G20 not much as an inclusive agenda (as it would seem to be the case looking at the comitology of the Global Forum) involving developing Countries that may happen to be non-co-operative jurisdictions (or *vice versa*) but rather as a way to tackle said non-co-operative jurisdictions, to the extent that at the 2009 London meeting, G20 representatives concluded to be ready to deploy sanctions to protect "*their*" public finances and financial systems.[655] While the G20 can be considered a much more inclusive forum than the G7/G8, it is dubious whether the reference to "*their*" public finances and financial systems may be suitable to include, at least in the light of the aforementioned concerns, also those of developing Countries.

Nonetheless, even in the ambiguity of the mandate originally conferred by the G20 and in the absence of a specific reference to good tax governance in its work , the Global Forum should in the end be concerned with it, as such an item would seem to constitute, based on the declarations of the G20, a part of its mandate. In this respect, it may argued that, while more formalised actions may be taken in the future, the main contribution of the Global Forum to the good tax governance agenda lies precisely in the carrying out of its peer review activity which provides some sort of platform where technical assistance may be provided by mutual peer pressure and the sharing of best practices as originally enucleated in the terms of reference and as emerging from the peer review reports of better performing Countries. In this respect, it seems indicative that the schedule of peer review activities was arranged in such a way to leave more time to developing Countries for amending their own system and benefit from the indications to be inferred from the already issued reports. In particular, the most promising area for this indirect form of technical assistance would seem to be areas of domestic procedural law dealing with the availability of reliable information and the accessibility thereto by Tax Administrations and other relevant authorities.

More recently, the Global Forum appears to having adopted an inscreasingly development-conscious agenda. In particular, the Global Forum appears to having been involved in the promotion of multilateral negotiations of bilateral T.I.E.A.s by getting involved in long term technical assistance programmes with the African Tax Administration Forum (ATAF).

A further initiative undertaken in this area by the Global Forum involves the setting up of a "technical assistance" platform, where the different requests for assistance by jurisdictions are matched with programmes run by international organisations concerned with technical assistance. Examples in this respect are the so-

[654] G20 Declaration: Strenghtening the Financial System, London, 2nd April 2009
[655] Ibidem

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called "Pilot Projects" which have been addressed to some African Countries, in particular to Ghana and Kenya. The projects involve the supply of technical assistance directly by the Global Forum, in co-operation with the British Department for International Development and with the World Bank, in relation to the improvement of the access powers of local Tax Authorities as well as of the availability of information.[656]

In any case, the interaction between good tax governance, especially whereas geared towards forms implementable also by developing Countries and the agenda of fiscal transparency and exchange of information, constitutes a very promising thread of policy reflections that are all yet to be further conceived and analysed. A very important work in this regard is currently being carried out at an academic level by the recently initiated research project backed by the Research Council of Norway titled "sustainable tax governance in developing Countries through global fiscal transparency".[657]

[656] This latter aspect is in particular monitored by the World Bank.

[657] For further information reference can be made to the website of the research project: http://www.jus.uio.no/ior/english/research/projects/global-tax-tranparency/index.html

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6 PART 5. ADMINISTRATIVE CO-OPERATION IN THE EUROPEAN UNION

6.1 EXCHANGE OF INFORMATION AND DIRECT TAXATION

6.1.1 Historical Background

At an European Union level, the awareness to fiscal co-operation has been present for a very long time; however, following a pattern common to that experienced by the OECD initiatives, after decades of very slow progresses, the last fifteen years have seen a real escalation either in terms of new legal instruments being adopted and of new administrative practices being established. It shall be mentioned that, despite the obvious different approach adopted respectively by the OECD and the European Union, OECD standard-setting role has reverberated also on the European initiatives, so that it can be said that some principles consolidated in the OECD Model Convention have found incorporation within the EU legal instruments[658]. Such an incorporation will clearly emerge further on in this chapter. For instance, notions such as those of "exchange of information upon request" or "automatic exchange of information" or "spontaneous exchange of information" are clearly drawn upon the classification set from the very beginning by the OECD Commentary to the Model Convention. It must be indeed very difficult to depart from such a conceptual framework as solid as that offered by Art. 26.

This "influence" has actually been criticised by some scholars, due to the fact that the OECD solutions, which are ultimately based upon a compromise between the legal structures of different Contracting States, cannot be suitable when the final goal is fostering harmonisation, as it should be the case with EU initiatives[659]. On the other hand, it is also to be remarked that issues concerning international mutual assistance need to share some common traits regardless of the institution promoting them, as the conceptual platform is necessarily the same. Thus, interaction between these two institutions, especially in the field of mutual assistance, should actually be encouraged.[660]In this regard, as it will be exposed in greater detail in the following sections devoted to Directive 2011/16/EU on administrative co-operation, a clear convergence between the OECD sponsored international standards of exchange of information and European initiatives in this area can be observed.

With reference to the problem of tax avoidance and tax evasion, the first document at an EU level expressly dealing with the subject can be considered the

[658] Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims*, London, 2003, p. 125.

[659] Bagnardi B., *Le modifiche alla Direttiva 77/799 sullo scambio di informazioni tra gli Stati Membri dell'Unione Europea*, Diritto e Pratica Tributaria Internazionale (2004), at 607.

[660] Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims*, London, Kluwer, 2003, at 126.

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Council Resolution of the 10th of February 1975[661] and the Commission Programme of Action on Fiscal Matters of the 23rd of July 1975 .   In particular, the need for member States to engage their Tax Administrations in mutual assistance have been seen as measures ensuring the fulfilment and reinforcement of the Common Market in the light of the increased mobility of capital and of taxpayers.[662]

It can also be added that the issue of cross-border tax evasion was seen as distorting competition in the Internal Market between those who pay their taxes and those who do not; it also indirectly affected the EU system of own resources.[663]

The sensitivity of European Institutions toward mutual assistance dates back, at least, to the Seventies. Already in 1962 the so-called Neumark Report recommended the creation of an European Community service to provide information for the purposes of tax controls, so to foster harmonisation in this field. The Report remarked that "*without harmonisation of control and collection procedures, there is a risk that many harmonisations of legislation and doctrine may end being useless in practice*"[664]. In 1973, the European Commission sent the Council of Ministers a Report[665] on the tax treatment of holding companies and the emerging issue of international tax avoidance, a phenomenon that would have been best addressed by a concerted effort to improve the existing information exchange agreements between Member States. In 1975 the EU Council adopted a Resolution concerning measures to be taken in order to tackle tax avoidance and evasion[666]. The Resolution already emphasised the need to deepen and to broaden co-operation between national administrations in tax matters and provided an original bulk of concrete initiatives in the field of mutual assistance between Member Countries. Namely, the main tool to ensure an effective co-operation was deemed to be exchange of information, aimed at correctly calculating tax liabilities as well as at tackling cases of tax-fraud taking place on a cross-border basis.

The dual nature of exchange of information, which can be found also under Art. 26 of the OECD Model Convention on Income and on Capital, i.e. both as a tool to ensure the correct assessment of cross-border income and to tackle tax evasion, is here thus re-affirmed. It should be remarked how the first legal instrument of record to deal with exchange of information was actually the Council Directive concerning mutual assistance in the field of the recovery of tax claims deriving from operations forming part

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[661] Official Journal C 35/1 of 14th of February 1975

[662] See Van Thiel S., *European Union Against Tax Avoidance and Evasion*, AA.VV., Tax Evasion and Tax Avoidance: Symposium on EU Tax Policy, Vienna, 2011, at 34 et seq.

[663] Vascega M., Van Thiel S., *Council Adopts New Directive on Mutual Assistance in Recovery of Tax and Similar Claims*, European Taxation June (2010), at 231

[664] Reported by Ardito F., *La cooperazione internazionale in materia tributaria*, Padova, Cedam, 2007, at 151.

[665] Reported by Burgio G., *La Comunità Europea e l'evasione fiscale internazionale, Diritto e Pratica Tributaria* (1984), at 822.

[666] Resolution of the Council of the 10th of February 1975, concerning measures to be adopted to tackle international tax –fraud and evasion, in *Official Journal of the European Communities*, 14th February 1975, n. C35 at 1.

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of the system of financing the European Agricultural Guidance and Guarantee Fund and of agricultural levies and customs duties[667]. Even though the primary driver for exchange of information was found in the fight against international tax evasion, the versatility of this administrative practice was clear from the very beginning, so that it can be foresaid that the most meaningful examples of exchange of information have often been experienced with reference to topics other than the fight to international tax fraud and avoidance.

In order to meet the goals envisaged by the aforementioned Resolution of the 10th of February 1975, the following acts were subsequently adopted :

- Council Directive no. 76/308/EC of 15th of March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the EU agricultural and guarantee fund and of agricultural levies and customs duties;

- Council Directive no. 77/799/EEC of the 19th December 1977[668] concerning Mutual Assistance in the field of Direct Taxation, subsequently extended also to Value Added Tax (with Directive no.79/107/EC of the 6th December 1979 and to excise duties with Directive no. 92/12/EC of the 25th February 1992). All these amendments have resulted in a final version, Directive no. 2004/56/EC of the 21st of April 2004[669] concerning Mutual Assistance between Tax Administrations in the field of Direct Taxation and of some excise duties and insurance premiums, in force since the 29th of April 2004;

- Council Regulation no. 92/18/EC of the 27th of January 1992[670] concerning administrative assistance in the field of Value Added Tax, in force since January 1st 2004;

- Council Directive no. 2003/48/EC of the 3rd of June 2003[671] on taxation of savings income in the form of interest payments.[672]

[667] Directive no. 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the EU agricultural and guarantee fund and of agricultural levies and customs duties, in *Official Journal L 306*, 30th of November 1977, p. 34.

[668] Directive no. 77/799/EEC of the 19th December 1977[668] concerning Mutual Assistance in the field of Direct Taxation, in *Official Journal* L 336, 27th December 1977, p. 82.

[669] Directive no. 2004/56/EC, Corrigendum to Council Directive 76/308/EEC, in *Official Journal L* 306 30/11/1977, p. 34.

[670] Regulation no. 218/92/EC of the 27th January 1992[670] concerning administrative assistance in the field of Value Added Tax, in *Official Journal L 24 1/2/1992*, p. 1.

[671] Council Directive no.2003/48/EC of the 3rd June 2003[671] on taxation of savings income in the form of interest payments, in *Official Journal L 157*, 26th June 2003, p. 38.

[672] On 13 November 2008, the Commission adopted an amending proposal to the Savings Directive with a view to closing existing loopholes and better preventing tax evasion. The two major loopholes identified were the use of

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Given that these Directives comprise of fully detailed practical procedures, it has been argued that, despite their actual juridical qualification, they should be seen as more similar to Regulations directly applicable and without the need of a specific domestic legislation to entry into force, but a formal one[673]

6.1.2 Introductory Remarks on Directive no. 77/799/EEC and the legal base for assistance

Directive no. 77/799/EEC, adopted on the 19th December 1977, represents the pillar of the whole EU system of mutual assistance in tax matters. The original commitment of the early Seventies was reaffirmed in the Nineties, when the Council established a Working Group with the task of analysing the most common forms of tax fraud taking place among EU Member States and providing solutions to cope with them. Such an effort led to the adoption, in 2004, of Directive no. 2004/56/EC concerning mutual assistance in direct taxation and in the field of some excise duties and insurance premiums.

It should now be remarked that singling out the most correct legal base for the aforementioned legal instruments has proven to be particularly controversial.

All the adoptions have been carried out on the grounds of Art. 93 and Art. 94 of the EC Treaty[674], however, according to an influential part of the doctrine and to the position of the European Commission these adoptions should have been carried out holding Art. 95 of the EC Treaty as a legal base.

Art. 93 and Art. 94 represented the legal base to all the provisions adopted by the EU Institutions in the field of taxation[675].

On the contrary, Art. 95 of the EC Treaty, referring to the co-decision procedure, was actually expressively banned with reference to legal instruments affecting fiscal

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untaxed intermediary structures to obscure the actual beneficial ownership and the use of innovative financial instruments and other products (i.e. structured retail products and insurance wrappers) not covered by the Directive. The second review of the Savings Directive confirmed the widespread use of untaxed offshore structures interposed between the payer and the ultimate beneficiary in order to obscure the actual beneficial ownership: 35% of the non-bank deposits in Member States (65% for deposits in Savings Agreements countries) are held by such structures located in offshore jurisdictions. The review also revealed that the market for structured financial products (EUR 767,3 billion current outstanding amount of sales) has been increasing annually at more than 30% on average in recent years. See European Commission, Communication From The Commission To The European Parliament And The Council, on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries, COM(2012) 351 final of 27th June 2012, at 7. For an independent economic assessment of the first years of application of the Directive see also Rixen T., Schwarz P., *How Effective is the European Union's Savings Tax Directive?: Evidence from four EU Member States*, 50 J. Common Market Studies 151 (2011)

[673] Grau Ruiz M.A.,*Mutual Assistance for the Recovery of Tax Claims*, London, Kluwer, 2003 at 127.

[674] Treaty concluded in Rome, 25th March 1957, establishing the European Community, as amended by the Treaty on the European Union concluded in Maastricht, on 7th February 1992 and entered into force on 1st November 1993. The Treaty was further amended by the Treaty on the European Union concluded in Amsterdam on 2nd October 1997 and entered into force on 1st May 1999.

[675] Persano F., *La cooperazione internazionale nello scambio di informazioni*, *il caso dello scambio di informazioni in materia tributaria*, Torino, Giappichelli, 2006, at 152.

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provisions of the Member States, as it appears from the very Art. 95, Para. 2. However, it was argued that such a limitation should be interpreted in a restrictive fashion; it is thus not deemed appropriate to require an unanimity adoption procedure in all cases that revolve around taxation. A clear distinction such as the following should be kept in mind; the limitation envisaged by Art. 95, Para. 2 should apply only to those cases involving matters that are substantial to the fiscal sovereignty of Member States, such as the notion of taxable income, the scope of application of taxes either *ratione materiae* or *ratione personarum*, and the definition of tax rate[676]. Both the European Commission and the European Parliament have endorsed the interpretation according to which administrative co-operation among Member States could take place without the need for unanimity.

The Council has however always opposed such a restrictive interpretation and has kept adopting legal instruments in this field resorting to unanimity. Such an approach has been justified by deeming the distinction between substantial provisions in the field of taxation and provisions referring to tax administration and collection as "void and unjustified"[677]. It should be remarked that the Council's orientation has found an ally in the European Court of Justice which has rejected all the appeals filed by the European Commission[678] and the European Parliament[679] against the Council for having adopted all of the European provisions dealing with mutual assistance on the grounds of Art. 93 and Art. 94 of the EC Treaty. As it will be further addressed in relation to the new Directive 2011/16/EU of 15th February 2011, the debate concerning the most adequate legal basis for administrative co-operation in tax matters was reinstated in relation to the new Treaty on the Functioning of the European Union.[680] In this regard, it should also be observed that, even though the new Directive 2001/16/EU will have to be implemented by Member States by 31st January 2013 and Directive No.77/799/EEC will be repealed, the regime thereby provided will continue to be applicable in a certain respect in relation to taxable periods prior to 1st January 2011.[681] Thus, the present part of this work has been arranged in order to present Directive 77/799/EEC along Directive 2011/16/EU, focusing in particular on the differences between the two and the policy debate in the European Institutions that led to the approval of the new Directive.

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[676] Ibidem

[677] See European Parliament, Commission for Economic and Monetary Problems, *Report on the Proposal of a Directive by the European Parliament and by the Council which amends Directive n.77/799/EEC related to mutual administrative assistance among competent authorities of the Member States in the field of direct and indirect taxation*, (COM(2003)446-C5-0370/2003-2003/0170(COD)), 4th of December 2003, p. 9.

[678] ECJ, 26th January 2006, C-533/03, Council- European Commission, in ECR, 006, p. I-107.

[679] ECJ, 23rd February 1999, C-42/97, European Parliament – Council, in ECR, 1999, p. I-869.

[680] Treaty on the Functioning of the European Union (2008/C115/01) , Official Journal - C-115 of 9th May 2008, at 1.

[681] In particular, Art. 18, Para. 3 of Directive 2011/16/EU of 15th February 2011 establishes that "Notwithstanding paragraph 2, a Member State may refuse the transmission of requested information where such information concerns taxable periods prior to 1 January 2011 and where the transmission of such information could have been refused on the basis of Article 8(1) of Directive 77/799/EEC if it had been requested before 11 March 2011."

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Directive 77/799/EEC revolves essentially around exchange of information and it is primarily aimed at enabling the Applying Member States to carry out a correct assessment of taxes on income and on capital. As it has already been mentioned, indirect taxes, and more specifically VAT, are dealt with in other *ad hoc* legal instruments[682]. It should be made clear that, even though tax assessment in the Applying Member State should be seen as the primary driver to exchange of information as conceived by the Directive, once the information has been exchanged, it can be used for purposes other than tax assessment, even though, according to Art. 7.1.3, such use could not go beyond the domain of taxation purpose. The exchanged information can then be used only in those proceedings which ultimately refer to some form of tax assessment. The following analysis of Directive 77/799/EEC will address the amended version resulting from the adoption of Directive no. 2004/56/EC and remarks on the innovative import of the latter will be made whereas it is the case.

6.1.3 Exchange of information according to Directive no. 77/799/EEC and Directive no. 2004/56/EC

Directive 77/799/EEC envisages three forms of information exchange:

- exchange of information on request;
- spontaneous exchange of information;
- automatic exchange of information;

Exchange of information on request is dealt with under the first Section of Chapter 2 of the Directive, encompassing Articles from 5 to 10 and it does not depart remarkably from the pattern envisaged by Art. 26 of the OECD Model Convention. Due to the fact that the Directive dates back to 1977, the model adopted is the same as the one found in the 1977 version of the OECD Model Convention. Thus, just to name one of the main differences between the 1963 and the 1977 version of Art. 26 of the Model Convention, by adopting the new approach found under the amended version of Art. 26, all the requests for exchange of information performed under the Directive must concern a concrete case and must be specific and limited in content. Moreover, unlike the 1977 version of Art. 26 of the OECD Convention, Art. 2.2 of the Directive specifies that in those cases where the requested information is not already in possession of the Tax Administration of the Applied Member State, then the latter has to carry out all the necessary investigations in order to provide that information. It should be said however that this innovation was introduced only with Directive no. 2004/56/EC, whereas the

[682] Namely, Regulation (EC) 218/92 of 27th January 1992 and Regulation (EC) 2003/1798.

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original version of the Article did not make reference to this form of co-operation. In this respect, it is not clear whether the Directive has then acted as an inspiration for later developments of Art. 26 of the OECD Model Convention, as the 2005 amendment openly introduced the concept of "information gathering measures" to be used in order to obtain the information requested by the Applicant State. Due to the fact that the EU Commission is aware and sometimes co-operates with the OECD Centre for tax Policy and Administration[683], it could also be the other way round.

Automatic exchange of information can be considered as the "favourite" of the EU approach to information exchange[684], as it has found much following in further legal instruments, first and foremost the 2003 Interest Savings Directive[685]. Automatic exchange of information can be particularly suitable as a mean to implement policies involving a plurality of States, as it has the advantage to follow rather standardised patterns. Such a form of information exchange is usually articulated into different, specific categories. Automatic exchange of information can then refer to specific items such as dividends, interests, royalties, which are dealt with under autonomous although parallel channels[686].

When referring to automatic exchange of information it should not be forgotten that despite its homologating nature, the interpretation and implementation efforts which underlie it are in most cases quite remarkable. In order to be able to standardise all the information which is bound to be exchanged, it is apparent that such information shall in a way be comparable. Such comparability can be achieved either through a harmonisation of the underlying concept (e.g., with reference to the notion of interest or the notion of royalty) or through a comparative law analysis in order to match the common substance of otherwise different concepts. When it comes to implementation, along with the aforementioned interpretative efforts, it must be ensured that all the States taking part into the automatic exchange of information have the technical and bureaucratic instruments which ensure a prompt and smooth transfer of information. Under the practical point of view, within the setting of the Directive, such a preliminary work is ensured by a pre-emptive agreement between the Competent Authorities of each involved State which, according to Art. 9 of the Directive should take place on a case by case level. Two parallel dimensions coexist in this respect, a bilateral dimension, which refers to those cases affecting only two Member States each time and

[683] Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims*, London, Kluwer, 2003, at 114.
[684] Fernandez Marin, *Lo scambio di informazioni tra gli Stati Membri*, *Lo stato della fiscalità nell'Unione Europea*, Roma, GdF, 2003, at 9.
[685] Council Directive no. 2003/48/EC of 3rd June 2003 on taxation of savings income in the form of interest payment, effective since 1 July 2005, in Official Journal L157/38 of the 26th June 2003.
[686] Bagnardi B., *Le modifiche alla Direttiva 77/799 sullo scambio di informazioni tra gli Stati Membri dell'Unione Europea*, Diritto e Pratica Tributaria Internazionale (2004), at 613.

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a multilateral dimension, whereas all Member States as well as the European Commission are involved[687].

Spontaneous exchange of information is dealt with under Art. 4 of the Directive with particular reference to those cases where :

- the Competent Authority of a Member State has grounds for supposing that there may be a loss of tax in the other Member State[688];
- a person liable to tax obtains a reduction in or an exemption from tax in the one Member State which would give rise to an increase in tax or a tax liability in the other Member State;
- business dealings between a person liable to tax in another Member State are conducted through one or more Countries in such a way that a saving in tax may result in one or the other Member State, or in both;
- the Competent Authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;
- information forwarded to the one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State.

The list quoted above should not however be considered as an exhaustive one, as, according to Para. 2 of Art. 4 of the Directive, spontaneous exchange of information may well take place with reference to other cases as long as a consultation procedure[689] is previously put into action. Such a consultation can be dismissed in those cases where the information spontaneously exchanged can prove to be functional to the performing of a correct tax assessment in the Receiving Country, as it is envisaged by Para. 3 of Art. 4.

An explicit endorsement of simultaneous tax examinations was not to be found in the original version of the Directive, while on the contrary, tax examinations to be conducted abroad are allowed under the form of collaboration by officials of the State concerned. In the past, these forms of co-operation were made possible by resorting to a consultation conducted on the grounds of Art. 9 of the Directive. On the other hand, Directive no. 2004/56/EC has introduced a new article, namely Art. 8 *b*, where this form

[687] Ardito F., *La cooperazione internazionale in materia tributaria*, Padova, Cedam, 2007, at 157.

[688] In analogy with the parallel provision of the Strasbourg Convention, this case should be interpreted very broadly and then apply not only to cases where a fraudulent behaviour can be detected apparently, but rather with reference to all those cases where an exemption or a reduction take place. Such an approach has been endorsed by the European Court of Justice in the decision C-420/1998, of April 13th 2000.

[689] See Art. 9 of Directive no. 77/799/EEC.

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of co-operation is thoroughly regulated. According to this provision, the Competent Authorities in each Member State shall identify independently the persons liable to tax whom it intends to propose for simultaneous examination. At the same time, the Competent Authority of the former State shall notify the respective competent authorities in the other Member States concerned of the cases which should be treated simultaneously and provide reasons grounding the opportunity to act jointly. Once decided whether it wishes to take part to simultaneous tax examinations, each Member State shall confirm its agreement and appoint a representative with responsibility for supervising the operation. It does not seem however that Member States have been taking advantage of such a chance so far[690].

Due to the fact that the Directive is by definition a multilateral legal instrument, it is not surprising to find out that triangular cases of mutual assistance are made possible on the account of its provisions. Such cases are dealt with under Para. 4 of Art. 7, which deals with secrecy. In those cases where a Competent Authority of a Member State considers that the information received from the Competent Authority of another Member State may be useful for the Competent Authority of a third Member State, a transmission of this very information to the latter State is admissible as long as the State which is the source of the information agrees to the transfer taking place.

The extremely sensitive issue of limits to exchange of information is addressed under Art. 8 of the Directive. The cases envisaged by this Article are the same mentioned by the 1977 version of Art. 26 of the OECD Model Convention on Income and on Capital, with some further clarifications. For instance, the refusal to transfer some items of information cannot be based upon the fact that such items of information are not functional to the national course of administration. The only limits admissible to exchange of information are thus those that coincide with limits encompassed by the laws and administrative practices of the Requested Member State, due to the fact that the gathering of such information is not admissible under that Member State's legislation. Another list of limits to exchange of information is found in the need to safeguard commercial, industrial or professional secret and those items of information whose disclosure would be contrary to public policy. The fact that the list of limitation due to the safeguard of confidentiality of some information is shorter, or at least less detailed than that found at Art. 26 of the OECD Model Convention on Income and on Capital should not be interpreted in a more restrictive way than the latter provision. As a matter of fact, the list found under at Art. 26 is in many respects redundant and Art. 8 of the Directive has simply merged similar cases under one definition[691]. As it is also

[690] Fernandez Marin, *Lo scambio di informazioni tra gli Stati Membri*, in *Lo stato della fiscalità nell'Unione Europea*, Roma, GdF 2003, at 13.

[691] Persano F., *La cooperazione internazionale nello scambio di informazioni, il caso dello scambio di informazioni in materia tributaria*, Torino, Giappichelli, 2006, p. 157.

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established by Art. 26 of the OECD Model Convention, the Applied Member State which refuses upon one of the aforementioned grounds to provide assistance, should inform the Applicant Member State about its decision as soon as possible and it should also provide reasons justifying its refusal. It has been argued that the inclusion of public policy among the reasons to decline a request for assistance is not appropriate as the very broad meaning of such a concept is prone to abusive interpretations and it may put the effectiveness of exchange of information at risk[692].

Art. 8 of the Directive maintains a so-called reciprocity clause, as, at Para. 3, it reads that a Member State may refuse to provide information where the "Concerned State"[693] is unable, for practical or legal reasons, to provide similar information. The same reflections in terms of the effects of such provisions as the ones expressed with reference to the parallel provisions found under Art. 26 and in the Strasbourg Convention apply also to this Paragraph. It should be noted that this Paragraph explicitly mentions either practical and legal reasons, whereas this is not so straightforward in the OECD Model Convention on Income and on Capital, while practical reasons are not taken into account by the Strasbourg Convention, whereas, in order to the reciprocity requisite being met is enough that the Applying State is apt to guarantee that it would theoretically be able to provide the information it has requested, even though there would be a lack of implementation tools.

Council Directive no. 2004/56/EC was also responsible for the reshaping of the secrecy regime to be observed by the Receiving State with reference to the transferred information. In this respect, according to Art. 1.3 of the Directive, all information made known to a Member State under the provisions of Directive no. 77/799/EEC shall be kept secret in that State in the same manner as information received under its national legislation. This means, *inter alia*, that such information may be made available only to the persons directly involved in the assessment of taxes and related activities. In any case, the transferred information shall not be used other than for taxation purposes or in connection with judicial proceedings related to tax assessments.

As it has already been mentioned, many of the forms of exchange of information envisaged by the Directive[694] involve some kind of consultation between the Competent Authorities of the Member States concerned and, whereas the matters involved are not solely of bilateral interest, even between member States and the Commission. Where the Competent Authorities aim at establishing a trend, i.e. make arrangements referring to cases that are not of mere bilateral interest, they should thereof notify the

[692] Fernandez Marin, *Lo scambio di informazioni tra gli Stati Membri*, in *Lo stato della fiscalità nell'Unione Europea*, Roma, 2003, p.4.
[693] Most interpreters, also on the grounds of the proposal of amendment of Art. 8, agree to interpret the notion of "Concerned Member State" as the Requesting Member State.

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Commission as soon as possible, which, in turn, is in charge of notifying the other Member States.

A particularly innovative feature of the Directive is the attention to the role of know-how in making exchange of information successful and the need to implement a shared feedback mechanism. In order to maximise the average awareness and capability in dealing with such issues, Art. 10 of the Directive prompts Member States, together with the Commission, to pool their experience.

A latter aspect to be remarked is that the wording of the Directive does not specify whether exchange of information should regard only residents or also non-residents. The fact that Art. 1 of the Directive reads that "Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital" would suggest a rather extensive interpretation. It should also be mentioned that most Member States, including Italy, have implemented the Directive so to extend its application also to non-residents[695].

6.1.4 An assessment of Directive 77/799/EEC and Reform Attempts

Even before the process that brought to the adoption of Directive 2011/16/EU, Directive77/799/EEC, which to date has been the longest serving European legal instrument in the area of direct taxation, has been criticised because of its lack of any remarkable innovative import with respect to the legal instruments concerning exchange of information that already existed when it was adopted[696]. The other, in a way more structural, criticism the Directive has undergone refers to the fact that it has missed the chance to foster an effective harmonisation in the field of mutual assistance in terms of legal and administrative instruments. Moreover, it has been argued that the fact that the Directive does not feature timing restrictions to the providing of mutual assistance jeopardises the effectiveness of exchange of information carried out to contrast tax fraud, a field where timing is extremely relevant in order to achieve some results[697]. Some administrative practices are left without an adequate legal framework, for instance, tax investigations conducted abroad are not encompassed by the Directive. The Directive attempts to fill this and other gaps by setting forth a consultation procedure, which is dealt with under Art. 9; however, such a procedure has proven to be lengthy and goes in the opposite direction to that of a concrete harmonisation, as sophisticated issues not covered by the Directive are decided on a case by case bilateral basis.

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[695] Ardito F., *La cooperazione internazionale in materia tributaria*, Padova, Cedam, 2007, at 159.

[696] Galli C., *Exchange of information within the EU*, Tax Planning International Review, 1997, p. 3.

[697] Fernandez Marin, *Lo scambio di informazioni tra gli Stati Membri*, *Lo stato della fiscalità nell'Unione Europea*, Roma, GdF, 2003, at 6

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Such pitfalls have not been ignored by part of the Doctrine[698], which has also expressed the following goals as desirable in order to make the struggle against tax fraud and avoidance more effective:

- first of all, a fixed timing for providing assistance should be established and sanctions should be introduced, shall compliance with these deadlines be missed ;
- a dedicated provision concerning tax examinations conducted abroad should be introduced ;
- in the meanwhile, a particular emphasis should be put on automatic exchange of information, where possible .

Unfortunately, along with these rightful and justified guidelines, the Document insists, quite surprisingly, on the need to deny preliminary notification rights to the involved taxpayers. It has already been shown how taxpayers' protection and effectiveness of exchange of information do not necessarily imply a mutual trade-off[699], while the Tax Fraud Group, apparently seems to be insensitive to this theoretical conclusion.

On the other hand, among the most positive features of the Directive it should be mentioned that the system it encompasses is ultimately an open one, as Art. 11 allows Member States to resort to other legal acts in order to fulfil wider obligations of exchange of information.

As it has been already mentioned, the Directive foresees notification rights for the benefit of taxpayers, even though such results have met some criticism[700] due to the fact that this form of safeguard would prove to slow down co-operation between tax administrations.

However, it can be affirmed that the main shortcomings of Directive 77/799/EEC, those that eventually led to its repeal, are probably not to be found in some inherent shortcoming but rather in its having become outdated as compared to other available international legal instruments in the area of administrative co-operation.

In any case, it can be observed that the process that led to the adoption of the new Directive 2011/16/EU started more than ten years earlier with the publication of the Council Report on tax fraud issued in May 2000 by the Council Ad Hoc Group on Tax Fraud[701]. In this document the need to improve and enhance administrative co-operation had already been highlighted along with the pointing out of some shortcomings of the available regulatory framework. In particular, the Report underlined

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[698] Ibidem

[699] For a thorough analysis of this subject, see Calderon J.M. , *Taxpayer Protection within the Exchange of Information Procedure between State Tax Administrations*, Intertax (2000), at 462.

[700] Ardito F., *La cooperazione internazionale in material tributaria*, Padova, Cedam, 2007, p. 169.

[701] Council Document 8668/00 of 2nd May 2000.

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the lack of an explicit prohibition of refusing to share information on the grounds of impediments deriving from banking secrecy prerogatives, the lack of set deadlines for following up to a request of information and the difficulties deriving from Art. 7 of the Directive 77/799/EEC, according to which the exchanged information can be used in a judicial proceeding only with the consent of the transmitting Member State.

The Report also pointed out at the underuse of forms of administrative co-operation other than exchange of information upon request, such as automatic exchange of information and spontaneous exchange of information. In broader terms the Report also pointed out to the lack of a common culture among the Tax Administrations of the Member States and the lack of a response strategy to the opportunities and threats posed by the recent developments in the area of information technology.

Such critical remarks have been reinstated in Commission Communication COM(2004) 611 of 27th September 2004[702] and Communication COM (2006) 254 of 31st May 2006[703] where the following main shortcomings of the 1977 Directive were singled out:

the circumstance that the provision of assistance was conditional on the exhaustion of all domestic possibilities to gather information was criticised based on the first Paragraph of Art. 2, Para.1 of Directive 77/799/EEC ;

based on Art.8 of Directive 77/799/EEC the requested member State could refuse to supply the requested information on the basis of its national legislation, including, where foreseen, banking secrecy legislation;

Art. 5 of Directive 77/799/EEC did not provide set time limits for providing information;

Although Directive 77/799/EEC provided a legal basis for exchange of information and cross-border tax examinations, these enhanced forms of assistance required agreement between the concerned Member States on the grounds of the consultation procedure laid down under Art. 9 of Directive 77/799/EEC.

These Communications show some convergence with later developments observed in the model legal instruments enabling exchange of information on a bilateral level as well as with the increasingly acknowledged nexus between tax evasion and money laundering: in particular, the 2004 communication advocated the possibility of the sharing of information between various regulatory and monitoring authorities. On a theoretical plan, the most interesting outcome of such an approach probably lies in the emergence of a meta-fiscal concept of fraud that includes tax fraud and tax evasion yet overcomes the related narrow specifications. Further elements of novelty transpiring

[702] COM(2004) 611 final of 27 September 2004 on Preventing and Combating Corporate and Financial Malpractice
[703] COM(2006) 254 final of 31 May 2006, Communication on an EU Anti-fraud Strategy, Concerning the Need to Develop a Coordinated Strategy to Improve the Fight against Fiscal Fraud

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from the earlier cited Communications are to be found in an enhanced of platforms for sharing best practices among Tax Administrations as well as co-operation between Member States and third Countries.

In order to assess the above pointed issues, in 2004 a Directive[704] amending the 77/799/EEC Directive was approved.

. As a result, one improvement was that the information received could now be used for other purposes than tax assessments, such as for public hearings or judgments and for the recovery of tax claims as provided by the current (amended) Art. 7, Para. 1 of the Directive.

The new Directive also incorporated in the text of Directive 77/799/EEC a legal basis for additional forms of enhanced administrative assistance, in particular, the notification of instruments and decisions on behalf of another Member State[705] and the possibility to carry out "simultaneous controls"[706][707]

Even following the amendments set forth by the 2004 amendment, Directive 77/799/EEC was still hampered by the lack of an explicit prohibition of refusing the supply of information based on banking secrecy[708] grounds as well as set limits for ensuring that information be provided on a timely basis. Moreover, the On the other hand, the consultation procedure to which enhanced forms of administrative co-operation were demanded resulted in numerous bilateral arrangementsor Memoranda of Understanding between Member States that covered many different issues in different ways, thus undermining the uniformity of assessment assistance obligations that was sought by the Directive.[709]

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[704] Council Directive 2004/106/EC of 16 Nov. 2004 amending Directives 77/799/EEC and 92/12/EEC (OJ L 359 of 4 Dec. 2004, 30).

[705] See Art. 8 a of the amended 77/799/EEC Directive.

[706] Substantially equivalent to simultaneous tax examinations exposed and analysed in the previous part of this work.

[707] See Art. 8 b of the amended 77/799/EEC Directive.

[708] In particular, it can be observed that banking secrecy has been accepted as a suitable basis to refuse to provide assistance grounded on two possible justifications: either based on Art. 8, Para.1 of the Directive, according to which the Directive does not oblige the requested State to carry out enquiries or to provide information if this is would be contrary to its domestic law or administrative practices; see in this regard Schilcher M*., The Directives on Mutual Assistance in Taxation*, Lang M. et Al., Introduction to European Tax Law on Direct Taxation, II Edition, Vienna, Linde, 2010 at 189. On the other hand, some Member States have traditionally based their refusal to provide information covered by banking secret on the grounds of the second Paragraph of Art. 8 of Directive 77/799/EEC, which foresees that a member State may refuse to provide information if this would lead to the disclosure of professional secret, banking secret being perceived as a manifestation of the broader concept of professional secret. See in this regard the presentation delivered by Ms Perolat, Head of Sector of Administrative Co-Operation for Direct Taxation, at the European University Institute on 9th June 2011 on the occasion of the Executive Seminar "Tax Havens". See in particular slide No. 10.

[709] See Van Thiel, S, M. Vascega, *Assessment of Taxes in Cross Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation*, 20 EC Tax Review 3 (2011), at 150.

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6.2 OVERVIEW OF PROPOSAL (2009) 29 FOR A COUNCIL DIRECTIVE ON ADMINISTRATIVE COOPERATION IN THE FIELD OF TAXATION

The fact that Proposal COM (2009) 29 (hereinafter "the Proposal") aimed at making cooperation between tax authorities quicker and more efficient than Directive 77/799/EEC (hereinafter "the Directive") emerges simply by looking through the two documents[710]. As a matter of fact, the Directive is composed by 13 articles in sequence whereas there are twenty nine articles in the Proposal, organized in seven chapters and drafted in a very analytical fashion[711]. The Directive concerns "mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums", the Proposal on the other hand is titled "administrative cooperation in the field of taxation". The lexical change is not insignificant but a clear sign of the new approach. Namely, Whereas mutual assistance appears being a neutral concept, whose dimension can be more suitably defined on a case-by-case basis, international co-operation seems to imply the pursuit of common goals and an attribution of powers based upon the provisions of international law[712]. Thus, if a line should be drawn between the two, mutual assistance would occur under the provisions of specific clauses found under double taxation conventions, whereas it would be the case of international co-operation when some kind of agenda is set and the action is not restricted to bilateral channels but can take a multilateral form. In this sense, the use of the wording "co-operation" appears as being more apt within the European context.

The opening chapter**,** devoted to general provisions, is composed of four articles. In the Directive however, only the first article deals with the general provision. Firstly, the reference to "electronic means"[713] contained by Art. 1 of the Proposal is new. Even though the European Union is at the forefront in the pursuit of administrative integration also as far as the sharing of electronic formats are concerned, the inclusion of such reference directly in the text of the Directive appears as particularly innovative.

According to Art. 2, the Directive applies to "all taxes of any kind, irrespective of the manner in which they are levied, except for indirect taxes already covered by Community legislation on administrative cooperation between Member States." On the

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[710] For a broader analysis of the relationship between the 77/799/EEC Directive and Directive 76/308/EEC (on the assistance in the collection of tax claims) and Proposals COM (2009) 28 and COM (2009) 29 (concerning the recovery of tax claims) see Caram A*., Enhancing International Cooperation Among Tax Authorities in the Assessment and the Recovery of Taxes: The Proposal for New European Directives*, Intertax11 (2009), at 630.

[711] While the wording of the Proposal is clear and precise, rendering it, along with the earlier cited degree of detail, almost more akin to a Regulation, it would be problematic to qualify its provisions as unconditional and independent from national implementation measures as Art. 26 of the New Directive focuses explicitly on the adoption of domestic provisions by the Member States that ought to render the administrative cooperation framework thereby designed fully operational. As such, it seems dubious that the Directive may be qualified as a self-executing Directive.

[712] Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims*, London, Kluwer, 2004, at 39.

[713] Its definition is provided for by Art. 3(8).

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other hand, in its last version, the Directive covers taxes on income, capital and insurance premiums[714].Therefore, the scope of the Proposal is broader than that of the Directive: it extends to direct taxes and to indirect taxes, except those for which there's a specific EU legislation (i.e. VAT and excise duties). As the Commission points out[715], this provision is modeled on Art. 2 of the OECD/ Council of Europe Convention on Mutual Administrative Assistance in Tax Matters of 1988.

Art. 3 contains some definitions, totally missing in the Directive, that foster the creation of a European administrative "common jargon", essential for an efficient administrative cooperation. Finally, each Member State is required to set up an organisation, competent for administrative assistance matters: in detail, it has to designate a Competent Authority and a single taxation Liaison Office and inform the Commission; in addition, taxation liaison departments and competent officials can be appointed by the Member States too. A similar system is already provided for in the field of VAT.[716]

According to chapter two of the Proposal,information may be forwarded on request, automatically or spontaneously. The same three possibilities are taken into account by Art. 2, 3 and 4 of the Directive, modeled on the OECD standards. However, there are some new noteworthy aspects. First of all, as concerns the exchange of information on request (section one), specific time limits for the provision of information are established by Art. 7: it states that the information has to be furnished "as quickly as possible, and no later than six months following the date of receipt of the request"(one month in the case that information is readily available to the requested authority). Instead, only a general time limit is provided for in the Directive: Art. 5 states that the information has to be forwarded "as swiftly as possible". Even though different exceptions[717] are included in the same article of the Proposal and there is no sanction in the case of failure to comply with those limits, this new provision is worth highlighting: it clearly shows the Commission's attempt to make exchange on request really quick and efficient.

With reference to exchange of information upon request, it is interesting to remark that According to Recital 9 in the Preamble, the standard of 'foreseeable relevance' is thereby intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not

[714] About the interpretation of the tax concept of the Directive, the European Court of Justice is of the opinion that the list in Art. 1(3) is not exhaustive and therefore a tax, even if not expressively mentioned in it, can be covered by the Directive. See for example ECJ, 12 Apr. 1994, Case C-1/93, Halliburton, ECR I-1137; ECJ, 11 October 2007, Case C-451/05, Européenne et Luxembourgeoise d'investissements SA (ELISA), ECR I-08251.

[715] Explanatory Memorandum, Additional information, Detailed explanation of the Proposal.

[716]

[717] In detail see Art. 7 Para. 2, 5 and 6. Paragraph 5 and 6 take lead from the 2002 OECD Model agreement on exchange of information in tax matters.

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at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

In this regard, when comparing the relevant provisions of Directive 2011/16/EU with the OECD model legal instruments in the area of exchange of information it can be observed that the Directives fills and intermediate position between Art. 26 of the OECD Model Convention and the OECD Model T.I.E.A.

Namely, while, on the one hand, Art. 26 of the OECD Model Convention purely sets a standard and, on the other hand, the OECD Model T.I.E.A. adopts a rule-based approach and comments that requests of information include some very analytical specifications in order not to qualify as fishing expeditions, Directive 2011/16/EU also incorporates a rue-based approach but, under Art….. sets forth less cumbersome requirements than those provided by the OECD Model T.I.E.A.; it could then be argued that the new Directive ensures a more proportional implementation of the standard of foreseeable relevance. In particular, as opposed to Art. 5, Para. 5 of the OECD Model T.I.E.A., the new Directive does not require the requesting Member State to provide the nature and the form of the information sought nor to give grounds for believing that the requested information is held by the requested Member State.

As regards automatic exchange, the Directive provides for it in cases determined under the consultation procedure defined by Art. 9 whereas Art. 8 of the Proposal provides for it in cases of specific categories of income and capital, determined by the Commission in accordance with Art. 24, Par. 2 and in some more specific cases, mentioned by Paragraph 3 of the same article[718].

The spontaneous exchange is strengthened too: according to Art. 4 of the Directive, a member State has to transmit information without prior request in five specified cases (which may however be extended by Member States) whilst according to Art. 9 of the Proposal, this exchange should be carried out "in any case" and "in particular where taxation is deemed to take place in the Member State of destination of the information and where the effectiveness of the control system may be facilitated by the information provided by the Member State of origin*"*. These latter provisions are of extreme importance as, upon the new Directive's implementation, they will be among the main differentiating factors between the European approach to administrative co-operation and the international standard of transparency and exchange of information as promoted by the OECD in its 2002 Model Tax Information Exchange Agreement and adopted by the Global Forum on Transparency and Exchange of Information for Tax Purposes. On this point, Art. 26 of the OECD Model and the related Commentary serves as a middle ground as, although the former does not mention automatic and

[718] For example, "where taxation is deemed to take place in the Member State of destination of the information, and the effectiveness of the control system may be facilitated by the information provided by the Member state of origin" (letter a).

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spontaneous exchange of information at all, these possibilities are expressly foreseen by the OECD Commentary[719].

Although the exchange of information remains the cornerstone of the administrative cooperation in the field of taxation as it is in the Directive, chapter three takes into consideration other possible forms of administrative cooperation. Firstly, the opportunity to admit officials of the requesting State in the administrative offices and procedures of the requested State is confirmed[720] and specified by the Proposal. Indeed, the second Paragraph of Art.10 enables officials of the requesting State to exercise the same powers of inspection conferred on the national officials "under the condition that they exercise these powers in accordance with the laws, regulations or administrative provisions of the requested Member State" and moreover, states that any refusal to cooperate is considered as a refusal to the national authorities.

With reference to simultaneous controls and administrative notification, the Proposal retains almost the same words of Art. 8a and 8b of the Directive, as amended by the aforementioned Council Directive 2004/56/EC. Art. 13 deals with feedback: its purpose is to motivate officials to make better use of the various forms of information exchange, it was introduced due to the Member States' wish[721] and has to be sent "as soon as possible and no later then three months after making use of any answer" in cases of exchange on request or spontaneous exchange and "once a year"in cases of automatic exchange.

The provision of the "sharing of best practices and experience" is confirmed[722] and strengthened by Art. 14: in particular, the Commission can issue guidelines, regulating this. Paragraph 1 of the Commentary on Art. 26 of the OECD Model Convention establishes that the three forms of exchange of information (on request, automatic and spontaneous) can also be combined and moreover, that other ways to obtain information are possible. In detail, it mentions simultaneous examinations, tax examinations abroad and industry-wide exchange of information (two authorities agree on exchange of information relating not to a specific tax-payer –natural or legal person- but a specific economic sector, such as the pharmaceutical industry). Likewise, Art. 8 and 9 of the OECD/ Council of Europe Convention on Mutual Administrative Assistance in Tax Matters regulate simultaneous tax examinations and tax examinations abroad.

Chapter four is devoted to the "Conditions governing administrative cooperation". Art. 15 establishes that the requesting or receiving authority can transmit the information or documents obtained to another authority within the same Member State, in accordance with the domestic legislation, "even if that information could be used for

[719] See in particular, OECD Commentary to Art. 26 of the OECD Model, Para. 9.
[720] Namely, such an administrative practice was already provided by Art. 6 of the Directive.
[721] Explanatory Memorandum, Additional information, Detailed explanation of the Proposal.
[722] It was already provided by Art. 10 of the Directive.

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other purposes than those referred to in Art. 2". The transmission is admitted also to the authority of another third Member State in accordance, in this case, with the Directive. A broad approach is adopted by the Commission in order to preserve Member State and taxpayers' interests[723].

Art. 16 and 17 should be analyzed jointly: the first deals with Member States' obligations and the second sets the limits on these obligations. The principle of exhaustiveness[724] is confirmed but the principle of the impossibility of imposing a disproportionate administrative burden on the requested authority is also introduced. Art.16 includes three grounds for refusal to cooperate, which are similar to those provided by Art. 8 of the Directive. Three cases are taken into consideration:

- the case in which the State should collect information or carry out enquiries, which its legislation would not allow it to collect or to carry out (paragraph two);
- the case of lack of reciprocity, meaning that the requesting State wouldn't be able to furnish similar information for legal reason (paragraph three);
- the case in which the disclosure of information and documents would cause the disclosure of a commercial, industrial or professional secret or, of a commercial process, or would be contrary to public policy (paragraph four).

Two differences emerge: as regards the first case, paragraph one of Art. 8 of the Directive refers not only to legislation but also to "administrative practices"; as regards the second case, paragraph three of Art. 8 refers to "reasons of fact or law".

Art. 17 specifies that the absence of interest or need of the information for tax purposes by the requested State are not a legal basis upon which a Member State is allowed to decline to supply information (paragraph one). Moreover, paragraph two establishes that a Member State can in no case refuse to provide information "concerning a person resident for tax purposes in the Member State of the requesting authority solely because this information is held by a bank" (or other financial institution). The two paragraphs are modeled on Art. 26, Paragraphs four and five of the OECD Model Convention. In particular, the provision on the lifting of bank secrecy was emphatically stressed by the Commission upon its presentation to the EU Council and Parliament[725] and has been welcomed by all the European Institutions[726]. However, it is important to stress that it does not represent an absolute innovation, being already

[723] Explanatory Memorandum, Additional information, Detailed explanation of the Proposal.
[724] It means that all the domestic means available to the requesting State have to be exhausted.
[725] See European Commission press release "Fight against tax fraud: Commission proposes measures to allow better cooperation between tax authorities." Brussels, 2 Feb. 2009.
[726] In particular, see below the European Economic and Social Committee's opinion and the European Parliament's resolution.

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provided for in the OECD Model Convention. It testifies the EU intent to align with the OECD standards and is a provision that can not be absent in European law, especially after the London G20 Summit.[727] The Commission also takes into account the more practical aspects of the collaboration among tax authorities: common forms and computerized formats are introduced, the aim being to make this collaboration quicker and easier[728]. The use of common communication network/common system interface (CCN Network[729]) is introduced "as far as possible" for communications among tax authorities. In addition, Art. 20 establishes that any language is admitted for the communication in accordance with the agreement between the authorities involved[730] and that the Commission can identify a minimum threshold of taxes, above which a request for cooperation is admitted. Both these provisions were introduced by the Commission due to the Member States' wish[731].

Chapter five, devoted to "Relations with the Commission", is composed only of Art. 22. It establishes a close collaboration among national tax authorities and the Commission, in order to evaluate the functioning of administrative cooperation.

Chapter six deals with relations with third countries. As regards these relations, first of all, Art. 18 (chapter four) should be mentioned: it introduces the most favored nation principle, meaning that a wider cooperation granted by a Member State to a third country has to be provided by that Member State to all the others. In addition, Art. 23, which makes up the Chapter under discussion, deals with exchange of information with third countries and governs them with regard to two possible aspects: the possibility for a Member State to transmit the information received by a third country within the European Union and, the other way round, the possibility of furnishing non-European countries with the information received pursuant to the Directive. Starting from this latter case, transmission is permitted in accordance with the domestic legislation provided that all the authorities involved agree and that "the third country concerned has given an undertaking to provide the cooperation required to gather evidence of the irregular or

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[727] In the Leaders' Statement it is to be read: "In particular, we agree (…)to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information."See Leaders Statement- The global plan for recovery and reform- London, 2 April 2009, available at <http://www.g20.org/Documents/final-communique.pdf>.

[728] In detail, exchange on request and spontaneous exchange should be carried out by means of common forms (already under construction and in use in a pilot scheme) while automatic exchange through the format already used in accordance with Directive 2003/48/EC. See paragraph "Additional information- Detailed explanation of the Proposal" of the Explanatory Memorandum.

[729] It is a network infrastructure, set up by the Commission for the exchange of information among Customs and Taxation authorities.

[730] For further remarks on the language problems and their possible solutions, see Roman Seer, *General report "Mutual assistance and information Exchange"* paragraph IV. 6 and IV. 10 (report written in occasion of 2009 European Association of Tax Law Professors conference in Santiago de Compostela, retrievable on the following website: <www. eatlp.org>.

[731] Explanatory Memorandum, Additional information, Detailed explanation of the Proposal.

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illegal nature of transactions which appear to contravene or constitute an abuse of tax legislation”. Regarding the first possibility, it is admitted if not expressively excluded by the agreement. This provision is worth highlighting, given that it would imply an increasing circulation of the information from outside the EU within the European Union and is the Commission’s answer to the recent fraud cases involving a Member State and non European country[732]. However, it is important to notice that this exchange runs the risk of not being carried out, considering that almost all the agreements expressively exclude it. Consequently, from this point of view the provision, included in the same article, according to which “Member States shall ensure that future agreements they conclude with third countries contain no such exclusion” is essential. It is clear that the Commission seriously took into account the aspect of the relations with third countries in order to strengthen administrative cooperation not only within the European Union’s borders but also beyond them.

Theconcluding chapter contains general and final provisions. A new Committee, called “Committee on administrative cooperation for taxation” has been established. It clearly differs from the Consultation Committee provided for by Art. 9 of the Directive. It is in charge of assisting the Commission and it can also have consultative functions.

6.3 FROM THE PROPOSAL TO THE NEW DIRECTIVE. THE DEBATE AMONG EUROPEAN INSTITUTIONS AND MEMBER STATES

From a chronological point of view the first reactions on the Proposal came from the European Economic and Social Committee**,** which was consulted by the Council in. The Committee examined the provisions of the Proposal: it welcomed the attempt to create a community administrative culture as the most relevant aspect of the Proposal. It also appreciated the provisions regarding the use of standardized forms and computerized formats, which can concretely make cooperation easier and quicker. Moreover, it considered as important aspects the powers of inspection given to the officials of the requesting Member State (Art. 10, Para. 2), the limits set for administrative cooperation (Art. 16) and the impossibility of invoking bank secrecy in order to refuse cross border cooperation (Art. 17, Para. 2). The European Economic and Social Committee’s concluding remarks are worth highlighting. First of all, it pointed out that there are articles with similar content in the administrative cooperation Proposal and in the Proposal concerning the assistance in the recovery of tax claims[733] and,

[732] Explanatory Memorandum, Additional information, Detailed explanation of the Proposal.

[733] It mentions as example, assistance for notification of documents, which is provided by Art. 7 and 8 of Proposal (2009) 28 and Art. 12 of Proposal (2009) 29; another example is given by the regulation of the presence of officials from the requested State which is provided for in both Proposals but also by Council Regulation (EC) 1798/2003 in

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therefore, invited the Commission to unify legislation as far as possible. This leads to a reflection on whether it is advisable to treat separately the assistance in the recovery of tax claims from the broader topic of administrative co-operation in tax matters or, at least, whether it would not have been better to just make cross reference between the two instead of delivering two self-standing legal instruments. Despite this criticism, the separate streamlining of the administrative cooperation framework and of the assistance in tax recovery matters was maintained.

IntheCouncil meeting of 10th November 2009, Austria and Luxembourg expressed political reservations on the Proposal and the Council noted the need to modify the regulations provided for the automatic exchange of information: the COREPER was asked to re-analyze both the aspects. Due to the Treaty of Lisbon coming into force(1st December 2009), the Commission specified that the new legal bases of the Proposal are Art. 113 and 115 of the Treaty on the functioning of the European Union[734], corresponding to Art. 93 and 94 of the Treaty establishing the European Community: there is confirmation of the consultation procedure (the document has to be approved unanimously by the Council after consulting the European Parliament and the Economic and Social Committee), which is defined as "special legislative procedure" by the Treaty on the functioning of the European Union. On 19 January 2010[735], the Council reached an agreement on Proposal 2009 (28) while the debate on Proposal 2009 (29) continued.

The European Data Protection Supervisor also took part in the debate in January 2010[736], criticising the Proposal. It recognized, on the one hand, the need to better the exchange of information among tax authorities but, on the other hand, emphasized that this exchange of information involves personal data and, therefore, has to respect the EU rules on data protection[737]. In more detail, it noticed that "the Proposal contains several elements which do not comply with the applicable data protection requirements" and therefore, indicated the changes deemed necessary (as for example the inclusion of a reference to Directive 94/46/EC and to Regulation 45/2001 at least in the recitals and preferably also in a substantive provision).

The European Parliament expressed its opinion in a resolution of 10th February 2010[738]. The rapporteur (the Spanish MP Magdalena Alvarez) judged the Proposal positively on the whole: the Directive "represents both a leap forward either because it

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the field of VAT and Council Regulation 2073/2004 in the field of excise duties, moreover with a different range of powers. See Paragraph 5.7 of the opinion.

[734] COM (2009) 665 final. In particular, see Annex 4, page 44.

[735] See Press release of 2990th Council Meeting (5400/10 Presse 6), page 7.

[736] Opinion of the European Data Protection Supervisor, OJ C 101, 20 April 2010.

[737] In detail, Art. 16 of the Treaty on the Functioning of the European Union, Art. 8 of the Charter of Fundamental Rights of the European Union, Directive 95/46/EC of 24 October 1995, Regulation 45/2001 of 18 December 2000.

[738] European Parliament legislative resolution of 10 February 2010, OJ C 341, 16 December 2010.

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sets new obligations and as well because it extends and specifies the existing obligations[739].” Nevertheless, in her opinion, some amendments to the Proposal were needed.The report[740] of the European Parliament pointed out a meaningful piece of information: 1% of GDP is the amount budgeted by the Commission’s economic recovery plan to face the crisis, whereas the amount of tax fraud is more than 200000 million euro or 2% of GDP, according to some studies. This comparison is enough to make it clear that the need to efficiently counteract tax fraud cannot be postponed.

With the aforementioned resolution, “the European parliament approves the Commission Proposal as amended.” The more remarkable amendments among the 27 suggested by the Parliament, are the following:

- the definition of “person” is extended in order to cover “any other legal instruments or arrangement, regardless of its nature or form and whether or not it has legal personality, that may own and manage assets, including income therefrom, that are subject to any of the taxes covered by this Directive” (amendment 10);
- references to EU rules on data protection are included in the light of the European data protection supervisor’s opinion (amendments 3, 7, 18, 27);
- Art. 8 of the Proposal, governing automatic exchange of information is the most amended: specific categories of income and capital[741] are provided for, there is the possibility of establishing a limit to this kind of exchange (based on the categories of income and capital and/or the amount) and a new paragraph is inserted, according to which “the information shall be communicated at least annually and no later than six months after the end of the financial year in the Member State in which the information has been obtained”(amendments 13, 14, 15, 16, 17, 18). These amendments appear being the ratification of a compromise reached at Council level.
- Art. 10 is also amended: the officials of the requesting Member States “may, in agreement with the requested authority and in accordance with the guidelines laid down by the latter, take part in the enquiry”, instead of being able to exercise the powers of inspection, as established by Art. 10 of the Proposal (amendment 19)[742];

[739] In more detail, also in Alvarez’ opinion, the lifting of bank secrecy represents the most relevant aspect of the Proposal.
[740] Report of the European Parliament - Session document A7-0006/2010.
[741] Income from work, directors’ emoluments, dividends, capital gains, royalties, life insurance products not covered by other Union legal instruments on the exchange of information and other similar measures, pensions and ownership of immovable property and income derived therefrom.
[742] According to the Report of the European Parliament (at 16), the reason for this remarkable cut of powers is preventing that this presence becomes counter-productive, making cooperation useless.

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▪ the provision of Art. 17 that the information has to concern a person resident for tax purposes in the requesting Member State is removed[743] (amendment 20).

The Commission expressed a partial agreement on European Parliament amendments. In the 19th October 2010 meeting[744], the Council examined the Proposal anew: the debate focused in particular on Art. 8, regulating the automatic exchange of information. On 7th December 2010[745], Council agreement was reached on the Proposal.

6.4 COUNCIL DIRECTIVE 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

On 15th February, the Council formally adopted Directive 2011/16/EU (hereinafter, "the New Directive"). Council Directive 2011/16/EU is titled "(Council Directive) on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC": thus the Commission's lexical choice to speak of cooperation and no longer of a simple mutual assistance is confirmed.[746]

The New Directive is composed of 31 articles: two more than those contained in the Proposal (in detail, Art. 10, setting up time limits for the spontaneous exchange of information, and Art. 25 about EU data protection are new). Its structureinstead, consisting of seven chapters, is unchanged when compared to the original proposal.

In the course of time span between the issue of the proposal of the new Directive and the adoption of Directive 2011/16/EU the framework of reference for European Law has changed dramatically due to the entry into force of the Treaty on the Functioning of the European Union. Nonetheless, the update of the primary EU legal framework did not affect the legal basis of the adoption of measures of harmonization in the area of direct taxation: namely the Directive 2011/16/EU has been adopted on the grounds of Art. 113, corresponding to Art. 93 of the Treaty of Rome and of Art. 115, corresponding to Art. 94 of the Treaty of Rome.

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[743] According to the Report of the European Parliament (page 16), this update is in accordance with the OECD standards and guarantees that the lifting of banking secrecy is definitive, abolishing any additional requirements

[744] See Press release of 3038th Council Meeting (15061/10 Presse 278), page 7.

[745] See Press release of 3054th Council Meeting (17447/10 Presse 333), page 7.

[746] Detailed assessments of the New Directive have been the subject of some items of insightful scholarship. Reference can be made in particular to Van Thiel S., Vascega M. Assessment of Taxes in Cross Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation, 20 EC Tax Review 3 (2011), at 148, Cerioni L., *The New Eu Tax Directive On Administrative Cooperation Between Member States: A Key Step Against Tax Distortions In The Internal Market?,* Diritto e pratica tributaria internazionale, 3 (2011) at 877 and Pitrone F., *Lo Scambio Di Informazioni E La Direttiva 2011/16/Ue In Materia Di Cooperazione Amministrativa: Innovazioni E Profili Critici*, Diritto e pratica tributaria internazionale 2 (2012), at 463.

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On the other hand, it may be recalled that the entry into force of the Lisbon Treaty repealed former Art. 293 of the Treaty of Rome, which required Member States to enter into agreements, as far as necessary, to achieve the abolition of direct taxation within the EU. While there is unanimous understanding that the concerned Treaty provision was not meant to have direct effect and in any case did not set forth a general prohibition of double taxation across member States but, rather, aimed at fostering commitment in this direction by Member States only insofar as "necessary". While an assessment of the actual impact of the removal of Art. 293 from the source of EU primary law goes beyond the scope of this study,[747] it can be argued how, in theoretical terms, the demise of such an explicit provision interacts with the scope and purpose of administrative assistance in the area of direct taxation. Namely, if it assumed that the abolition of international double taxation does not fall within the scope of aims and prerogatives of EU law, then it might be argued that the EU administrative co-operation framework in the area of direct taxation would only fulfill an anti-fraud rationale, thus apparently acting to the exclusive benefit of Tax Administrations[748] with the more balanced approach adopted by the OECD which combines the prevention of double taxation with the enforcement of the domestic laws of the Contracting States (including a clear anti-evasion and anti-fraud perspective).

In this regard, although the Preamble to the new Directive mentions double taxation, it apparently does so only in the perspective of its being a possible driver of abusive behaviours, that need to be contrasted through enhanced co-operation between the Tax Administrations of the Member States[749]. At the same time, it can be

[747] The issue has been the subject of an analysis set forth by very authoritative commentators. In this regard it may be argued that two different perspective can be found. On the one hand, some scholars have argued, based on the lack of direct effect of such a provision, that the lack of a provision analogous to the old Art. 293 in the TFEU has actually broadened the scope for eliminating double taxation across Member States; see in this regard Kemmeren E., *After Repeal of Art. 293 EC Treaty under the Lisbon Treaty, the EU objective of Eliminating Double Taxation can be Applied more Widely*, EC Tax Review 4 (2008), at 156 et seq. On the other hand, skepticism was expressed concerning the suitability of "negative integration" as ensured by the case law of the Court of Justice as the exclusive tool to address the issue of double taxation (and double non-taxation across Member States). See in this regard Lang M*., Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions*, EC Tax Review 3 (2009), at 93.

[748] The conclusion according to which European legal instruments dealing with administrative assistance have been more concerned with providing the Tax Administrations of the Member States to tackle tax fraud and evasion with more vigour rather than for benefitting taxpayers seems also to be conveyed by an interpretative stream (referring to Directive 77/799/EEC) developed by the Court of Justice according to which taxpayers cannot derive rights from the Directive and it is up to the Member States to decide whether they want to submit a request for information based on the Directive. If a taxpayer cannot directly provide the information needed to be granted a tax benefit, it cannot force his Member State to obtain such information through the Directive. Such an orientation is well represented by the conclusions reached by the Court in the Twoh Case, ECJ, 27 September 2007, Case C-184/05, Twoh International BV v. Staatssecretaris van Financiën, in part. Paras 29 et seq. and in the Persche Case, ECJ, 27 January 2009, Case C-318/07, Hein Persche v. Finanzamt Lüdenscheid, in particular, Para. 64. In this regard see also Hemels S., *References to the Mutual Assistance Directive in the Case Law of the ECJ: A Systematic Approach*, European Taxation 11 (2009), at 583 et seq and Lang M., *The Legal and Political Context of ECJ Case Law on Mutual Assistance*, European Taxation 5 (2012), online version

[749] In particular, the first Recital of the Preamble to Directive 2011/16/EU foresees that "(…) There is a tremendous development of the mobility of taxpayers, of the number of cross-border transactions and of the internationalisation of financial instruments, which makes it difficult for Member States to assess taxes due properly. This increasing

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remarked that, whatever the intent of the Council may be, the reference to double taxation is a novelty as no reference to the problem of cross-border double taxation was found in the Preamble of Directive 77/799/EEC. For this reason, it still seems reasonable to argue, as it has already been set forth,[750] that the Directive 2011/16/EU, due to its being issued after the repeal of Art. 293 of the Treaty of Rome, could be considered as a first response to overcoming a general risk of double taxation through a better administrative co-operation, in the sense that the resulting improved administrative co-operation would allow a more effective application of the existing double tax treaties and may motivate any Member State to greater extent than it would otherwise occur, to take into account the tax provisions of other Member States.

It can be observed, on the other hand, that a reference to the safeguard of the rights of taxpayers has been included in the Preamble to the new Directive under Recital No. 28, according to which "This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union." However, besides rules governing data protection laid down under Art. 25 of the Directive, there is no specific reference to the perspective of the involved taxpayer so that it can be said that no specific framework for the safeguard of taxpayer rights is provided for in the body of the Directive. This appears as a somewhat of a missed opportunity when considering that the Directive on administrative co-operation is the only item of EU Law which does not deal with substantive tax law but, to some extent, with "procedural issues" in tax law.

Starting from Art. 1 on "Subject matter" (chapter one), the specification that the New Directive deals with "rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration" is worth highlighting as it adapts to the wording of Art. 26, Para. 1 of the OECD Model. This also testifies that the conceptual category of "fishing expeditions"[751], conceived within an OECD environment has been acquired also by European Law so that a clear phenomenon of convergence[752] can be observed.[753]

According to Recital 9 in the Preamble, the standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible

difficulty affects the functioning of taxation systems and entails double taxation, which itself incites tax fraud and tax evasion, while the powers of controls remain at national level. It thus jeopardises the functioning of the internal market."

[750] See Cerioni L., *The New EU Tax Directive On Administrative Cooperation Between Member States: A Key Step Against Tax Distortions In The Internal Market?*, Diritto e pratica tributaria internazionale 3 (2011) at 880

[751] See recital number nine of the Directive.

[752] In particular, this case could be quoted as an example of "full convergence" in the sense developed by seminal work in the area of comparative tax law. See Garbarino C., *Tax Transplants and the Circulation of Corporate Tax Models*, British Tax Review (2007), at 169 et seq.

[753] In this regard, it is interesting to remark that it has been reported by qualified anedoctal evidence that the earliest draft of the proposal of the new Directive did not include the wording "foreseeable relevance" nor any specific reference to the notion of "fishing expedition".

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extent and, at the same time, to clarify that Member States are not at liberty to engage in ‘fishing expeditions’ or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

In this regard, when comparing the relevant provisions of Directive 2011/16/EU with the OECD model legal instruments in the area of exchange of information it can be observed that the Directives fills and intermediate position between Art. 26 of the OECD Model Convention and the OECD Model T.I.E.A.

Namely, while, on the one hand, Art. 26 of the OECD Model Convention purely sets a standard and, on the other hand, the OECD Model T.I.E.A. adopts a rule-based approach and comments that requests of information include some very analytical specifications in order not to qualify as fishing expeditions, Directive 2011/16/EU also incorporates a rule-based approach but, under the first Paragraph of Art. 21 sets forth less cumbersome requirements than those provided by the OECD Model T.I.E.A.. Namely, while the earlier cited provision foresees that “exchange of information takes place as far as possible using a standard form adopted under comitology procedure that shall include: a) The identity of the person under examination or investigation; b) The tax purposes for which information is sought (…) and to the extent known and in line with international developments, the name and address of any person believed to be in possession of the requested information as well as any element that may facilitate the collection of information by the requested authority”, the new Directive would not require the requesting Member State to provide the nature and the form of the information sought nor to give grounds for believing that the requested information is held by the requested Member State.[754] It could then be argued that the new Directive ensures a more proportional implementation[755] of the standard of foreseeable relevance. In particular, as opposed to Art. 5, Para. 5 of the OECD Model T.I.E.A..

The wide scope of the New Directive covering “all taxes of any kind”, with the exception of those regulated by other EU legal instruments is confirmed. Moreover, unlike the Proposal, “compulsory social security contributions payable to the Member State or a subdivision of the Member State or to social security institutions established under public law” are also excluded.

Art. 3 of the New Directive provides for more definitions than Art. 3 of the Proposal: indeed, definition number seven (“to grant access”) is deleted but another five definitions are included, regarding the authority competent for the application of the New

[754] As it will be addressed in more detail further on in this Paragraph, the conclusion holds true also in the light of Regulation No. 1156/2012.

[755] Some commentators have even argued that, due to the potential of ensuring a broader supply of information upon request, Directive 2011/16/EU would “go beyond the OECD standards”. See Van Thiel S., Vascega M. *Assessment of Taxes in Cross Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation*, 20 EC Tax Review 3 (2011), at 152.

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Directive[756]. Furthermore, as indicated in the earlier cited Resolution of the Parliament, the definition of person included in Art. 3 has been remarkably extended to cover "any other legal arrangement of whatever nature and form, regardless of whether it has legal personality, owning or managing assets, which, including income derived therefrom, are subject to any of the taxes covered by this New Directive".

Art. 4 confirms the institutional arrangements set up by the Commission in the Proposal: it is compulsory to designate a competent authority (to be defined by 11th April 2011) in addition to a single central liaison office and optional to designate liaison departments and competent officials who would be entrusted with the carrying out of direct contacts.

As regards Chapter two, devoted to exchange of information, several provisions of the Proposal have been modified while other have been subject to minor changes.

Art. 5, laying down the basic rules for exchange of information upon request has not been modified and merely contains a *renvoi* to Art. 1 of the Directive as well as to Art. 6, which set the framework for the proactive dimension of administrative co-operation by laying out the administrative enquiries that ought to be carried out by the requested State when the required items of information are not in their files. In this regard, the provision originally found in the Proposal has not been remarkably modified even though it is worth underlining that the new provision goes beyond both the previous 1977 Directive and the rules laid down under Art. 26 and under the OECD Model T.I.E.A. In this regard, it is particularly worth mentioning that Para. 2 of Art. 6 specifies that the request may contain "a reasoned request for a specific administrative enquiry": this wording somewhat sets a precedence as emphasis would appear to be shifted from "an output", such a set of information to a "process" such as the entrusting of a specific administrative enquiry to be carried out. On the other hand, the last Paragraph of Art. 6 explicitly foresees that, upon request, the supplying Member State should provide original documents as long as this is not contrary to its laws. The issue of the format of the supplied items of documentation is a very sensitive one since, as it has already been pointed out, extraterritorial information is supposed to undergo official recognition in the receiving State and it then appears relevant that information be provided under such a form which is compatible with the legal requirements of such a jurisdiction.[757]

New specifications concerning, inter alia, exchange of information upon request have been set forth by Regulation No 1156/2012 of 6th December 2012. The regulation

[756] In detail, the expressions "central liaison office", "liaison department", "competent official", "requesting authority" and "requested authority" are determined.

[757] Such a specification was already provided under Art. 5, Para. 3 of the OECD Model T.I.E.A. but it was not contemplated by Art. 26 of the OECD Model nor by its Commentary, although such a gap appears to having been filled in the 2012 update of Art. 26 and its Commentary; see, in particular, Para. 10.2 of the 2012 OECD Commentary to Art. 26 of the OECD Model Convention.

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is notable also because it has been subject to the approval and has been based on the opinion set forth by the newly established Committee on Administrative Cooperation for Taxation. In particular, requests for information should include, as per the abovementioned binding form,[758] the following specifications:

- Legal basis;
- Reference number;
- Date;
- Identity of the requesting and requested authorities;
- Identity of the person under examination or investigation;
- General case description and, if appropriate, specific background information likely to allow assessing the foreseeable relevance of the information requested to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2 of Directive 2011/16/EU;
- Tax purpose for which the information is sought;
- Period under investigation;
- Name and address of any person believed to be in possession of the requested information;
- Fulfilment of the legal requirement imposed by Article 16(1) of Directive 2011/16/EU (namely, the fulfillment of the status of official secrecy of the exchanged information);
- Fulfilment of the legal requirement imposed by Article 17(1) of Directive 2011/16/EU (namely the fulfillment of the subsidiarity obligation).

Art. 7 of the Directive, concerning time limits for following up to a request of information similarly deal with a very sensitive issue, as it is also testified by the specific focus placed on the "efficiency"[759] within the context of the Global Forum Peer Review process. In this respect no major amendments were introduced in the final Directive when compared to the original proposal which is fully in line with the best practice established by the Global Forum, according to which information should be provided within six months from the request. The Directive is even stricter in demanding that information already in the files of the supplying Member State be provided within two months (as opposed to one month as stated in the Proposal) from the date of the request.

As anticipated, Art. 8 of the New Directive, governing automatic exchange of information, appears as the one that has been subject to the most meaningful

[758] Included under Annex I to the Directive.

[759] Even though, in this regard it would probably be more suitable to refer to "expediency", "efficiency" being a much more far-fetching concept.

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amendments when comparing the Proposal with the New Directive. Starting from 1st January 2014, this kind of exchange will be mandatory for five categories of income and capital; namely:

- income from employment;
- director's fees;
- life insurance products not covered by other Union legal instruments on exchange of information; and
- other similar measures, pensions; and
- ownership of and income from immovable property.

It is interesting to remark that, despite a very extensive provision devoted to providing autonomous definitions a key issue such as the delimitation of the earlier cited categories of income and capital are not thereby autonomously defined but, rather, a *renvoi* is made to the domestic law of the State supplying the information.

Similarly to what had been foreseen by the original Proposal, the provided that the information is readily available. Such an automatic exchange of information would cover the tax periods as from 1st January 2014. Based on the conjunct reading of Para. 1 of Art. 8 of the Directive, which set the basic framework for mandatory automatic exchange of information, which provides that "the competent authority of each Member State shall, by automatic exchange, communicate to the competent authority of any other Member State, information (…) that is available" and Para. 9 of Art. 3 of Directive 2011/16/EU, which provides the key definitions to the Directive where it is specified that "in the context of Article 8, available information refers to information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State", there would seem to be some ambiguity concerning the conclusion on whether automatic exchange of information postulates any proactive behaviour on the head of the supplying State, as the earlier cited definition of "available" information would seem to include both information "already in the files" as well as "retrievable" information. Based on Para. 2 of Art. 8, according to which "before 1 January 2014, Member States shall inform the Commission of the categories listed in paragraph 1 in respect of which they have information available": thus, the second interpretation may more reasonably be upheld as the mere circumstance of having information "in file" may be a transient one, not suitable to be determined by category. At the same time, it might be argued that, unlike exchange of information upon request, where additional enquiries, where necessary, may directly follow up to a request, automatic exchange of information postulates that information be pre-emptively gathered in order to be exchanged on a routine basis at set times so that there should likely be an overlap between the information which is "available" to Tax Authorities and that actually in the files, thus making the dichotomy outlined above somewhat blurred. In any case, it can be foreseen

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that in order to be available specific reporting obligations have to be set up, where not already present, in order to ensure such an availability.

In accordance with the Parliament's resolution, a Member State may indicate that it does not require information on specific categories or below a specific threshold. By 1st July 2016, Member States are required to provide the Commission with information on the functioning of this form of administrative co-operation and, on such basis, the Commission has to provide a report and a Proposal before 1st July 2017. Subsequently, the Council will take into consideration the possibility of removing the condition of availability and adding another three categories of income and capital, namely: dividends, capital gains and royalties. Furthermore, similarly to the previous regime, there is the possibility of bilateral agreements for other types of income. In this regard, the new Directive stands out as a very flexible instrument which allows for a dynamic approach.

Para. 3 of Art. 8 foresees that a Member State may be considered as not wishing to receive information on a routine basis if it does not inform the Commission of any single category in respect of which it has information available. Such a somewhat peculiar stipulation is most likely to be understood as a measure some form of reciprocity in order to prevent freeriding by Member States:[760] in other words it foreseen that no Member State can expected to receive what it cannot provide. At the same time, it can be observed that such a provision does not imply full reciprocity as a Member State would have to mention even only one single item of information "available" in order to be entitled to the whole automatic exchange package.[761]

Automatic exchange of information as dealt with under the final version of the Directive also shows concerns with the issue of expediency in providing assistance. In particular, unlike the Proposal, specific time limits are set up for the other two kinds of exchange too. Paragraph 6 of Art. 8 establishes that the information has to be forwarded "at least once a year, within six months following the end of the tax year of the Member State during which the information became available". From an implementation viewpoint, automatic exchange of information within the framework of the new Directive should stem from the same work carried out in relation to the Savings Directive: in particular, the compulsory use of formats based on FISC 153, already introduced in relation to the EU Savings Directive is foreseen.[762]

Art. 9, governing spontaneous exchange of information has also been subject to major amendments when compared to the proposal. In particular, the final version of the

[760] In this regard, see also Van Thiel S., Vascega M., *Assessment of Taxes in Cross Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation*, 20 EC Tax Review 3 (2011), at 153.
[761] Ibidem.
[762] See in this regard the presentation delivered by Ms Perolat, Head of Sector of Administrative Co-Operation for Direct Taxation, at the European University Institute on 9th June 2011 on the occasion of the Executive Seminar "Tax Havens". See in particular slide No. 19.

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provision provides for five cases in which information should be spontaneously exchanged, namely:

(a) the competent authority of one Member State has grounds for supposing that there may be a loss of tax in the other Member State;[763]

(b) a person liable to tax obtains a reduction in, or an exemption from, tax in one Member State which would give rise to an increase in tax or to liability to tax in the other Member State;[764]

(c) business dealings between a person liable to tax in one Member State and a person liable to tax in the other Member State are conducted through one or more countries in such a way that a saving in tax may result in one or the other Member State or in both;[765]

(d) the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;[766]

(e) information forwarded to one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State.[767]

These typified cases are the same selected by paragraph one of Art. 4 of Directive 77/799/EEC but, on the contrary, were not provided for by Art. 9 of the Proposal. On the other hand, the second Paragraph of Art. 9 of Directive 2011/16/EU does not limit spontaneous exchange of information to a set of specific categories, as each Member State has to spontaneously furnish "any information of which they are aware and which may be useful" to another. In the case of spontaneous exchange of information, information should be provided "as quickly as possible, and no later than one month after it becomes available".[768]

A critical aspect that should be examined in conjunction with Art. 9 is the possibility of engaging in spontaneous exchange of information on a triangular basis. Namely although the earlier cited Para. 2 of Art. 9 of the new Directive provides for the spontaneous exchange of "any information", the third Paragraph of Art. 16 of the same Directive, dealing with the disclosure regime of exchanged information commends that where a competent authority of a Member State considers that information which it has

[763] In this regard, there is a clear anti-evasion rationale.

[764] This case appears to implicitly address the issue of cross-border double non taxation.

[765] This case appears to tackle abusive behaviours: in this regard, it is interesting to remark the focus on the emergence of a tax saving in one or in both Member States. The more typical case foreseen by the EU Lawmaker was that of business dealings through a permanent establishment with possible decrease of taxes. . See in this regard the presentation delivered by Ms Perolat, Head of Sector of Administrative Co-Operation for Direct Taxation, at the European University Institute on 9th June 2011 on the occasion of the Executive Seminar "Tax Havens". See in particular slide No. 20.

[766] This case appears to deal with the issue of "transfer pricing".

[767] This indent provides a general clause enabling spontaneous exchange of information to take place in any case where it might be necessary in the light of the tax assessment procedures or one of the concerned Member States.

[768] Art. 10, Para. 1 of Directive 2011/16/EU.

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received from the Competent Authority of another Member State is likely to be useful to the Competent Authority of a third Member State, it may transmit that information to the latter Competent Authority only upon previous notification to the Member State of origin of the information which may oppose such a sharing within ten working days from the notification. In the view of this author, the inclusion of such a specification appears as a missed opportunity to render exchange of information among Member States truly multilateral and to affirm also in this context the overarching principle of Union loyalty.

Concerning the other possible forms of administrative cooperation, dealt with under Chapter three of the final Directive,[769]while simultaneous tax examinations and the participation in administrative enquiries carried out in another Member State had already been foreseen by previous legal instruments, administrative notifications and the sharing of best practices are innovative forms of administrative co-operation which postulate a stricter form of "administrative integration" among Member States. In this regard, rules governing the presence of foreign officials and simultaneous controls have not been amended in comparison to the Directive Proposal.

On the other hand, compared to the Proposal, an important Paragraph four has been added to Art. 13 regarding administrative notifications, specifying some conditions: in particular, a request for notification is now admitted only in case of impossibility in accordance to domestic law or at least, disproportionate difficulties for the requesting Authority.

Art. 13, dealing with administrative notification, is based on the existence, in certain Member States, of legal requirements that taxpayers be notified of decisions and instruments concerning their tax liability, and on the realisation that there are cases when these States may be unable or find difficulties in making notifications according to their rules, such as cases of taxpayers who have relocated to other Member States.[770]Art. 13, Para. 1 foresees that the notification must be made by the requested authority in accordance with the rules governing the notification of similar instruments in the requested Member State. As it has been pointed out, such a circumstance may, however, give rise to difficulties in cases where, in the requesting Member State, the competent authority must make the subsequent enforcement but, in the requested Member State, there are, for instance, more extended deadlines for notification.[771]

Art. 15 governing the sharing of best practices should likely play a key relevance within the framework of the new Directive as it is directly related to the good tax governance agenda which provides the policy background to the renewed effort to

[769] In particular, Art. 11 deals with the participation in administrative enquiries of other Member States, Art. 12 deals with simultaneous controls, Art. 13 with administrative notifications and Art. 15 with the sharing of best practices.
[770] Cerioni L., *The New EU Tax Directive On Administrative Cooperation Between Member States: A Key Step Against Tax Distortions In The Internal Market?*, Diritto e pratica tributaria internazionale 3 (2011) , at 911.
[771] Ibidem.

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achieve further “administrative integration” among Member States. At the same time, the provision maintains a rather programmatic approach to the issue and sets forth recommendations rather than providing a shared platform. At the same time, since the provision requires Member States to carry out an evaluation and examination of administrative co-operation in order to draft additional guidelines on any aspect further deemed necessary it still plays a commendable role as the legal basis for rendering the Directive a dynamic framework whereas a common administrative culture can further be developed.

Art. 14 governing feedback has been amended too with respect to the original Proposal: feedback becomes optional, at the discretion of the supplying State, in the case of exchange on request and spontaneous exchange but remains mandatory in the case of automatic exchange and ought to be provided on a yearly basis in accordance with bilaterally agreed practical arrangements. In the case of feedback related to exchange of information upon request and on a spontaneous basis, the receiving State should forward feedback as soon as possible and, in any case, within three months after the outcome of the use of the received information.

This implies that, unlike the cases of exchange on request and of spontaneous exchange, in cases of automatic exchange the practical arrangements for the transmission of feedback may be different from one bilateral relations between Member States to another, which would not help uniformity of practical arrangements for the transmission of feedbacksthroughout the EU.[772]

Chapter four on conditions governing administrative cooperation also includes several changes if compared to the corresponding chapter of the Proposal. Firstly, in Art. 16, dealing with the disclosure of information and documents, the broad approach suggested by the Commission is abandoned as it is specified that the information obtained by a Member State has to “be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it”. Its use is admitted for some specific purposes provided by the first Paragraph of the same provision[773]; on the other hand, its use for further purposes is admissible provided that it is allowed by the domestic law of the requesting Country and there is the permission of the requested Country[774].

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[772] As remarked by Cerioni L., *The New EU Tax Directive On Administrative Cooperation Between Member States: A Key Step Against Tax Distortions In The Internal Market?*, Diritto e pratica tributaria internazionale 3 (2011) , at 912.

[773] “(…) for the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Art. 2. (…) for the assessment and enforcement of other taxes and duties covered by Art. 2 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, or for the assessment and enforcement of compulsory social security contributions. In addition, it may be used in connection with judicial and administrative proceedings that may involve penalties, initiated as a result of infringements of tax law, without prejudice to the general rules and provisions governing the rights of defendants and witnesses in such proceedings.”.

[774] “Such permission shall be granted if the information can be used for similar purposes in the Member State of the competent authority communicating the information.”

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In Art. 17 of the New Directive, the principle of the impossibility of imposing a disproportionate administrative burden originally introduced by the Commission in the Proposal was deleted.

As for the new Art. 18, dealing with the obligations[775] which exchange of information carries along, on the one hand, as suggested by the Parliament, there is a full alignment with the OECD standards by deleting the condition of residence in the requesting Country of the person under investigation but, on the other hand, some original features are also to be detected. In particular, the third Paragraph of Art. 18 sets forth a compromise solution, by introducing a safeguard clause and establishing that the information cannot be furnished "where such information concerns taxable periods prior to 1st January 2011 and where the transmission of such information could have been refused on the basis of Art. 8(1) of Directive 77/799/EEC if it had been requested before 11 March 2011." Such a provision appears as a very sensitive one as it affects the possibility of applying the new standards in a retroactive fashion[776] since in relation to information pertaining to tax periods predating 2011 the original limitations to exchange of information, including that based on banking secrecy may be invoked.

In broader terms, it can be observed that, despite the explicit write-off of the two aforementioned limitations, the remaining limits to exchange of information have not undergone significant reviews in comparison to Directive 77/799/EEC; in particular, these limitations continue to be grounded on the already exposed principles of equivalence and reciprocity as well as by the principle of the subsidiarity which has traditionally constituted a peculiarity of European legal instruments in the area of administrative assistance.[777]

The use of standard forms and computerised formats for the exchange of information is confirmed under Art. 20 and Art. 21 of Directive 2011/16/EU. As in the

[775] From a substantial standpoint, such a provision can be considered as a cornerstone of the new Directive in bringing the rules concerning exchange of information in line with the international standards. In particular, stress is put on the explicit prohibition of refusing to provide information on the grounds of bank secrecy reasons and on the prohibition to turn down requests for assistance that would require additional investigations on the grounds of the lack of a domestic tax interest in relation to the same inquiries.

[776] The issue of retroactivity is one of the most controversial one within the framework of the international standards of exchange of information. Namely, while this specific aspect does not appear to having been specifically addressed in the course of the peer review process conducted within the Global Forum, there seems to be no doubt that the model legal instruments from which the international standards have been derived allow for a retroactive exchange of information, that is, they are not incompatible with the exchange of information concerning facts that have taken place in Fiscal Years prior to the entry into force of the legal basis providing for exchange of information. Explicit confirmations in this regard can be found in Para. 114 of the Commentary to OECD Model T.I.E.A., according to which "the rules of Paragraph 4 do not preclude an applicant Party from requesting information that precedes the effective date of the Agreement provided it relates to a taxable period or chargeable event following the effective date." The only grounds for not providing information relating to previous tax years would seem to be of practical nature whereas the same Paragraph of the OECD Commentary to the OECD Model T.I.E.A. specifies that "a requested Party, however, is not in violation of this Agreement if it is unable to obtain information predating the effective date of the Agreement on the grounds that the information was not required to be maintained at the time and is not available at the time of the request."

[777] See Pitrone F., *Lo scambio di informazioni e la Direttiva 2011/16/UE in materia di cooperazione amministrativa: innovazione e profili critici*, Diritto e pratica tributaria internazionale 2 (2012), at 480 et seq.

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Proposal, a distinction is made between the compulsory use of computerised formats, which is foreseen in relation to automatic exchange of information[778], the compulsory use of standard forms, which is foreseen in relation to spontaneous exchange of information[779] and the recommended[780] yet optional use of standard forms in relation to the various steps[781] of an exchange of information upon request procedure. Art. 21 on practical arrangements keeps the wording of Art. 20 of the Proposal, the only exception being the removal of paragraph five regarding the relevant threshold. [782]As earlier mentioned, Regulation (EU) No. 1156/2012 of 6th December 2012 provided the models of the standardised forms to be used in relation to exchange of information upon request, spontaneous exchange of information, notification requests and the provision of feedback.

Art. 23 confirms the close collaboration among the Commission and the Member States. With regard to the relations with third Countries, the most favored nation principle is confirmed under Art. 17 whilst, in Art. 24 (chapter six), the provision that "Member States shall ensure that future agreements they conclude with third countries contains no such exclusion" is removed.[783]

Finally, in Chapter seven, the new Art. 25 introduces the reference to EU rules on data protection, as recommended by the European Data Protection Supervisor.

A very important provision in the light of the policy objective pursued by the Directive is the setting up of the new "Committee on administrative cooperation for a taxation", which, when compared to the proposal, appears having been confirmed, even if its functions have been partially re-determined[784]. As it has been aptly pointed out,[785] the most striking aspect of the "comitology" procedure laid down in the concerned provision is that, although in relation to issues of implementation, allows Member States

[778] As anticipated, by using the same computer format already deployed within the context of the EU Interest Savings Directive.

[779] In this case a simple standard form, to be adopted by means of a comitology procedure as laid down under Art. 26 of the Directive should be used.

[780] Art. 20, Para. 1 recommends that the standard forms be used as far as possible.

[781] In particular, in relation to requests for information, answers, acknowledgements, requests for additional background information, and for notifying the refusal or the impossibility to comply with a request of information.

[782] It should be mentioned in this regard that a Regulation laying down common rules for formats and the transmission of information has been set forth with the Commission Implementing Regulation (EU) No 1156/2012 of 6 December 2012, laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation.

[783] On the other hand, a very critical aspect of Art. 24 in the view of this Author is that the possibility of transmitting information received from one Country to another Country is subject, as it used to be the case under Directive 77/799/EEC to the consent of the former Country. However this approach would seem to be at odds with the more liberal view undertaken in relation to VAT. This author argues that, also in the light of the principle of Union loyalty, no such consent should be binding.

[784] The provision that the Committee has to "examine any matters raised by its chairman, either on his own initiative or at the request of the representative of a Member State, concerning the application of the Directive" has been deleted.

[785] See Van Thiel, S. and M. Vascega, *Assessment of Taxes in Cross Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation*, 20 EC Tax Review 3 (2011), at 154.

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to bypass the normal voting procedure within the Council, in striking contrast to the consensus rule which has typically shaped, in good and in bad, the path of positive integration in the area of direct taxation.In addition, the provisions of Art. 23, in particular Para. 2 and Para. 3, can constitute the vehicles for an ex post solution – during the early years of application of the new Directive - of any interpretative issues and of related difficulties in application. Member States must in fact communicate to the Commission any information relevant to the evaluation of the effectiveness of administrative cooperation and should also provide the Commission with an annual assessment of the effectiveness of the automatic exchange of information under Art. 8 as well as the practical results achieved. For the very purpose of meeting this obligation, Member States should communicate to the Commission any difficulties arising in the application of Art. 8 and deriving from interpretative issues.

The relationships with third Countries are also a very critical aspect of the new framework of administrative co-operation within the European Union. In this regard, similarly to what had been laid down in the Proposal, the policy orientation is based on two pillars.

Firstly, the Directive implies the recognition of a sort of most favourite nation clause, in compliance with the principle of Union loyalty as far as the conclusion of exchange of information instruments with third Countries is foreseen: namely, based on Art. 19 of the final Directive, where a Member State provides a wider cooperation to a third country than that provided for under this Directive, that Member State may not refuse to provide such wider cooperation to any other Member State wishing to enter into such mutual wider cooperation with that Member State.

Secondly, based on Art. 24, the Directive pursues an isolation of the intra-EU network of information exchange in respect of the outside global network of exchange of information, as provided by general tax treaties and T.I.E.A.s: namely, on the one hand, a Member State can communicate to another Member State information received from a third Country only under strict conditions and if it is allowed pursuant to an agreement with the concerned third Country; on the other hand, a Member State can communicate to a third Country information received from another Member States under strict conditions, namely, the consent of the Member State from which the information originates and, even more restrictively, under the condition that the concerned third Country has given an undertaking to provide the cooperation required to gather evidence of the irregular or illegal nature of transactions which appear to contravene or constitute an abuse of tax legislation. It is the view of this author that the latter condition appears as rather critical from a policy as well as from a legal perspective: namely, under the former respect, the provision introduces conditions that largely go beyond the conditions for administrative co-operation that are enshrined in the international standards: while it is true that the confidential nature of the exchanged information

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should be protected and that there would seem to be no grounding for affirming that the degree of administrative co-operation granted to and among Member States should be extended also to third Countries, especially when the threshold of the minimum common denominator represented by the international standards is surpassed and while it is true that the European Union has not opted for a common information treaty policy *vis à vis* third Countries, it seems in contrast with the endorsement of the international standards which has been set forth by European Institutions[786] that the concerned Member States introduce more burdensome conditions for the circulation of foreign sourced tax information than those laid down in the model legal instruments constituting the basis of the international standards.[787] On a legal plan, reference to the very proteiform notion of “abuse of tax legislation” also appears somewhat critical.[788]

From 1st January 2013 Directive 2011/16/EU will repeal Directive 77/799/EEC; 1st January 2013 is the deadline for the implementation of the New Directive, which entered into force on 11th March 2011. In the meanwhile, Directive 77/799/EEC will continue to be applied. At the same time, some transitory period problems may emerge from the fact that Council Directive 2010/24/EU on the recovery of tax claims, which will enter into force at the beginning of 2012, contains a whole Chapter (Chapter 5) dealing with exchange of information; said chapter is substantially aligned with the framework set forth by Directive 2011/16/EU but is definitely on another level when compared with Directive 77/799/EEC. As such, for one year, two different standards of information exchange may coexist within European tax law, leading to some potential inconsistencies.

6.5 THE FISCALIS PROGRAMME

2007 saw the approval of a landmark initiative concerning the EU tax policies. The Programme has been adopted with Decision no. 2235/2002/EC of the 3rd March 2002[789] of the European Parliament and of the Council. The programme can be considered as a follow up and a feedback procedure of a programme by the same name which was approved back in 1998.

The main goal of the Programme, as it could also be said of Fiscalis 1998, is to promote further coordination among Member States’ tax systems by increasing the degree of administrative cooperation. The 2007 Programme goes however a step

[786] Such an endorsement is well exemplified by the circumstance that, besides single Member States, the European Commission is also a member of the Global Forum.
[787] For instance, no such specification is foreseen by the OECD Model T.I.E.A. or Art. 26 of the OECD Model T.I.E.A. and the related commentary, nor by the Convention on mutual administrative assistance.
[788] In this regard see Cerioni L., L., *The New Eu Tax Directive On Administrative Cooperation Between Member States: A Key Step Against Tax Distortions In The Internal Market?,* Diritto e pratica tributaria internazionale, 3 (2011) at 916.

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further than its predecessor, as it features the stated intention to unify the existing administrative systems in order to cope with tax fraud and avoidance, as if a unified Tax Administration were involved[790]. Moreover, the 2007 Fiscalis Programme encompasses both indirect and direct taxation. The Fiscalis Programme is trying to foster the exchange of know-how among Tax Administrations, an aspect that is particularly relevant with reference to the new Member States, that have often had to build a system of monitoring and information exchange from scratch and presumably still need some adjustments. The Programme foresees the intervention of multinational task-forces in order to spread a common know-how. Exchange programmes among Tax Officials are also intended to be put into practice, as well as experiments in the field of multilateral tax assessments, in a way not dissimilar from Multilateral Advanced Pricing Agreements.

It is no mystery that a further emphasis in the field of mutual assistance concerning direct taxation will be put on transfer pricing[791]. This type of multilateral assessments will be most likely carried out either in the form of a networking activity among tax administrations or through the creation of a central co-ordination structure. The choice between the two models should not however be considered as a self-excluding one. Both approaches have advantages and pitfalls and are meant to be applied to different situations. For instance, a trade relationship involving unrelated parties resident in different Member States is for sure more easily handled by coordination and networking, while the activity of a multinational enterprise active across many Member States could be more suitably monitored by a centralised office.

6.6 EUROPEAN COURT OF JUSTICE CASES AND EXCHANGE OF INFORMATION

The main issue which has been dealt with by the European Court of Justice in cases involving information exchange revolves around how mutual assistance among Member States interacts with the fundamental freedoms established by the EC Treaty and it was cases its implementation may result in a discrimination affecting taxpayers that are residents of other Member States.

In some cases, Member States have in a way justified the adoption of discriminatory measures with the need to safeguard the effectiveness of their tax assessments and to promote the tackling of tax fraud and tax evasion.

In the Vestergaard Case[792], Denmark was accused of disparity of treatment with reference to the deductibility of the costs of professional seminars from the income of

[790] Ardito F., *La cooperazione internazionale in materia tributaria*, Padova, Cedam, 2007, at 226.
[791] Ibidem
[792] ECJ, 28th October 1999, C-55/98, Vestergaard, in ECR, 1999, I-4695.

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residents at variance with the fact that the seminars had been held within or without the territory of Denmark. In the latter case the costs had to be deemed as non-deductible, due to the fact that they could not have been correctly ascertained by Danish Tax Authorities.

In the Danner Case[793] Finland justified the non-deductibility of contributions for voluntary pension insurance taken out with a foreign insurance institution due to the fact that the latter could not have been effectively quantified by Finnish Tax Authorities. The European Court of Justice refused however to endorse this justification and, generally speaking, justifications based upon administrative restraints in assessing tax situations that take place out of the territory of the Assessing State. The system envisaged by Directive no. 77/799/EEC already features tools to overcome such problems, so that discrimination rooted in these cases, even though justified by general interests, is to be deemed as disproportionate, as an alternative not implying discrimination is perfectly viable. Thanks to the co-operation of other Member States, any Member State can have access to all the needed information in order to calculate the correct amounts of taxes to be levied with reference to any kind of taxpayers.

The European Court of Justice has also focused on the issues of taxpayers' rights. For instance, in the Wielockx case[794] the Dutch Tax Administration assimilated a non-resident worker who earned most of his income in the Netherlands to a Dutch Resident, leading to a discriminatory situation. The Dutch Tax Administration justified its behaviour on the account that only the State of residence could have all the necessary information to assess the taxpayer's tax situation. The European Court of Justice dismissed this approach by re-affirming that Tax Administrations can have access to all the necessary information concerning a taxpayer regardless of its residence within the European Union.

In the leading A. case[795], the Court stated that this principle may hold true if the "Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the Competent Authority of a third Country".[796] Based on such a background, the Court has repeatedly stated that the need to safeguard the effectiveness of fiscal supervision or the need to fight against tax evasion might be a valid justification in relation to third Countries, although these overriding reasons may not save the same restrictive measures in intra-EU situations

[793] ECJ, 3rd October 2002, C-136/00, Danner, in ECR, 2002, I-8147.
[794] ECJ, 11th August 1995, C-80/94, Wielockx, in ECR, 1995, I-2493.
[795] ECJ, 18 December 2007, C-101/05, Skatteverket v. A., in ECR, 2007, I-11531
[796] ECJ 18 December 2007, C-101/05, A., Para. 63.

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Another relevant case in this area, as it startled whole stream of case law on some factually similar circumstances, is the Elisa Case[797], which dealt with the decision of the French Tax Administration to exempt from a tax on immovable property French companies as well as companies having their residence in another State, under the condition that those States had concluded with France either an information exchange agreement or a convention encompassing information exchange. Such an approach was discarded by the European Court of justice on the grounds that all Member States have, although to different degrees, already implemented European Directives on administrative assistance, so that requiring the conclusion of bilateral agreements on the subject would not have been justifiable. It should be strongly remarked that the aforementioned case[798] makes reference to a principle which has been progressively developed by the European Court of Justice, according to which, Member States should resort to EU Directives on administrative assistance in order to ensure the effectiveness of their fiscal controls, rather than acting unilaterally[799].

The Rimbaud Case shared roughly the same factual and legal pattern with the Elisa Case but a different territorial setting, with the involvement of a third Country, in particular, Liechtenstein. In this regard, it can summarily be reported thatthe transposition of the conclusions drawn in the Elisa case to third Country settings has been explicitly denied by the Court in the Rimbaud case. In particular, whereas in the Elisa case the Court held that EU taxpayers need to have the possibility to produce evidence in order to prevent that the lack of an obligation to provide administrative assistance[800] be detrimental to the taxpayer. With regard to non-Member States, however, the possibility of providing evidence has to be denied due to "the fact (…) that the regulatory framework is quite different",[801] namely because no framework ensuring for exchange of information on par with that provide by the Mutual Assistance Directive was in place.[802]The conclusions reached by the Court in the Rimbaud case appeared somewhat foreseeable where the possibility for the taxpayer to provide proof as a less restrictive measure was denied in case third Countries not bound to the concerned Member State by an agreement providing for exchange of information were involved.

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[797] ECJ, 11th October 2007, C-451/05, Elisa, in ECR, 2007, I-8251

[798] Even though the aforementioned case is very straightforward in this respect, many other cases directly or indirectly refer to such approach. A selection follows: ECJ, 30th January 2007, C-150/04, European Commission Vs. Denmark, in ECR, 2007, I-1169, ECJ, 7th September 2006, N, in ECR, 2006, I-7409, ECJ, 21st July 2005, C-349/03, European Commission Vs. UK, in ECR, 2005, I-7321.

ECJ, 11th March 2004, C-9/02, De Lasteyrie, in ECR, 2004, I-2409.

[799] A similar approach can be found also in Para. 4 and Para. 5 of the Preamble to Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, effective since 1 July 2005, art.18 of the Preamble, in OJ L 157 of 26th June 2003, p. 38.

[800] As deriving from Art. 8 of the Directive.

[801] ECJ 28 October 2010, C-72/09, Etablissements Rimbaud, in ECR, 2010, I-0000, Para. 46

[802] ECJ 28 October 2010, C-72/09, Etablissements Rimbaud, Para. 50

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In this regard, it would have been even more interesting for the Court to assess cases where the concerned third Country be bound to the concerned Member State by an exchange of information agreement.

On a different plan, the geographical picture inaugurated with the ELISA case has been completed by the Prunus case,[803] which also shares the same legal and factual background with the two aforementioned cases involves an oversea Territory in sense of Art. 198 et seq. of the TFUE, in particular of the British Virgin Islands. The case was eventually solved by justifying the underlying restrictive measure in the light of Art. 64, Para. 1 of the TFUE and, even without such a legal backing, as remarked by Advocate General Cruz Villalón, the case would have been decided in the negative as no instrument of administrative co-operation had been concluded between France and the British Virgin Islands; it would however have been very interesting to see how the Court of Justice would have evaluated a T.I.E.A. concluded with a traditional offshore centre.

Such an issue reconnects to the way non-EU instruments of administrative co-operation would be assessed against the EU administrative assistance directives. The centrality of such an assessment in order to draw a more coherent picture of the role played by the administrative co-operation within the context of the safeguard of fundamental freedoms emerges from the case Commission v. Portugal,[804] where the latter member State argued that the conditions that resident pension funds must fulfil in order to avail themselves of the corporation tax exemption are intended to ensure the maintenance of the Portuguese pension system, by subjecting those funds to particularly strict requirements as concerns management, operation, capitalisation and financial responsibility. The Courtconcluded with regard to EU funds that the measure went beyond what is necessary, since Member States would have accessto the European Directiveson mutual assistance as a less restrictive measure. Withregard to EEA funds, the Court reached the same conclusion, based on the observation that the concerned Portuguese law did not make the benefit of the exemption from corporation tax subject to a bilateral assistance agreementsbetween the Portuguese Republic and the EEA Member States which enables cooperation and assistance equivalent to that put in place between the EU Member States."[805] Thus, not unlike previous conclusions reached in relation to EU instruments of administrative co-operation, the Court appeared to consider only the existence of a framework for administrative co-operation without taking into account their actual relevance and implementation.

[803] ECJ 5th May 2011, C-384/09, Prunus, ECR, 2011, I-0000

[804] ECJ, 27 October 2011, C-493/09, Commission v. Portugal, in ECR, 2011, I-0000

[805] ECJ, 27 October 2011, C-493/09, Commission v. Portugal, Para. 50.

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In this respect, it may be asked how bilateral agreements with third Countries would have to be designed to qualify for equal treatment under EU law.[806] In this regard it could be observed that the approach adopted by the Court necessarily qualifies as a factual rather than a juridical one, treaties falling outside the scope of EU law would qualify as mere facts for the European Court of Justice.Thus, a case-by-case analysis is needed to verify whether certain informationmay be obtained under a bilateral agreement and, thus,requires an examination of the scope of the bilateral agreement; such an examination would clearly need to be undertaken by the concerned national courts. On the other hand, Member States may not be in the best position to provide an evaluation of the existing instruments of administrative co-operation with third State: Commission v. Italy[807] set an (in)famous precedent in this regard, as Italy denied, without having being contradicted, to have exchange of information mechanisms into place with Iceland and with Norway, a statement that was patently detached from reality.[808]Also in order to avoid such paradoxical consequences, useful guidelines may be derived from authoritative scholarship, where it suggests that adherence to the international standards of transparency and exchange of information by the legal instrument under scrutiny could serve as a valuable parameter, to the extent that no justification based on the need to ensure the effectiveness of fiscal controls , even in relation to third Countries, may be invoked whereas such a legal instrument be in place.[809]

It should however be understood that in the near future, the European Union might regain its previous “avantgarde position” in the area of administrative co-operation by adopting a standard that goes beyond the current international standards; an example in this respect may be for the new administrative co-operation directive to encompass automatic exchange of information: based on a literal take of the “equivalence test” foreseen by the Court of Justice in the Commission v. Portugal test, no agreement with third Countries based on the current OECD models in the area of administrative co-operation may be considered to satisfy such a requirement.

In relation to the role automatic exchange of information may play in future cases to be decided by the European Court of Justice, reference could be made to the

[806] Spies K., *Influence of International Mutual Assistance on EU Tax Law*, 40 Intertax 10 (2012), at 521

[807] ECJ, 19th November 2009, Commission v. Italy, C-540/07, in ECR, 2009, I-0000; see in particular Par. 71

[808] Namely, with regard to EEA countries, the ECJ dismissed the Commission´s claim against Italy in so far as it concerned Iceland and Norway on the ground that, as claimed by Italy, the double taxation conventions concluded with those Countries did not feature an exchange of information clause. However, the Court seemed not to be concerned with double checking the assertion set forth by Italy as both the double taxation with Iceland and with Norway include an information exchange clause modeled after Art. 26 of the OECD Model Convention.

[809] See Pistone P., *Five Years Of EURYI Research On The Impact Of European Law On Relations With Third Countries In The Field Of Direct Taxes: Selected Remarks For A General Report*, Heidenbauer S., Stürzingler B. (Eds), *The EU's External Dimenstion in Direct Tax Matters*, Vienna, Linde, 2010, at 38 et seq.

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Passenheim-van Schoot case,[810] where the Court referred to the 1977 Directive to decide whether the extension of the period during which Tax Authorities may issue an additional assessment for income earned in another Member State was disproportionate to the objective of ensuring compliance with national tax legislation. The Court observed that, since Art. 2 of the Directive only permits a request for information in a particular case, Tax Authorities that do not have any evidence of taxable items of income in another Member State can only carry out an investigation if they are aware of such income. [811]In this respect, it has been in particular remarked that the circumstance according to which a Member State does not avail itself of the possibility of automatic exchange of information in order to obtain banking data would not be sufficient, *per se*, to deprive that Member State of the right to apply a different recovery period according to the place where their savings balances are held .[812]The Court observed that by leaving it to the Member States to set up a mechanism for the automatic and regular exchange of information, Art. 3 of Directive 77/799/EEC merely permits a Member State to contact the other Member States with a view to setting up such a mechanism, the implementation of which eventually depends on the same Member States. The Mutual Assistance Directive was therefore found not sufficient to constitute the basis for an extension of the period in which an additional tax assessment may be levied, disproportionate.[813]It might be argued that in a scenario encompassing automatic exchange of information by default, as it will be the case when the relevant provisions of Directive 2011/16/EU will have become effective, the Court might have reached a different conclusion.

It then appears from these examples, which have been quoted and chosen among others mostly on the grounds of their innovative import, that exchange of information within an EU context is enriched by a new dimension. Along with the original aims of information exchange, namely as a tool to assess and to prevent double taxation and, maybe even more relevant in later years, as an instrument to tackle international tax fraud and avoidance, a new function has emerged at an EU level; exchange of information has also become a way to restrict those hypothesis where discrimination can be justified. All the practical arguments that in the past could be used to allow room for a disparity of treatment based on the impossibility to assess situations involving non-residents or income produced in other Member States meet no comprehension any more. Regardless how exchange of information is actually implemented and successful in its practical achievement, its theoretical relevance

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[810] See ECJ, 1st August 2009, C-157/08, Passenheim – van Schoot, in ECR, 2009, I-5093, Para. 65

[811] See ECJ, Passenheim-van Schoot, Para. 64

[812] In this regard, see Hemels S., *References to the Mutual Assistance Directive in the Case Law of the ECJ: A Systematic Approach*, European Taxation 11 (2009), at 588.

[813] Ibidem

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cannot be understated. Moreover, one of the constant concerns of the European Commission is to design measures apt to successfully tackle international tax fraud and avoidance. Having regard to the protection of Community principles, an *ex ante* regulation of mutual assistance still appears to be the most practical and promising approach.

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7 PART 6: THE EMERGING ROLE OF TAX INTERMEDIARIES

7.1 Introductory Remarks

Since April 2009, a growing number of governments and NGOs[814] have called for automatic exchange of tax information to address concerns related to the ongoing threat to the financial resources of States, developed and developing alike, posed by the phenomenon of international tax evasion, with great visibility attributed, also in the aftermath of some major scandals to evasion involving offshore bank accounts.

Many threads would seem to converge towards a common knot pointing in this direction: as it has been already addressed, the recently revised Convention on Mutual Administrative Assistance in Tax Matters ("Multilateral Convention") creates a platform for automatic information exchange; a more unexpected endorsement of this specific form of administrative co-operation has recently been set forth by the OECD. From an EU Law perspective, the EU Interest Savings Directive[815] introduced automatic information exchange among most EU countries in relation to interest income, while recent amendment proposals point at expanding its scope and filling up its loopholes. Finally, yet somewhat even more unsettlingly, across the Atlantic, "F.A.T.C.A." (Foreign Account Tax Compliance Act)[816] legislation released by the United States in 2010 would eventually require foreign financial institutions to report financial information about accounts held by specified United States persons or be subject to a punitive withholding tax.

As it has been already pointed out, in the existing scenario, there is no doubt that any serious approach to the implementation of automatic exchange of information could not do without the more or less direct involvement of the actors that are already in possession and that constantly handle the information that would be vital to the setting up of such a system, namely financial institutions.

The relationship between finance and States pursuing sovereign functions is certainly not new. It may be sufficient to recall the role played by Italian bankers from the 13th Century onwards in lending to sovereigns (especially those of France, England and Spain), in exchange for the control of goods of primary importance (which could be produced or traded only under royal license) to the extent that the emergence of a

[814] The most prominent voice in this regard is that of the Tax Justice Network, also due to the depth of the underlying analysis, that indeed goes well beyond the understandable but somewhat sterile indignation that characterises other similar fora. See www.taxjustice.net .

[815] Within the present Part of this work also referred to as "the Directive".

[816] Introduced by Subtitle A of Title V of the Hiring Incentives to Restore Employment Act (HIRE) of 2010.

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"privatisation" of some governmental functions (e.g. a direct pledge on the tax revenues of the State) started to take shape.[817]

What's new is the current dynamics, at least for the purposes relevant to this analysis, is that the relationship between States and banks (to epitomise also other financial intermediaries) has been characterised not by the latter's role of sources of financial resources but rather as sources of a monitoring and regulatory leverage essential to the well-functioning of the mass oriented tax systems typical of developed fiscal States.

While the recent push towards extending the tax intermediation role which has characterised financial institutions also in cross-border situations has more visibly focused on the setting up of possible mechanisms for administering automatic exchange of information, the more traditional role of acting as withholding agents has also mirrored a recent controversial come back.

Namely, in August 2011 both Germany and the United Kingdom signed treaties with Switzerland that reject automatic information exchange and substitute anonymous cross-border tax withholding. Under these agreements, Swiss financial institutions will impose withholding tax on behalf of the residence State of the investor and the Swiss Fisc will remit that tax anonymously to the former Countries, guarding the anonymity of the concerned investors. The Swiss agreements would not only be relevant on the grounds of the perceived status of Switzerland as a "representative" for other jurisdictions providing offshore services[818] but also from a quantitative perspective, given the fact that more than twenty-five percent of the world's offshore wealth is managed from Switzerland, while approximately another twenty-five percent of the world's offshore wealth is managed from the UK and its dependencies.[819]

At the same time, as acutely pointed out, both cross-border information exchange and anonymous cross-border withholding share one thing in common: they require financial institutions to act as cross-border tax intermediaries.[820]

While, as earlier mentioned, the pivotal role of financial intermediaries in relation to the domestic administration of developed tax system is almost a common place nowadays, the present Part of this thesis is devoted to an investigation of the origin and possible evolutionary perspectives for tax intermediaries when acting within a cross-border context which constitute. Namely, not unlike the standards of exchange of information have undergone a form of dynamic consolidation, in the sense that,

[817] See Cuocolo L., Miscia V., *Time for Sovereignty: Sovereign Wealth Funds and Sovereign Ratings*, The Journal of Regulation (2012), retrievable at the following website: http://www.thejournalofregulation.com/I-1-44-Time-for-Sovereignty.html

[818] In these terms Grinberg I., *The Battle over Taxing Offshore Accounts*, UCLA Law Review (2012), at 310.

[819] Boston Consulting Group, *Global Wealth 2011: Shaping A New Tomorrow 13* (June 2011), retrievable at the following website: http: www.bcg.com.pl/documents/file77766.pdf

[820] Grinberg I., The Battle over Taxing Offshore Accounts, UCLA Law Review (2012), at 311.

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although the provisional arrival point of the process which has led to the setting of the international standards cannot be relinquished, it cannot similarly be denied that these standards need, in order not to lose their vitality, to open up to further evolutionary perspectives, among which routine exchange of information appears as the option which is more widely sponsored by high tax Countries (including their civil societies), the same should apply also to the actors involved in the exchange of tax information. As it has been demonstrated that the paradigm in this regard has shifted from States interacting as rough sovereigns within a diplomatic framework to tax administrations autonomously networking on a cross-border level, it might be argued that the next frontier and, indeed, the next challenge, will be represented by the emerging role of cross-border tax intermediaries.

Although the disclaimer set forth in the first Part of this work, according to which, legal history is a story which cannot be begun at the beginning, this author believes that, at least chronologically, the currently fading system of "Qualified Intermediaries", as started by the United States in the early '00s has played under many respects a seminal role. Starting from such an ill-fated yet influential attempt, the present Part of this work will proceed examining and comparing the different mechanisms under which financial institutions have been called (or will be called) to act as cross-border tax intermediaries. The focus of the discussion will finally shift to a distinct yet inextricably interrelated topical issue of the current international tax policy debate, namely the dialectic and the choice between the two opposite models that could be implemented thanks to the co-opting of cross-border tax intermediaries: the automatic exchange of information model and the anonymous withholding tax model.

7.2 THE QUALIFIED INTERMEDIARIES AGREEMENT

7.2.1 Introductory Remarks

This Chapter is devoted to the description and analysis of the Qualified Intermediary programme promote by the United States in the early '00s.

The primary concern of the Qualified Intermediary programme (hereinafter, Q.I.) was to ensure that non-U.S. persons making portfolio investments in the United States were being properly taxed by the United States on income from those investments.

The Q.I. programme was therefore directed at taxation of US sourced income received by non-residents. In this respect, the Q.I. system could be considered as complementary to the current developments in the area of administrative co-operation in tax matters, that have chiefly been driven by the perspective of the State of residence of the investors and with a more thorough implementation of the principle of worldwide taxation.

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In this respect, the Q.I. is somewhat off-centred with regard to the current policy debate but it has the merit of shedding light on the complementary issue of a the carrying out of source based taxation in a proper manner. Even more remarkably, since the Q.I. system originated in 2001, it predates other meaningful examples of the involvement of financial institutions in a role of international tax intermediaries.

7.2.2 Historical Background

The very idea of introducing a system of Qualified Intermediaries as a tool to ensure the correct application of withholding tax relief as established by double tax conventions negotiated by the United States stems directly from a US domestic law set of problems, even though its effects can fully be considered referable to international tax law due to their outbound nature. The main concerns of the IRS and of the US Congress referred to three particular issues:

- The possibility of having US taxpayers evading US tax, using foreign intermediaries;
- The abuse of the “address rule” on dividends;
- The difficulty in defining the actual beneficial owner of US sourced financial income.

The rules that affect Q.I. basically deal with the correct application of a withholding tax. However, withholding taxes applied to financial income are a recent and non-generalised innovation in a US tax law setting. In this respect, the first attempts were made back in 1982, when the Treasury decided to introduce, under some limited conditions, a withholding tax on dividends and interests.

The result of this attempt was the introduction of several rules that are briefly discussed hereafter, as they are all in a way interconnected to Q.I. rules.

The first set of provisions refers to the so-called “back-up withholding”, which basically allowed US persons not to disclose their identity when being paid income from dividends and interests, while ensuring the correct application of the withholding tax[821].American citizens must provide their social security number in order to avoid a withholding tax rate of 31%.

Among the international corollaries of back-up withholding, the so-called “address rule” was also introduced, according to which, if a payer of dividend was making payments to an address in a Country which maintained a double taxation convention with the United States, the withholding tax rate applied could be reduced.

In 1984, the Congress passed the “Portfolio debt” regime which exempted interest payments received by foreign residents. The main aim of the introduction of

[821] Reported by Rosenbloom H.D., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.

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such regime was one of economic policy, as it was meant to be a tool apt to allow US companies to raise debt [822]more easily in Europe. Such a provision has however found its more remarkable application more recently with reference to Far East investors, who have largely benefited from this regime[823].

These initiatives were basically domestic tax law provisions; however, once the United States had taken action by introducing withholding tax, it had to do so versus the whole world. This led to some contrasts with foreign jurisdictions that were not comfortable with the unilateral introduction of these massive amendments outside of the scope of a formal re-negotiation of the existing treaty provisions. The US Treasury felt however that such initiatives were to be kept separate from bilateral negotiations, as they were perceived as a mere extraterritorial extension of domestic tax provisions. After some attempts to mediate between these different demands, the decision was taken to appeal directly to the direct counterparts, namely, financial intermediaries. However, prior to the introduction of the Q.I. system, a mediation was attempted and the issue of US sourced financial income paid to persons residing in other States, was handled by Form 1011, which adopted a self-certification approach. In such a context, actual assessment was carried out at the sole expense of the IRS. This system, however, soon proved inefficient.

The difficulties in terms of re-negotiation with States partners of the US treaty network were overcome by adopting the idea of dealing with banks and trusts rather than governments. Due to the fact that the United States could not impose any legal obligation on foreign subjects, the only possible way to establish a relation with foreign financial institutions was the setting of an agreement having a contractual nature. Among the primary aims of the embryonic idea of a Q.I. agreement there was also the need to have a sole counterpart. In this respect, Q.I. agreements cannot be considered as a form of extraterritorial enforcement of tax law, as no US domestic tax law is actually enforced abroad; rather, extraterritoriality could be intended in the very broad meaning according to which the US Tax Administration exerts some extraterritorial power whereas it negotiates an agreement with financial institutions incorporated under the laws of another State without previously consulting with the latter State[824].

It has happened quite often that investments in US securities (thus producing US source income) was carried out along a chain. For instance, the actual beneficial owner would use its local bank, which in turn resorted to a national counterpart, which in turn handled the case to its US branch or to a US bank. The concrete risk was that, due to the many links of the chain involved, one could benefit from reduced withholding tax

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[822] Ibidem

[823] Molteni L., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.

[824] Jeffery R., *The Impact of State Sovereignty on Global Trade and International Taxation*, London, 2001, at 98.

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rates as envisaged by the provisions of double tax conventions without unveiling its identity and, more important, its actual tax residence. It could then well happen that US residents domiciled abroad could benefit from a reduced withholding tax rate for the sole fact of having moved to a Country which had negotiated a double tax convention with the United States.

The first initiative in the implementation of the new system date back to 1996 with drafts designed during the Clinton Administration. The whole Q.I. system can be considered a thorough creation of the Clinton Administration[825], coming into being during the last semester of the Clinton Administration, even though, the first results were seen only the following year, already under the Bush administration. The Q.I agreement was formalised in 1999 with a simple a regulation, thus lacking a proper legal base[826]. In this respect, even though Q.I. agreements represent something quite unique, they can be defined as the “tip of the iceberg”, since they cannot be separated from domestic provisions dealing with issues such as back-up withholding and portfolio debt. This can be clearly understood when realising that the whole background to Q.I. agreements is set by a subsection of a regulation dealing with the aforementioned issues, which in turn is a mere regulation concerning Section 1441 of the Internal Revenue Code[827].

7.2.3 *Benefits And Duties Arising From The Q.I. And The Non-Q.I. Status*

At this point, it should be made more clear what are the major implications of becoming a Q.I. rather than maintaining a non-Q.I. status.

In the latter case, the non-qualified intermediary is subject to full tax at source, unless documentation concerning the actual beneficial owner of the income in question is provided. As already mentioned, the income subject to withholding tax is the one deriving from dividends, interest payments, royalties, while maintaining some statutory exceptions for cases such as bank-deposit interest, short term obligations and portfolio debt. In the case of a non-Q.I., the payer has to receive documentation or it will act on the account of presumptions. Thus, also in this case, full exemption can still be obtained by providing full documentation; if documentation requirements are not satisfied, standard tax rates are applied. This implies for non-US residents the application of a 31 percent withholding tax rate on US dividends and other interests, including portfolio interest. On the contrary, whereas documentation requirements are satisfied, a 0 percent withholding tax rate is applied for non-US residents with reference to US bank

[825] Ruchelman S., Shapiro S., *Exchange of Information*, *Intertax* 11 (2002), at 411.
[826] In the IRS jargon a regulation is a document which does not have a binding legal nature as it attains to an internal policy decision of the IRS and the Treasury Department.
[827] Dealing with non-resident alien withholding tax.

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deposit interest and portfolio interest, while the reduced conventional tax rate[828] is applied with reference to dividends and other interests. For US residents, a 0% tax rate on all income payments and sale proceeds is applied.

Only non-US financial institutions or foreign branches of US financial institutions are entitled to become Q.I.. There are two regimes stemming from entering a Q.I. agreement. There can be a primary withholding responsibility for the Q.I., i.e. the Q.I. should directly apply the withholding tax to the prescribed income or there can be the chance for the financial institution not to assume a primary withholding responsibility. In this case, information must be provided to the payer who is in turn responsible for the withholding tax. In both scenarios, the primary advantage is that reduced withholding tax rates deriving from double tax treaty relief[829] can be applied directly and much more easily than by non-Q.I.. Moreover, banking secrecy does not need to be waived[830], as confidential information concerning clients does not need to be transmitted. In the case of primary withholding responsibility, no disclosure whatsoever is necessary, as the withholding is performed directly by the Q.I. On the contrary, when not assuming primary withholding responsibility, the Q.I. has to transfer to the withholding payer the information necessary to apply the correct withholding tax rate. Such information is however not as analytical as for non-Q.I., but rather it is provided in rate pools, i.e., by pools of clients in relation to which the same withholding tax rate should be applied. This confidentiality is allowed by the fact that, when negotiating the Agreement, the IRS opted for evaluating on a case-by-case base the rules observed by financial institutions to gather information concerning their clients, the so-called “know your client” rules. Due to the fact that, in most cases, such rules are defined at a national level, it has been possible for the IRS to carry out a less detailed analysis covering these national legislations. Financial intermediaries have also benefited from this approach, as, once the rules in force in the State where they operate have been judged appropriate by the IRS, they have to limit themselves to observe these rules, rather than complying with a different standard expressly designed by the IRS. The main effort for foreign intermediaries is to handle all the forms imposed by the IRS in order to manage the whole process. In order to fulfil the documentation requirements set by the IRS, the following forms should be provided by the financial intermediaries according to different types of clients; namely:

- W-8EXP Form for international organisations, foreign governments, foreign central banks and certain foreign tax exempt organisations;

[828] Which for some tax-exempt entities can equal 0%.

[829] According to Art.10 of the US Model Income Tax Convention, withholding tax rate on dividends should not exceed 15%, versus a normal withholding tax rate of 31% or 30%.

[830] In this respect, it should be no surprise that Swiss banks have been the forerunner in complying with the IRS requirements and they became Q.I. back in 2000, one year before the financial intermediaries of most other Countries.

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- W-8ECI Form for foreign persons receiving income effectively connected to a US trade or business;
- W-8BEN Form for other foreign beneficiaries;
- W-9 Form for US account holders.

As already mentioned, the Q.I. regulation, as a broad and primary goal, is meant to simplifying and securing procedures with regard to the following:

- First of all, making sure that the US tax regime on classes of income such as dividends and interests is applied with reference to US persons living abroad;
- Ensuring that all US persons are correctly identified wherever they may be;
- With reference to non-resident aliens, making sure that tax treaties' withholding tax rates are correctly applied.

Being a non-QI is not a residual situation, but rather a different status which imports different obligations, procedures, rights and sanctions.

First of all, no primary responsibility is envisaged for non-Q.I. . In this respect, the US custodian acts as the sole withholding agent. Unlike Q.I., which, under some conditions, can skip the filling of form W-8BEN, a non-Q.I. needs to fill either W-8BEN or W9 and the accompanying documentation for each foreign or US beneficial owner. In this respect, details concerning each payment must be disclosed, as reporting by rate pools is not allowed. As a consequence, banking secrecy needs to be waived. This information needs to be filed to the US custodian, which in turn carries out end-year reporting to the IRS. If this procedure is not followed, non-QI have to directly submit comprehensive end-year reporting to the IRS. The sanctions , in case of failing to meet this obligation, include fines and, when requirements are not met for two consecutive years, the seize of assets held by the non-QI in the US.

7.2.4 Parties Involved

The players in a Q.I. agreement basically consist of either US investors or non US investors dealing with US sourced income (e.g. US securities), foreign financial intermediaries that have signed an agreement with the IRS, and, in the majority of cases, a US bank acting as a custodian on behalf of the foreign bank and the IRS. It should be made clear that even though the Q.I. system affects a number of different subjects, only foreign intermediaries can actually become Q.I. The first definition to be provided in this respect is that of "intermediary", which, according to the IRS, is a

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custodian, a broker, a nominee who holds investments on the account of other purposes[831].

The Regulation provides a test to identify foreign intermediaries. Only financial intermediaries that are located outside the United States and have either undertaken a primary responsibility or have entered into a custody agreement with a bank located in the United States[832] can become Q.I.. By definition, an intermediary, thus including also Q.I., is not the beneficial owner of the securities. A very peculiar case is that of financial intermediaries other than banks that act as collective investment vehicles. The latter, outside of some major exceptions, are considered beneficial owners of the income deriving from the securities they hold. As a consequence, these kind of entities cannot become Q.I.[833]. According to US doctrine, a beneficial owner can be defined as the individual or the entity which enjoys the benefits of owning a security, regardless of whose name the title is in[834].

For those intermediaries that are actually intermediaries according to the definition provided *supra*, but that have not opted for entering the Q.I. agreement, there is the need to specify the fact that they are not beneficial owners of the income deriving from the securities they hold. Unless they provide documentation of the identity of the beneficial owner in question, the payer will act on the account of a presumption and will consider the former as the beneficial owner of the income, thus applying full withholding tax at the source.

Even though the whole Q.I. system is based upon an agreement and no third State intervention is envisaged, the tax residence of the aspiring Q.I. is of some relevance. As a matter of fact, only intermediaries residing in those States either having established a tax treaty with the United States or having ensured an adequate enforcement of anti-money laundering rules can aspire to become Q.I.. It is not enough to have an anti-money laundering legislation, the latter needs to be scrutinised and approved by the IRS[835].

Foreign intermediaries have different options. They can enter a Qualified Intermediary Agreement with the IRS or they can stick to being Non-Q.I. The consequences of these choices have already been underlined. A third option for foreign

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[831] Reported by Rosenbloom H.D., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.

[832] Which in this case would act as a withholding agent.

[833] It should however be remarked that some of the most common forms of collective investment vehicles have been recognised by the IRS as intermediaries, *inter alia*, Italian SICAV and Italian Investment Funds.

[834] Reported by Rosenbloom H.D., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.

[835] This approach has impacted those small banking States not being part of the US Treaty Network. For instance, Monaco financial intermediaries have the chance to become Q.I. because the anti-money laundering provisions of the *Principauté* have been judged sufficient by the IRS, while the same did not happen with Liechtenstein.

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intermediaries is to enter into an agreement with an upstream Q.I., thus becoming a Private Arrangement Intermediary.

7.2.5 The Contents Of The Agreements

The Qualified Intermediary Agreement was first published in its final version back in 2000 and it has the legal nature of a binding legal contract between a foreign intermediary and the IRS. This is an extremely original feature of the Q.I. system, as, a duty which is normally established with laws and regulations is here set forth by a contract establishing some advantages for the financial intermediary that agrees to the terms of the agreement as well as setting some severe penalties in the case of non-compliance.

Each contract will be enforced for six years, after which it will be possible to renew it, even though no implied renewal is admitted. As previously quoted, any foreign financial intermediary or foreign branch of an US intermediary can enter the Q.I. agreement with the IRS. Normally, actual withholding on the interest and dividend income related to a US source is carried out by a withholding agent in the United States, which can be defined as any person having control, receipt or custody of amounts to which withholding is applied. However, such duties can be carried out also directly by the Q.I. in what is called a primary responsibility. The decision whether to assume or not to assume a primary responsibility creates two very different situations. In the first case, the Q.I. is due to identify all the taxable forms of income deriving from US securities and to calculate the withholding tax which is due.

Intermediaries can differentiate their responsibility profiles according to different clients, for instance by adopting primary responsibility only for non-US persons, or *viceversa*. When no primary responsibility is undertaken, the Q.I. can limit its activity to comply with the documentation requirements and to periodically file to the US custodian information concerning the beneficial owner of the income[836]. Among the duties of the Q.I. there is also the obligation to adequately instruct all the staff on the practical implementation of the Q.I. Agreement. The Agreement is a complex one and, although to a different extent, the whole of the organisation is concerned with its actual application[837].

Out of the actual investors, the Q.I., the withholding agent in the form of the US Custodian and the IRS, a fifth entity is part of the agreement, namely an auditor who is in charge of monitoring on a periodical basis that Q.I carry out correctly what they are

[836] Two different forms for filing the information are adopted to file the information: Form 1042 for payments to non-US persons and Form 1099 for payments to non-US persons.

[837] Braccioni P., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.

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required to do, depending on the type of responsibility they assume. The auditor is to be ascribed to one of the "Big Four" Auditing Companies[838] that have signed a specific agreement with the IRS and that have defined a standardised methodology in order to carry out audits[839]. Auditing of the Q.I. is to be conducted every three years, between the second and the fifth year of the Q.I. agreement. The remuneration of the Auditor lies however primarily on the intermediaries that are being audited. Along with the external audit, most intermediaries have tried to develop an internal audit programme. In this respect, the IRS has recently encouraged external auditors to submit audit plans in advance and to partly rely on the work of the internal auditing procedures[840]. This practice represents a substantial amendment if compared with the original approach encouraged by the IRS, which favoured either an analytical audit, or auditing practices based upon statistical inference. Both approaches would have proven too hard and have then been discarded. However, as it will be later explained, statistics still holds a relevant role in the imposition of sanctions. If the faults in the Q.I. behaviour detected by the Auditor are of particular relevance, then the Q.I. will undergo a tax assessment carried out directly by a US official.

The advantages of applying to a Q.I. Agreement consist in a simplification of the normal procedures to obtain the application of the reduced conventional withholding tax rate as well as the possibility to report US source income by pool, i.e. in an aggregated fashion, while such income should normally be reported analytically. Apart from practical facilitations, the gathering of information into pool also allows to maintain confidentiality on non-US clients. In the background, by applying to a Q.I. agreement it is possible to give a co-operative turn to relations entertained with the IRS instead of a strictly subordinated position. On the other hand, it should be underlined that the procedures for non-Q.I. have been made more demanding after the introduction of the Q.I. regulation, with particular reference to obtaining the application of a reduced conventional withholding tax rate. This situation has occurred upon a decision of the IRS and is meant to encourage financial institutions worldwide to become Q.I. and can be considered almost as an indirect sanction. Another advantage of becoming a Q.I. also consists in the impossibility to report information in pool, so that full disclosure for each single client cannot be avoided. More specifically, pools are jointly organised by type of income produced and by the withholding tax rate applied.

If the terms of the agreement are not respected and the Q.I. does not meet its obligations, several penalties can be imposed by the IRS. In case no primary responsibility is assumed by the Q.I., the latter is to be considered responsible for the

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[838] Deloitte and Touche, Ernst and Young, KPMG and Pricewaterhouse Coopers.

[839] Ascari R., *Qualified Intermediary Regulations, US Tax Regime, Basic Rules*, Materials from the Seminar "Il diritto tributario convenzionale e comunitario", Vezia, 15-16th June 2007, p.4.

[840] Gilbert R., *New US Withholding Tax Regulations*, Chase Internal Presentation, 2003.

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behaviour of the US custodian and it has to equalise the sums due by the former when withholding has not been carried out correctly.

7.2.6 Localisation Of Income

It has been already underlined how the whole Q.I. system impacts only US securities, as only US sourced income is addressed.

The US sourced income which is relevant for the Q.I. purposes is to be determined by the US withholding agent acting as a custodian; nevertheless, it is necessary for the Q.I. to provide basic information to non-US investors concerning US taxation at source guidelines. In this respect, a payment is subject to withholding tax if it derives from sources within the US and it is a fixed or annually or periodically determinable income. This definition would then mostly apply to two forms of income, dividends and interests[841]. Exemptions to this general rule are to be found in capital gains, interest income qualifying as portfolio interest, non-US targeted bearer bonds, such as Eurobonds, US Global Bonds, or bonds issued in bearer by a US Corporation in non-US markets to be sold to non-US persons only and bank deposit interests not effectively connected with US trade and business.

Q.I. have to report annually the income received by their clients and some typologies of income are to be reported even though they are tax exempt[842]. A peculiar aspect to be addressed is that securities may pass from not qualifying as US source income to qualifying as US source income, as it may well happen within groups. For instance, securities issued by US subsidiaries of non-US companies are to be considered US securities, while the same is not true for securities issued by non-US subsidiaries of US companies.

7.2.7 Subjective Scope Of Application And Reporting Obligations

Ratione personarum, the main distinction to be remarked is that between US persons and non-US persons, who are also defined as non-resident aliens. Another paramount distinction is that between accounts directly held and accounts indirectly held.

US persons have to be documented with a specific form issued by the IRS called W9, on the contrary the form to be used with reference to non-resident aliens is the W8BEN as well as an attached document covering the “know your customer”

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[841] Although other examples can be found in gains deriving from the sale or exchange of patents, copyrights and transactions involving other intangible property.

[842] Ascari R., *Qualified Intermediary Regulations, US Tax Regime, Basic Rules*, Materials from the Seminar “Il diritto tributario convenzionale e comunitario”, Vezia, 15th-16th June 2007, p. 7.

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requirements. The W8BEN form can basically be seen as a self-certification of tax residence which can be used in order to demonstrate that the person is not a US resident. Form W9 has the same self-certificating value, but refers to the status of being a US resident. Unlike Form W9, which is always needed when a US person is involved, the filling of the W8BEN form is not mandatory and it is required only when the Q.I. has reason to know that the involved person may not be a resident of that State.

It would be too long to address each form in detail; however, some general principles apply to the handling of either form W9 and form W8BEN. First of all, these forms must be completed by the final client if they refer to individuals or by the company representative if they refer to corporations, even though some introductory parts can be filled directly by the bank before signature. Once the forms have been signed they cannot be altered. The forms maintain their validity for three years after the year of receipt. Whereas the client is in the position to require the application of lower treaty tax rates, a reasonable explanation must be provided directly in the forms. A peculiar case, which has been solved only quite recently[843] is that of joint accounts, whereas the most correct behaviour is to document each of the participants to the account.

An account holder is deemed as a direct account holder when he is also the beneficial owner of the account. This implies that only one level of documentation has to be produced, either referring to an individual, a corporation or a trust. On the contrary, when dealing with indirect account holders, the account is normally opened in the name of the intermediary, thus requiring two levels of documentation. This situation most likely occurs when grantor trusts or partnerships are involved, which, unlike complex trusts are considered transparent entities. With reference to direct account holders, trusts are also encompassed when they are deemed as complex trusts according to US legislation. A complex trust is a residual example of trust, which cannot qualify either as a grantor trust or a simple trust. Its further characteristics are that it is irrevocable, the management is at total discretion of a trustee and the trust owns income and assets. Conversely, a grantor trust is defined directly by the Internal Revenues Code as a trust where the grantor or other owner retains the power to control or direct the trust's income or the trust's assets. Some criteria are provided in order to detect such a situation, for instance the power to decide who receives the income, the power to vote, the power to control the investment of the trust funds, the power to revoke the trust. In these cases, the income is taxed to the grantor and not to the trust, as the trust is disregarded as a separate tax entity.

Due to the fact that information is normally reported in pool, no information concerning specific clients will eventually be disclosed to the IRS, not even when audits on the Q.I. are conducted. More specifically, before sending information to the US

[843] Gilbert R., *New US Withholding Tax Regulations*, Chase Internal Presentation, 2003, p. 9.

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custodian which is the direct counterpart of the IRS in this domain, data have to be aggregated by type of income and applicable rates. Some types of income are reportable even though they are tax exempt. The form used for these purposes is called Form 1042-S[844]. The main purposes of the reporting provided with reference to non-resident aliens is that the latter should prove that they are not US persons in order to request either the application of a reduced withholding tax rate by double tax treaty relief or obtain a portfolio exemption on interests.

In order to be valid, "know your client" documentation needs to comprise an affirmative statement and the required documental proof. In this respect, four acceptable documents can be used: a passport, a national identity card, a residence permit, a drivers licence with a photograph or a licence to carry weapons[845], all of which need to be still valid when received. As it is required by the common US policy in this field, documentation has to be provided either in its original form, or, as it is more likely, in an authenticated copy. If these requirements are not met and no proper documentation is provided, the purchase of US securities cannot even take place. The Form W8BEN is required only in few particular cases such as when the client has standing order in favour of an account held by himself in the United States or a client has a mailing address in the United States. The same problem may arise when the nationality and the fiscal domicile are different and the client is willing to apply for the application of the tax treaty. In this case tax relief can be obtained only by filling also Form W8BEN.

Non-resident alien corporations demand a specific documentation different from that needed for non-resident aliens individuals. Moreover, in order to obtain treaty relief, form W8BEN needs to be signed by a company representative.

With reference to trusts, only a complex trust is considered a non-transparent entity for Q.I. purposes, i.e., it is the only form of trust which can directly be considered as an effective beneficial owner. The documentation to be provided in this case is a valid trust deed. When a W8BEN is also needed, it has to be signed directly by the Trustee.

With reference to documentation requested for US persons, US corporations, US trusts and US partnerships, the W9 form must be filled by indicating a tax identification number, which remains valid forever unless taxpayer's names change, and by

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[845] The adoption of a limited and standardised number of identification documents has proven to be particularly complex, as identification policy across the world vary quite dramatically. The situation is made worse by the absence of an international standardisation of tax identification numbers, which would solve these problems to the root. Reported by Parisotto R., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.

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specifying the type of client[846]. If the documentation provided is adequate, then, no withholding tax is applied in cases involving a US client.

With reference to eventual banking secrecy issues, a waiving occurs as the form is disclosed when sent to a US custodian intermediary acting as a withholding agent. The withholding agent has to report to the IRS the income perceived on Form 1099, of which one copy is handed directly to the US client who can use it for filling US tax returns, so that a dual reporting obligation occurs with reference to this case. If the documentation related to a US client is not deemed as sufficient by the IRS, then a 28% back-up withholding tax is applied to any US source income. Moreover, in this case, no purchase or deposit of securities is allowed, so that the non-documented US client faces the obligation to resale securities with these characteristics. Another relevant issue in this case is that banking secrecy will be totally discarded. Severe consequences may affect the Q.I. as well, as the failing in providing a correct documentation concerning US clients is judged in an extremely negative fashion when periodic audits take place and may eventually lead to the withdrawal by the IRS of the Q.I. status.

7.2.8 Sanctions For Q.I. And Non-Q.I.

A problem yet to address is to define what happens when a Q.I. does not comply with the terms of the agreements and either fails to fulfil its duties or does not do it correctly. The sanctions in this case can go from having a tax assessment carried out by an IRS official which may end in the revocation of the Q.I. status. This action would imply severe consequences both in economic and in reputation terms. First of all, it would be extremely difficult for a former Q.I. to keep investing in US securities, as no US custodian would handle assets pertaining to an intermediary that has been spotted by the IRS. This would impact the relationship with the clientele in an extremely negative fashion. Along with this decision, contractual penalties can be applied. Even though one of the parties of the agreement is a Tax Administration, the latter acts as if it was almost a private sanction. No bound other than a contract exists between the IRS and the Q.I., thus it would be inappropriate to impose sanctions other than contractual penalties, as the sanctions arising from a contractual default should be of mere compensatory nature. Sanctions can however prove to be extremely serious, as they are based upon a statistical method called extrapolation. This implies that, if after an audit of a limited percentage of Q.I., a certain percentage of non-compliant Q.I. is found, then it is assumed that the same proportion of non-compliant Q.I. is to be found with

[846] I.e., whether it is a person, a corporation, a trust or a partnership.

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reference to all Q.I. In this respect, the non-compliance of one Q.I. directly impacts the position of other Q.I. .

With reference to non-QI, the sanction for failing to meet the IRS requirements is even harsher and consists in a seize of all the assets held by the foreign financial institution at its US custodian.

It has been argued that, establishing the seize of assets for non-Q.I. has been a major driver in the decision of many banks to become Q.I., due to the disruptive consequences that such a sanction would import[847]. The seize of assets represented an innovation also for US domestic tax law, but was something completely unheard of in its outbound application. The sanction cannot be considered an extraterritorial one as it impacts assets already held in the United States although producing income which is benefited abroad. However, the financial intermediary which is impacted by the sanction is anyway usually subject to a foreign jurisdiction. This kind of sanction could have never been imposed to Q.I., as it would not be possible to incorporate what is an administrative action among the sanction foreseen by a contract.

No contract binds non-Q.I. and the IRS, so that this approach is actually viable in this latter respect. The value of the seize of asset provisions should however be considered more of a deterrence tool rather than an actual sanction[848]. The involved non-Q.I. could prevent such a situation by pre-emptively selling its US securities held at its US custodian, so that for the IRS there would be no assets to seize. As the US model tax convention does not feature any reference to international co-operation in the field of the recovery of claims, the IRS would not be in a position to impose the prescribed sanction[849]. However, it cannot be discarded that, in such case, the non-Q.I. would face a severe reputation boomerang.

7.2.9 Qualified Intermediaries and Information Exchange

The Q.I. system is normally studied only in terms of withholding tax application, while it embeds a substantially innovative information exchange mechanism, which shares some major similarities with the system set forth by the EU Interest Savings Directive[850]. This system can be detected only when foreign intermediaries that have met the requirements to become Q.I. do not assume what is called "primary responsibility", i.e. directly carrying out a withholding tax on income deriving from US

[847] Braccioni P., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.
[848] Rosenbloom H.D., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.
[849] Braccioni P., *Gli adempimenti fiscali dei Qualified Intermediaries*, Meeting held at Bocconi University, Milan, 10th May 2001.
[850] Council Directive no.2003/48/EC of 3 June 2003 taxation of savings income in the form of interest payment, effective since 1st July 2005, in Official Journal L 157, 26th of June 2003, p. 38.

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securities. This happens quite often, as such responsibility features some major technical problems that just few major players in the field of financial intermediation can handle, as well as implying more responsibilities versus the IRS. When no primary responsibility is undertaken, then the Q.I. technically limit themselves to carry out an exchange of information. Information gathered in pools as previously described is sent to a US bank acting as a custodian, which in turn provides to apply the correct withholding tax on the account of the information provided by the foreign Q.I.. This kind of information exchange could be assimilated to an automatic exchange of information, as information is expected to flow regularly and arranged in bulks. The main peculiarity of this information exchange system is that, even though its effects are of eminently public nature, as they import the correct application of a withholding tax, its actual parties both are companies bound by a business relationship and by a private contract, which, in the light of a broader Q.I. agreement, becomes instrumental to the carrying out of US tax laws[851]. What is then faced in this case is a complete privatisation of information exchange, which no longer can be considered a form of mutual administrative assistance, although the results achieved by the system are exactly comparable, if not more successful, than those achievable on the grounds of an information exchange agreement.

This experience can be considered one of the most recent trends in the field of exchange of information as well as , until the entry into force of the EU Interest Savings Directive, quite an unparalleled one. The system which more closely resembles the US Q.I., the Japanese Q.F.Y. seems to focus more specifically on the direct application of the withholding tax by the foreign financial intermediary. Within the setting of the EU Interest Savings Directive, information gathering measures have been privatised, but actual information exchange is still carried out by Member States' Tax Administrations.

It is probably early to tell whether this approach, which has proven to be quite successful when implemented by the United States[852], will find a following among other Countries and will survive a legal transplant without further complications.

According to the author, the main problem, in this respect, would be represented by the difficulty of getting financial institutions to carry out this service. With reference to this US initiative, prestige and harsh sanctions have proven to do the trick. It is yet to be seen whether these factors will prove being sufficient when similar initiatives will be carried out by less influential Countries.

Moreover, and probably even more significantly in view of its possible fate in the future, the Q.I. system has proven to be prone to a series of loopholes which has

[851] The regulation does not mention what kind of relations should bind the Q.I. and its US custodian and neither defines the general terms of such an agreement.

[852] The first Q.I. contract has been stipulated on the 1st January 2001. In January 2007 the second round of agreements was negotiated. The number of Q.I. has more than triplicated over the years, encompassing all the main financial institutions in the world.

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provided a suitable environment for a rampage of now (in)famous examples of tax fraud, it then appear likely that once the new F.A.T.C.A. system, which will be dicussed later in this part of this work will have become fully operational, the Q.I. system will likely be put aside or downplayed in order to be absorbed into F.A.T.C.A..

7.2.10 Shortcomings of the Q.I. System

The Qualified Intermediary System has been in place for over ten years and such a time span has allowed policy makers and scholars to identify some apparent loopholes of the underlying mechanism which can be summarised as follows:

First of all, the QI system only required Qualified Intermediaries to report to the IRS the US source income of their US customers. Since foreign source income was not reported, many US taxpayers invested in foreign source assets to avoid reporting.

When the QI system was first implemented in 2001, many US taxpayers that had previously invested in US source assets through a foreign financial institution converted those assets to foreign source assets and continued to avoid reporting to the IRS.

Moreover, the QI system did not specifically require that QIs look-through foreign shell entities to determine the underlying beneficial owner. Thus, if a US taxpayer wanted to invest in US source assets, it could establish a foreign shell entity (or entities) and argue under the QI system that the entity was the beneficial owner of the income. In such case, the QI took the position that the foreign entity should be viewed as the beneficial owner under the QI regime and no reporting to the IRS was required. As a result, many US taxpayers that had previously invested in US assets and did not want to convert those assets to foreign source assets contributed their US source assets to a foreign shell entity (or entities) and continued to avoid reporting to the IRS.

Moreover, since the primary emphasis of the QI system was to make sure the proper withholding tax was charged on payments to foreigners, the QI system allowed foreign financial institutions to designate those accounts that were part of the QI system. This was done to avoid the QI having to perform detailed due diligence procedures on its entire customer base, especially those that never invested in the United States: the result was that QI could exclude certain customers from the QI system, especially "undeclared accounts" where account holders were recalcitrant to identification.

A further loophole of the Q.I. system was to be found in the circumstance that QIs almost exclusively consist of financial institutions such as banks and fiduciaries among their ranks while they do not normally included entities treated as corporations for ta purposes such as mutual funds and private equity funds.

As it will be further investigated in the chapter dedicated to the F.A.T.C.A. system, the above exposed shortcomings of the Q.I. regime deeply influenced the policy debate concerning the adoption of F.A.T.C.A., whose structure and outreach appear

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designed as a tool for addressing the perceived faults of the Q.I. system. Namely, the F.A.T.C.A. system could be defined, from a structural perspective, as a quasi-Q.I. mechanism endowed with penalty mechanisms.

7.3 International tax Intermediaries and Assistance in Collection through Withholding Taxes

7.3.1 Introductory remarks

As anticipated in the introductory remarks to the present Part of this thesis, traditionally the main role of financial intermediaries in relation to the administration of taxes within a domestic context has been to act as withholding agents on items of income earned or channelled through them.

Such a role can clearly be observed also in cross-border situation in relation to non-resident payees. However, in this case, implications can be twofold. Besides “plain vanilla” withholding, carried out in the interest of the Fisc of their own State of establishment, cross-border tax intermediaries can act on behalf of the State of residence of the payees. In this regard, as it will more thoroughly discussed, the service rendered by cross-border tax intermediaries would consist in a form of assistance in the collection of taxes, with the peculiarity of being implemented in a contemporaneous way and not ex post as it would otherwise be typical of other examples of assistance in the recovery of tax claims.

Due to the circumstance that such an activity is extremely burdensome for the involved financial intermediaries and considering that forms of revenue sharing for the concerned financial institutions are typically not foreseen (or, where foreseen, would exclusively benefit the Fisc of the State where the financial institution is established) it might be argued which kind of rationale and which kind of hidden incentives underlie this form of cross-border withholding. Such a rationale and the related incentives can be found in a key feature of such a collection practice, namely, its being carried out in an anonymous way. The policy objective would then be to directly address the foreign tax gap of the State of residence of the investors without however unveiling the latter. Due to anonymity being a relatively sought after feature for a financial centre, the inherent incentive for the involved financial intermediaries would be to preserve such a status of things. Similarly, if the incentive is a defensive one, the goal is a derivative one, in the sense that, it comes out as rather intuitive that such a peculiar form of co-operation would have the objective to supplant automatic exchange of information, which will be discussed in further detail in the following chapter.

On the other hand, this chapter examines the anonymous withholding mechanism as sprung, also in this case, from the fertile precedent of the US Q.I. system

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and implemented within the context of the European Interest Savings Directive as well as of the related Bilateral Agreements with Switzerland. Subsequently, this Chapter examines and compares with its forerunner the currently hotly debated set of bilateral agreements concluded between Switzerland and a handful of European Countries which are ordinarily referred to as "Rubik Agreements.

7.3.2 The "Withholding Tax" Model Within the EU Savings Directive Framework

The withholding tax system has been adopted only by three Member States, namely Austria, Belgium[853] and Luxembourg. Moreover, the withholding tax mechanism is considered the default option in most of the Agreements regarding the taxation of savings stipulated with non-Member Countries, first and foremost Switzerland. It should be noted that this option has been made possible on the grounds of structural differences affecting these Countries and it is only intended as a provisional situation, with increasing applicable rates on interest savings income. Namely, the withholding tax rate has amounted to 15 per cent during the first three years of the transitional period, 20 per cent for the subsequent three years and 35 per cent thereafter [854]

The choice operated by these Countries can be explained by the following reasons. In the majority of cases, the withholding tax system seems to be the only option in order to make the Directive effective, notwithstanding the existence of banking privilege regulations. It is quite apparent that the very notions of exchange of information and of banking privilege hopelessly collide.

It is interesting to point out that banking privilege regulation is not regarded with the same degree of deference throughout all these Countries. For instance, in Austria the legal basis for such privilege lies directly in the republican constitution[855], while in Belgium the so called banking privilege simply prevented the Belgian Tax Administration from collecting information from financial institutions in order to assess their clients; however, such limitations cease to exist whenever they clash with money-laundering investigations or are subsequent to serious presumptions of tax fraud[856]: it can then be observed that the transition to the exchange of information model likely proved less problematic than expected. Moreover, while Austria is seriously considering a

[853] However, Belgium has shifted to the exchange of information model as of 1 January 2010.

[854] Art. 11.1 of the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payment, effective since 1 July 2005.

[855] Tumpel M., Aigner D.J., Glaeser L. , *Answers to the Questionnaire of the Interest Savings Directive, Austria,* in *EATLP Annual Conference Materials*, Budapest, 2006, at.4.

[856] Vanistendael F., *General Report on the Interest Savings Directive*, in *EATLP Annual Conference Materials*, Budapest, 2006, at 28.

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progressive abolition of banking privileges, the debate seems inevitably far from a conclusion in respect to Luxembourg and Switzerland.

In the vast majority of the Countries which have opted for withholding tax, the latter can be substituted by regular exchange of information procedures upon explicit request by the foreign resident beneficial owner, as stated by Art. 13 of the Directive[857]. Belgium has not provided an alternative option to the withholding tax that is based on exchange of information; on the contrary, the beneficial owner may avoid the retention tax only by presenting a certificate of taxation of interest in the Country of residence to the paying agent, which is in charge of transmitting it to the Belgian Tax Authority.

The Belgian Tax Authority has criticised the amount and the type of information required by the Directive, considering such data to be inconsistent with the eventual aim of the Directive [858]. For the time being, it is however to be remarked that requiring a certificate of taxation in the Country of residence actually leaves no practical alternative to the withholding tax system, since no Country has produced such a document so far and the introduction of a harmonised certification form appears unlikely at the moment [859]. It is interesting to point out that Belgium had already adopted a system of global exchange of information for national purposes, but it has discarded it prior to the adoption of the Directive, because of its disappointing results [860].

Some major differences can be found even among the Member States that have introduced exchange of information "by request". In all these Countries exchange of information is considered an exception, but in Luxembourg, strictly the minimum amount of information required by the Directive under art. 3 can be forwarded to the beneficial owner's Country, while in relation to Austria, supplementary information can also be forwarded upon request of the beneficial owner's Country of residence, once given the consent of the eventual beneficial owner[861]. This could be the case for Scandinavian Countries which have set high informative standards in order to the exchange of information being deemed effective. Moreover, while Austria has made the paying agent responsible for the transfer of information, Luxembourg has opted for allocating the informative burden directly to the beneficial owner[862], who has to disclose all the information to the competent Tax Administration. It can be argued that this measure

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[857] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payment, effective since 1 July 2005, art 13.

[858] Dassesse M., Dayez A., *Implementation of the Council Directive 2003/48/CE of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payment, Belgian Report*, in *EATPL Annual Conference Materials*, Budapest, 2006,p. 8.

[859] Vanistendael F., *General Report*. at 31.

[860] Gerard M., *Combining Dutch Presumptive CapitalIncome Tax and US Qualified Intermediaries to Set Forth a New System of International Savings Taxation*, CESifo Working Paper No. 1340, Munich, 2005, at 5.

[861] Tumpel M.,Aignel D.J.,Glaeser L. , *Answers to the Questionnaire of the Interest Savings Directive, Austria,* in *EATLP Annual Conference Materials*, Budapest, 2006, at 7 .

[862] For further details, see Winandy P., *Answers to the Questionnaire and Special Reports on the Interest Savings Directive*, in *EATLP Annual Conference Materials*, Budapest, 2006.

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seems to be designed to discourage beneficial owners from opting for the alternative regime. This situation might change in the future, as the withholding tax rate is destined to increase.

Switzerland has adopted the exchange of information in case of request by the beneficial owner; however, this is one of the rules where the gap between the text of the European Directive and the provisions of the Agreement seems to be wider.

If the implementation of the voluntary disclosure option has been rather differentiated, on the contrary, the withholding/retention tax itself has not led to meaningful national differences. Austria, Belgium, Luxembourg have simply adopted Art. 11 of the Directive[863], which refers to the transitional period. Conversely, Switzerland excluded withholding tax whenever the debtor is a Swiss resident. As a general rule, the withholding tax shall be levied by the paying agent on the amount of the interest paid or credited.

It has been pointed out that the withholding tax is applied directly by the paying agent, as the connecting factor of the retention is not the debtor of the interest, but rather the paying agent[864]. This conclusion once more confirms that the notion of paying agent represents something different from that of “payer” found in the OECD Model Treaty.

With reference to revenue sharing, the State where the payment takes place and which is the one entitled to levy the withholding tax, may keep 25% of the revenue, while it has to transfer the remaining 75% to the EU Member State of residence of the beneficial owner.

Lawyers have argued whether the withholding tax ought to be levied even when interest income is not taxed in the State of residence of the beneficial owner. It has been underlined that the very aim of the Directive is to make interest income taxable in the State of residence of the beneficial owner, “in accordance with the laws of the latter Member State”[865]. A literal interpretation would imply that, in this case, in Countries applying the withholding tax method, there would be a taxation of interests from savings in case no exchange of information takes place and no taxation in case of engagement of exchange of information[866]. This conclusion has been considered unacceptable by some interpreters, but such a comment seems quite arguable. It is true that the problem could be easily circumvented by opting for the voluntary disclosure. It is no mystery that the Directive considers the exchange of information system preferable, whenever

[863]Art. 1 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

[864] Danon R., *Taxation of Savings Income-Swiss National Report*, EATLP Congress, Budapest 2006, at 13.

[865] Art. 1 of the Council Directive 2003/48/EC of 3 June 2003.

[866] For further details, see Winandy P., *Answers to the Questionnaire and Special Reports on the Interest Savings Directive*, in *EATPL Annual Conference Materials*, Budapest, 2006.

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possible, and this special case could be considered as a logical consequence of this basic guideline.

It has been argued that a withholding tax such as the one conceived by the Directive may conflict with Art. 63 of the Treaty on the Functioning of the European Union[867]; if it is actually true that the State of residence is supposed to eliminate double taxation by granting a tax credit to the beneficial owner, at the same time a liquidity disadvantage occurs at the expense of a taxpayer having relocated part of his savings in another Member State[868]. A taxpayer who did not opt for this investment allocation would not face such a disadvantage; this would lead to a disparity of treatmenthindering the free movement of capital[869]. However, it is important to bear in mind that this unfavourable condition can once again be avoided by opting for voluntary disclosure. Again, this conclusion seems to confirm that the Directive also aims at encouraging the setting of a more effective EU system of exchange of information in relation to the taxation of financial income, even while temporarily enabling Member States to adopt a withholding tax system.

Austria, Luxembourg and Switzerland all tend to consider the special withholding tax not as a proper withholding tax in the source Country, but as a sort of prepayment of the tax in the residence Country, also considering that the majority of revenues are transferred to the latter[870]. This interpretation is particularly suitable with reference to Switzerland, where the retention tax is expressively conceived as a matter of administrative assistance[871] aimed at making the taxation of interest income in the residence country more effective.

According to Art. 14 of the Directive, the eventual problems of double taxation arising from the levying of the special withholding tax should be solved by making sure that the Member State of residence of the beneficial owner grants a tax credit up to the amount of tax due in its territory and by reimbursement to the beneficial owner of any excess amount of tax withheld. An alternative could also be to grant a refund of the special withholding tax.

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[867] Treaty establishing the European Community, 25 March 1957, effective since 1 January 1958.

[868]Tumpel M., Aigner D.J., Glaeser L. , Answers to the Questionnaire of the Interest Savings Directive, Austria, in EATLP Annual Conference Materials, Budapest, 2006, at 6.

[869] For a thorough analysis of such problems see Dassesse M., *Does the EU Directive “on taxation of savings” violate the freedom of movement of capital?*, in *Butterworths Journal of International Banking and Financial Law*, 2004, at 12-17.

[870] As earlier cited, States levying the withholding tax retain 25% of the revenues and transfer 75% to the State of residence of the beneficial owner.

[871] Danon R., Taxation of Savings Income-Swiss National Report, in *EATLP Annual Conference Materials,* Budapest 2006, at 16.

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7.3.3 The Bilateral Savings Agreement with Switzerland and with Other Countries

Switzerland, Andorra, Monaco, San Marino have all agreed to put into place measures equivalent to those that will be applied by Member States with reference to the implementation of the Interest Savings Directive.

The decision to negotiate with these States was taken on the grounds that the European Union soon realised that if the Member States had adopted the Interest Savings Directive, due to the restrictions imposed by the latter, part of the savings in question would have likely flown away, either in search of lower tax rates or in pursuit of places where the anonymity of beneficial owners would have been nevertheless guaranteed. In order to prevent such a substantial avoidance of the Interest Savings Directive, the European Union started negotiations with the aforementioned Countries in order to reach an agreement concerning the adoption of similar rules. The pool of negotiating partners originally included also the United States, which however eventually did not pursue negotiations due to lack of interest in the subject[872]. The content of the compromise which eventually led to an adoption of measures similar to those envisaged by the Interest Savings Directive was the safeguard of Swiss banking secrecy in exchange of co-operation in avoiding outbound capital flows.

The arrival point of this negotiation was the conclusion of the Agreement with Switzerland on 2nd June 2004. Such an agreement provided for measures equivalent to those found in the Interest Savings Directive in its special withholding tax version. The same pattern was applied to Andorra[873], Liechtenstein, Monaco and San Marino[874].

Namely, the key points of the Agreement were:

- The application of a special withholding tax, the same applied by Austria, Belgium and Luxembourg during the transitional period of application of the Savings Directive, even though this mechanism is here defined as “retention”;
- The envisaging of an alternative option for the taxpayer to allow disclosure of the income received to the Tax Authorities of its Member State of residence;
- The possibility to carry out information exchange on a request base in cases of “tax fraud or the like”;

[872] Bernasconi M., *L’assistenza fiscale amministrativa. La politica della Svizzera dal 1951 in poi e prospettive future*, in *Diritto senza devianza*, Bellinzona, 2006, p. 121.
[873] Agreement signed on 15th November 2004.
[874] Agreements with these three Countries were conclude on 7th December 2004.

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- The presence of a review clause allowing Contracting Parties to assess the terms of the Agreement with reference to its effectiveness and its conformity to international developments.

7.3.4 The Bilateral Agreements II

The Agreement parallel to the Interest Savings Directive was actually only a part of a broader spectrum of Agreements between Switzerland and the European Union, commonly named Bilateral Agreements II and which were signed on 26th October 2004. Bilateral Agreements II are the follow-up of Bilateral Agreements I, which were signed back in 1999 and featured a set of bilateral and sector-specific negotiations and agreements. This approach to co-operation between Switzerland and the European Union was first undertaken after 1992, when the project of having Switzerland accessing the European Economic Area was discarded. The need to enter on a second round of negotiations with Switzerland was driven by two main concerns, the aforementioned problems of expected capital flows following to the adoption of the EU Interest Savings Directive and the need to find a common position in the fight against tax fraud concerning indirect taxes, with primary reference to smuggling carried out across the EU-Swiss borders.

Other subjects impacted by the set of Bilateral Agreements II are:

- The association of Switzerland to the "Schengen acquis" in order to facilitate free movement of persons with reference either to EU and Swiss citizens, primarily trans-border workers;
- Participation of Switzerland in the "Dublin" and "Eurodac" regulations, which refer to the EU asylum policy. Namely, Eurodac is a pan-european electronic system aimed at identifying asylum-seekers;
- Trade of processed agricultural products;
- Participation of Switzerland in the European Environment Agency and in the European Environment Information & Observation Network in order to promote the issues of sustainable development;
- Participation to the EU Media Programme;
- Ensuring the prevention of double taxation for pensions paid to former EU civil servants residing in Switzerland.

Going back to the Agreement concerning the taxation of interest savings, it is to be underlined that the central assumption of the adopted model is that by imposing a retention tax, two needs can be satisfied, that of the EU to ensure a more global effectiveness of the Interest Savings Directive and that of Switzerland to safeguard its banking secrecy and other pillars of its legal framework.

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Within the setting of the Agreement, Switzerland has also obtained the application of Directive 90/435/EC[875], according to which dividends are not taxed in the source State; the same treatment has been extended to dividends, interest and royalty payments between companies[876]. Limitations to this provisions have however been invoked by Spain, due to some peculiarities of the Tax Treaty signed with Switzerland.

7.3.5 The contents of the Agreement

The Agreement between the European Union and Switzerland is founded on Art. 54 of the Swiss Federal Constitution[877]. This Agreement has been implemented with the adoption of a Federal Law on the Taxation of Savings, which entered into force on the 1st of July 2005[878]. While the aforementioned Federal Law dealt with the procedural aspects of the implementation of the agreement, no implementation legal instrument was adopted with reference to the key terms and the key provisions of the Directive. The notions of paying agent, beneficial owner and interest are thus the same encompassed by the actual Agreement. On the other hand, key aspects of the Agreement such as the technical aspect of the retention on interest payments carried out by the paying agent or the voluntary disclosure procedure have been defined with a regulatory approach by the Swiss Federal Tax Authority[879].

One should not forget that the Agreement is directly linked to the Interest Savings Directive, but it should not be seen as a direct and slavish replication of this latter legal instrument[880]. In this respect, it has been argued that, the Agreement should be interpreted independently from the Interest Savings Directive[881]. However, it seems quite apparent that the Directive is relevant with reference to the interpretation of some key terms that have not been even slightly modified in the Agreement and with reference to which the Swiss Federal Tax Authority felt no need to provide independent interpretations guidelines.

The provisions of the Agreement are all referable to two distinct categories:

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[875] Council Directive no. 90/435/EEC of 23rd July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by Council Directive no. 2003/123/EC of 22nd December 2003, in OJ L7 of 13rd January 2004, pg. 41.

[876] See Art. 15 of the of the . Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

[877] Governing foreign relations of the Swiss Confederation.

[878] Loi fédérale concernant l'accord avec la Communauté européenne relatif à la fiscalité de l'épargne of 17 December 2004, RS 641.191.

[879] See Directives relatives à la fiscalità de l'épargne de l'UE (retenue d'impo^t et déclaration volontaire) of 24 June 2005, available at http:// www.stv.admin.ch/data/dvs/druck/euz/euz-wegleitung-20050624 -f.pdf

[880] Oberson X., *Agreement between Switzerland and the European Union on the Taxation of Savings- A balanced "* Compromis Helvétique", IBFD Bulletin 3/2005, at 109.

[881] Ibidem

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- Provisions concerning the "underlying mechanism" of the Agreement; i.e. the mechanics of the retention carried out and collected by the Swiss paying agent[882]; the voluntary disclosure procedure[883], which is instrumental to the avoidance of the retention by the Swiss paying agent[884]; the mechanism for eliminating double taxation[885] ; the rules governing revenue sharing[886].
- Rules introducing key terms of the Agreement. Key terms revolve around the notions of beneficial owner[887], the notion of paying agent[888] and the notion of interest payment[889].

In the following paragraphs these key concepts will be addressed in further detail.

7.3.6 Some key definitions

The notion of beneficial ownership for the purposes of the Agreement is defined directly by this legal instrument, similarly to what happens with the Interest Savings Directive and unlike what normally applies to tax treaties. Namely, a beneficial owner is defined at Art. 4 of the Agreement as: "*any individual who receives an interest payment or any individual for whom an interest payment is secured, unless such individual provides evidence that the interest payment was not received or secured for his or her own benefit"*. Even though the wording is the same adopted by the Interest Savings Directive, some interpretative differences seem to apply.

The Swiss Federal Tax Authority in its Guidelines to the interpretation of the Agreement[890] emphasises the fact that the system envisaged by the Agreement focuses

[882] Art. 1 and Art. 3 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

[883] Art. 2 of the . Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.

[884] It is obvious that the withholding tax will then be directly collected in the State of which the taxpayer is a resident.

[885] Art. 9 of the Agreement of of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.

[886] Art. 8 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.

[887] Defined by Art. 4 and Art. 5 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.

[888] Defined by Art. 6 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.

[889] Dealt with under Art. 7 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.

[890] See Para. 77 of the Swiss Federal Guidelines to the Interpretation of the Agreement.

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solely on individuals to whom interest is paid . As a consequence, an interest payment made to a legal entity is not affected by the Agreement, even though the ultimate direct or indirect economic owners of the legal entity in question are actually persons. The interpretation of beneficial ownership seems then to be particularly narrow and formal, in contrast with the common principle according to which the notion of beneficial ownership can be best described resorting to the notion of final economic beneficiary. An interpretation such as the one endorsed by the Swiss Tax Authority is surely literally well-grounded, however, under a teleological point of view, it does not seem to have an adequate grasp on the actual practice. The risk is that entire categories of individual beneficial owners receiving interest payments from Swiss banks could eventually be able to bypass the application of the Agreement by establishing some sort of legal entity, which, by this very definition, cannot be considered in any case as a beneficial owner.

In this respect, the Swiss approach to the subject seems to be particularly conservative, and no interpretations other than the literal one have been forwarded by the Swiss Federal Tax Authority. On the other hand, the EU Institutions seem to have realised the presence of this major loophole and there have been proposals to reformulate the connected provisions in the Interest Savings Directive and to renegotiate this section of the Agreement in order to explicitly include juridical entities among beneficial owners[891]. It appears quite clearly however that the problem does not lie in the text of the Interest Savings Directive, with reference to which interpretations requiring to search for the actual economic beneficial owners of the interest payments are already the mainstream interpretation; on the contrary, the problem is directly linked to the narrow Swiss interpretative approach to the subject, upon which European Institutions cannot exert any influence. This is an extremely controversial issue, as Switzerland adopts for its domestic purposes a different approach, based on a check-the-box taxation principle. The Swiss Federal Tax Administration is actually aware, for its domestic purposes of the economic beneficiaries of entities that are not recognised as beneficial owners for Swiss tax purposes, such as the Liechtenstein purpose trusts and Familienstiftung[892]. Such an interpretation implies that the exchange of information is precluded whenever interest payments see a Swiss resident as a debtor, since, in this case, the retention tax as defined in the Agreement cannot apply. [893]

Art. 6 of the Agreement establishes that the status of paying agent may refer to:

- Banks under Swiss banking law;

[891] See EU Parliament Report A5-006/2004final of 26th February 2004.

[892] Bernasconi M., *Gli accordi bilaterali II e lo scambio di informazioni fiscali. L'accordo sulla fiscalità del risparmio*, Manno, 2005, p. 132.

[893] Danon R., Taxation of Savings Income-Swiss National Report, EATLP Congress, Budapest 2006, p. 13.

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- Securities dealers under the Federal Law on Stock Exchanges and Security Trading;
- Natural and legal persons resident or established in Switzerland, partnerships and permanent establishments of foreign companies, which even occasionally, accept, hold, invest or transfer assets of third parties or merely pay interest or secure the payment of interest in the course of their business.

According to the prevalent Swiss interpretation of these notions[894], making or securing a payment requires an active responsibility and not a mere supporting role. The latter may be the case of financial institutions concretely carrying out the payments whilst acting under the directions of other entities or persons as well as financial institutions providing auxiliary services to the actual paying agent. This situation should not be confused with that encompassing a chain of paying agents all acting independently, although being part of the same payment pipeline. In this case, the general principle, already cleared when assessing the Interest Savings Directive, directly applies. In this respect, the paying agent is always the last intermediary making or securing the interest payment to the beneficial owner.

Another relevant issue is that of the localisation of the actual financial intermediary which secures the payment. The Agreement only applies to paying agents which are located in the Swiss territory. As a consequence, when the interest payment is performed or secured by a foreign branch of a Swiss bank, the retention envisaged by the Agreement cannot be enforced and voluntary disclosure is also to be dismissed.

The notion of interest and interest payment for the purposes of the Agreement is defined by Art. 7. Actually the foundation to the notion of interest payment, which is dealt with at the first Paragraph of Art. 7, is literally equivalent to that found under Art. 6 of the Interest Savings Directive. More specific to the Agreement is the inclusion, among other typologies deemed as "interest payments" of the following categories of income:

- Income deriving from interest payments carried out either directly or through an entity distributed by Swiss investment funds which at the time of the entry into force of the Agreement, or at a later date are exempted from Swiss anticipatory tax on their payment to individuals who are resident of a Member State[895].
- Income realised upon the sale, refund or redemption of shares or units in Swiss investment funds which invest directly or indirectly more than 40% of their assets in debt-claims. This applies also to those Swiss investment funds that at the time of the entry into force of the Agreement or, at a later date, are exempted from Swiss

[894] Swiss Federal Tax Authority Interpretation Guidelines to the Agreement, Para. 10.

[895] Art. 7.1.c.iv of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.

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anticipatory tax on their payments to individuals who are residents of a Member State[896]. From 2011, the threshold for qualification will be lowered to 25%[897].

On the other hand, penalty charges for late payment shall not be regarded as interest payments[898], as well as income relating to undertakings or entities which have invested up to 15% of their assets in debt-claims[899].

According to the current interpretation, the question whether income derived from financial derivatives should be considered as a form of interest has been solved negatively.

It is clear that, no retention is levied on interest payments related to debtors having fiscal residency or a permanent establishment in Switzerland.

7.3.7 Key mechanisms of the Agreement

The Agreement establishes that certain interest payments made to individuals residing in the EU by a Swiss paying agent shall be subject to a retention on a *pro-rata* basis for the period during which the beneficial owner holds the debt-claim. The retention has so far been 15 percent , and it will increase to 20 percent from 2009 and for the subsequent two years, reaching 35 percent thereafter. It is apparent that the defined thresholds are the same established by Art. 11 of the Interest Savings Directive, already applicable to Austria, Belgium and Luxembourg during the so-called "transitional period". As earlier quoted, the retention mechanism ensures that Swiss banking secrecy is not waived, as no filing of information is required. In this respect, there is no difference with reference to Swiss withholding tax procedure normally applying in a cross-border context. The fact that no information is handed out is also fully consistent with the secrecy clause of the version of Art. 26 adopted by Switzerland in its treaty network. However, beyond this *prima facie* consistency, some peculiarities of the retention system based upon the Agreement cannot be missed. First of all, the retention is not considered a withholding tax *per se*, but rather it is deemed as an administrative assistance tool, even though part of its proceeds[900] directly flow into the Swiss treasury. The retention is also peculiar because it is applied only to payments made to EU

[896] Art. 7.1.d.i.v. of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.
[897] Art. 7.5 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.
[898] Art. 7.1.a of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.
[899] Art. 7.4 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive no. 2003/48/EC on taxation of savings income in the form of interest payments.
[900] More precisely, 25%.

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citizens. Moreover, the scope of the retention does not coincide with the normal withholding tax levied on interest income. Namely, the retention applies on a *pro-rata* basis, while the normal Swiss withholding tax is levied when the income falls due[901].

Art. 2 of the Agreement features the same text of Art. 12 of the Interest Savings Directive. The core rule is that the beneficial owner is entitled to avoid the retention carried out by the Swiss paying agent by expressly authorising the latter to report the interest payments to the Swiss Federal Tax Authority. The authorisation cannot be adjusted to include only a portion of the interest payments received, once the decision has been taken, it must be applied to all interests paid by the paying agent to that beneficial owner. It is not clear, whether the option can be limited to only one paying agent when the beneficial owner has resorted to more financial intermediaries. This double-standard does not seem particularly appealing, so that the problem does not seem to have a particularly meaningful practical import. The kind of information to be collected by the paying agent refers to:

- The identity of and residence of the beneficial owner;
- The name and address of the paying agent;
- The account number of the beneficial owner, or, where there is none, an identification of the debt-claim giving rise to the interest;
- The amount of the interest payment.

The implied waiver of Swiss banking secrecy is here admissible, even in the absence of tax fraud concerns; this is clearly due to the fact that such waiver is voluntarily requested by the beneficial owner of the interest[902]. Moreover, it should be maintained that this kind of disclosure is inevitably extremely limited, as it may only relate to items falling within the scope of the Agreement. Similarly to what happens under the provisions of the Interest Savings Directive, the Swiss Federal Tax Authority, which is the recipient of the information gathered by the paying agent, is in charge of communicating the aforementioned information items to the Member State of residence of the beneficial owner.

Art. 9 of the Agreement requires the EU Member State of residence of the beneficial owner to eliminate double taxation which may arise from the overlapping of the retention tax with withholding taxes levied by the beneficial owner's State of residence. In this respect, the State of residence is due to allow the beneficial owner to credit the retention tax in accordance with what is established by domestic tax law of that State and by the provisions of the treaty signed by the latter with Switzerland. Similarly, a tax credit equal to the retention levied by the paying agent must be allowed

[901] Danon R., *Taxation of Savings Income-Swiss National Report*, in *EATLP Annual Conference Materials,* Budapest 2006, at 14.
[902] Bernasconi M., *Gli accordi bilaterali II e lo scambio di informazioni fiscali. L'accordo sulla fiscalità del risparmio*, Manno, 2005, at 127.

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to the beneficial owner to be offset against the income taxes due in the State of residence.

The issue of revenue sharing is dealt with under Art. 8 of the Agreement, which re-affirms what is also established under Art. 12 of the Interest Savings Directive with reference to the cases of Austria, Luxembourg and Belgium. In this respect, Switzerland is entitled to keep 25 percent of the revenue generated by the retention and it has to transfer 75 percent of the revenue to the EU Member State of residence of the beneficial owner. The timing of the transfers is such that they should be carried out within a semester following the end of the tax year in Switzerland. Swiss cantons are also entitled to retain a portion of the proceeds of the retention, namely a 10 percent out of the 25 percent already directed to the Swiss Treasury

Art. 16 is concerned with transitional provisions to be applied with reference to negotiable debt securities. Similarly to what is prescribed under the provisions of the Interest Savings Directive[903], these transitional provisions also apply to negotiable debt securities held through various investment funds. Despite these similarities, the content of Art. 16 of the Agreement seems to be broader than that encompassed by Art. 15 of the Interest Savings Directive. Specific to the Agreement are the following provisions. First of all, domestic and international bonds and other negotiable debt securities which have been first issued before 1st March 2001 or for which the original issuing prospectuses have been approved before that date by the competent authorities of the issuing State shall not be considered as debt-claims, provided that no further issues of such negotiable debt securities are made on or after 1st March 2002. This provision applies to a transitory period which will end by the 31st December 2010. However, beyond 2010 and even whereas all Member States cease to apply similar provision, the provisions of this Article shall continue to apply in respect of those negotiable debt securities which contain gross-up and early redemption clauses[904] and where the paying agent is established in Switzerland.

The application of the Agreement is conditional on the adoption and implementation by the dependent or associated territories of the Member States[905] as well as by Andorra, Liechtenstein, Monaco, and San Marino of measures which conform with those established by the Agreement. These conditions should be met at least six months in advance with reference to the entry into force of the Agreement, i.e., within the end of 2004. It is clear that the application of the Agreement shall be suspended by either Contracting Party with immediate effect through notification to the other Parties,

[903] See Art. 15 of Council Directive 2003/48/EC of 3 June 2003.

[904] A gross-up clause is basically a compensation for the withholding already levied on the paid interest, so that the pre-tax and the taxed amounts are equal.

[905] As mentioned in the report of the Council to the European Council of Santa Maria da Feira of 19th and 20th June 2000

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should the Interest Savings Directive or part of the Interest Savings Directive cease to be applicable, even temporarily, in accordance with Community laws or in the event that a Member State should suspend the application of the implementation legislation pertaining to the Interest Savings Directive. Suspensions need to be previously notified and shall take place no earlier than two months after the notification. Similarly, application of the Agreement shall be resumed as soon as the measures are reinstated.

If disagreements on the interpretation and the implementation of the Agreement shall arise, then the Swiss competent authorities and the counterparts are expected to resolve these by mutual agreement. The European Commission may take part to consultations at the request of any of the competent authorities[906] involved.

7.4 The Withholding Tax Model Within the So-Called "Rubik Agreements"

7.4.1 Background

Within the framework of a broader "money strategy", Switzerland has developed a Model Agreement, firstly negotiated only in relation to Germany[907] and then concluded also with the United Kingdom (on 6th October 2011) and with Austria (on 13th April 2012).

The expression "Rubik Agreements" is actually an informal definition penned by the President of the Association of Foreign Banks in Switzerland,[908] which has however stuck to the Agreement and has become of general currency also among policy commentators. The reference to the well-known twisty-puzzle under the same name derives from the objective of the agreements, that would consist in jointly accommodating the goals and interests of the involved actors, namely, clients, banks and Countries.

The "money strategy" paradigm on which the whole Rubik construction is ultimately geared toward ensuring that resources invested through financial intermediaries established in Switzerland are not in any way at variance with the laws of the State of residence of the investor.

In this regard, it can be argued that, although the concrete legal instruments through which the concerned models are bilateral treaties, its roots may could be traced to a rationale of (partially self-interested) comity.

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[906] See Art. 12 of the Agreement of 2 June 2004 between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in the Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

[907] The Agreement was then formally concluded on 21st September 2011

[908] Mr. Alfredo Gysi.

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7.4.2 Personal scope of application of the Agreements

The personal scope of application can be broken down into an active and a passive scope of application, the former identifying the categories of financial institutions responsible for the application of the agreements and the latter identifying the concerned investors.

The active scope of application identifies, adopting the same term coined in the EU Interest Savings Directive and in the EU-Swiss Agreements the notion of "paying agent". The perimeter of the category of paying agents is defined in absolute terms even though it can be derived that the categories abstractly identifiable as paying agents would acquire such a status only when involved in the payment of items of income related to assets that are relevant to the objective scope of application of the Agreements.

The category of paying agents abstractly comprises the following:[909]

- banks under the Swiss Banking Act of 8 November 1934;
- securities dealers under the Swiss Stock Exchange Act of 24 March 1945;
- natural and legal persons resident or established in Switzerland;
- partnerships and permanent establishments of foreign companies which accept, hold, invest or transfer assets of third parties or merely make payments of income or gains for third parties or secure such payments in the normal course of their business.

It seems worthy to clarify that by the reference to "natural an legal persons resident or established in Switzerland" reference is particularly made to entities such as insurance companies, asset management companies and fiduciary companies as well as to professionals such as attorneys and notaries public.

The "passive personal scope of application" of the treaty extends to:

- individuals residing in Austria, Germany or the United Kingdom who, as a contractual partners of a Swiss paying agent, qualify as account holders or deposit holders and beneficial owners of assets; or
- individuals residing in Austria, Germany or the United Kingdom who, in accordance with the conclusions of a Swiss paying agent drawn in line with the prevailing Swiss due diligence obligations and taking into consideration all the circumstances known to it, qualify as the beneficial owners of assets held by:

[909] See Art. 2, Para. 1 e) of the Agreements.

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- a domiciliary company (i.e. legal entities, companies, institutions, foundations, trusts, fiduciary companies and other establishments not exercising a trading or manufacturing activity or another form of commercial operations); or
- an insurance company in an insurance wrapper; or
- another individual by means of an account or a deposit with a Swiss paying agent.

A domiciliary company is considered to be the beneficial owner in exceptional cases if proof is provided that it is itself subject to effective taxation under the general rules for direct taxation applicable under the law of its place of establishment or its place of effective management, or that it is treated as non-transparent with reference to its income under the domestic laws of the State of residence of the investor.

On the other hand, assets held by individuals through a trust or a foundation do not fall within the scope of application of Rubik Agreements whereas it is not possible to ascertain the beneficial ownership of such assets, for instance, due to the discretionary nature of the arrangement.[910] Examples of such arrangements could be found in trusts or discretionary non-revocable foundations whose bylaws refer to a category of beneficiaries without specifying their identity.[911]

Similarly, assets held through an insurance wrapper do not fall within the scope of application of the Rubik Agreements if the insurance company demonstrates to the Swiss paying agent that it will provide the Tax Administration of the State of residence of the investor with the necessary certification[912].

If a relevant person holds an interest in a collective or joint account or de-posit, the entire assets are to be attributed to the relevant person, unless the Swiss paying agent can determine all the persons holding an interest in such an account or deposit. In this case, the Swiss paying agent shall allocate assets according to the number of contractual partners, unless the Swiss paying agent has been informed of, and has received appropriate documentation regarding, a different allocation.

7.4.3 Objective scope of application

The objective scope of application of Rubik agreements can be defined at two distinct levels. First of all, it is necessary to define which assets qualify as “relevant assets” for the application of the Agreements. Secondly, as the Agreements basically adopt a scheduler approach, it is necessary to define which items of income are relevant for the purpose of the application of the Agreements.

[910] See Art. 2, h) of the Agreement with the United Kingdom.
[911] Ibidem
[912] Ibidem

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The "relevant assets"[913] are identified by means of an exhaustive positive list complemented by a "negative list". In particular, "relevant assets" can be identified as all forms of bankable assets booked or deposited with a Swiss paying agent including, but not limited to, the following:

- cash accounts and precious metals accounts;
- bankable assets held by a Swiss paying agent acting as a fiduciary agent;
- all forms of stocks, shares and securities;
- options, debts and forward contracts;
- other structured products traded by the banks such as certificates and convertibles.

While the positive list is substantially consistent across the three different Agreements, the "negative list" varies from Agreement to Agreement, the most extensive one being the list set forth by the Agreement with the United Kingdom, which specifically includes an exclusion from relevant assets of real estate and chattels. The "negative list" then includes:

The following shall not be regarded as relevant assets for the purposes of this Agreement:

- contents of safe deposit boxes;
- real property;
- chattels;
- insurance contracts which are regulated by the Swiss Financial Market Supervisory Authority (with the exclusion of so-called "insurance wrappers").

While relevant assets *per se* constitute one of the factors of the formula that determines the one-off payment[914] for "regularising the past", the solution for the future requires that the paying agent operates a withholding on some specific items of income deriving from the relevant assets; it is interesting to underline one of the peculiarities these items of income consist in particular of:

- interest income;
- dividends;
- capital gains;
- other income.[915]

However it is interesting to remark that the Rubik Agremeents provide an autonomous definition of the aforementioned items of income[916] but, at the same time,

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[913] See Art. 2, Para. 1, f) of the Agreement with the United Kingdom
[914] See *infra*.
[915] See Art. 19, Para. 3 of the Agreement with the United Kingdom.

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subject these items of income to the same rates applicable in the Country of residence of the investor. What can be observed is then a fairly peculiar combination of renvoi-based and autonomous rules so that a formally autonomous tax rate, which has however been set in order to exactly equal that established in the Country of residence of the investor, is applied to items of income whose definition is autonomous[917] and may not necessarily coincide with that foreseen by the domestic tax law of the same Country of residence.

7.4.4 Composite nature of the Rubik Model

The basic elements of the Rubik Model consist in two distinct branches:

- a regularisation for the past (“regularising the past”[918]) having the objective of “sanitasing” previous investments;
- a withholding mechanism (solution for the future) for some categories of income deriving from money invested in the account.

With reference to the regularisation for the past, two distinct options are available to the Clients:

a) a final “one-off payment” (effectively, a form of tax shield[919]) in relation to relevant assets”calculated based on a formula which pounders the amount of the assets and the length of the intermediation relationship with the Swiss paying agent.

b) a voluntary disclosure to be filed directly with the Tax Authorities of the State of residence of the investor and which would submit the latter to ordinary tax obligations on previously undeclared items;

In any case, clients and financial institutions (and, in particular, their employees) would be lifted from any criminal prosecution.

The mechanism also grants the Fisc of the State of residence of the investors an advance payment[920] to be paid by Swiss financial institutions. Cotributions to the advance payments by different Swiss institution is based on the proportion of investment relationships involving beneficiaries domiciled in the other Contracting State as of 31st December 2010. It is interesting to remark that, in order to introduce an incentive to comply with the terms of the agreements and ensure effective collection of

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[916] See Art. 24 – 27 of the Agreements with Germany; Art. 23 – 26 of the Agreement with Austria and Art. 25 – 28 of the Agreement with the United Kingdom.

[917] By comparing the three Agreements it can be noticed that the definitions are substantially the same and do not vary from Country to Country.

[918] From the title of Part. 2 of the Agreements.

[920] 2.000.000.000 Euros for Germany, 500.000.000 for the United Kingdom. In the Agreement with Austria no revenue will be received.

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the one-off payment, Swiss financial institutions will be entitled to retain, *pro quota*, part of the revenue generated by the one-off payments.[921]

Investors that would be recalcitrant to the one-off payment and to the disclosure option would have to undergo the forcible closing of their accounts.

Needless to say that a third implicit option available to investors would be to transfer their money outside of Switzerland. A safeguard mechanism in this regard is offered by the obligation for Swiss banks to keep track of the Countries of destination of the bank transfers. The Swiss Tax Authorities would then be bound to communicate to each contracting State the top ten target jurisdictions to which their residents have transferred resources.

The second pillar of the "Rubik system", which probably appears more relevant in relation to the policy analysis underlying this Part of this study, also provide for two alternative options for investors.

The default regime would basically be the same foreseen by the voluntary disclosure option provided by the Savings Agreement and would consist in the obligation for the Swiss Financial Institution to gather information concerning the account of the investors who sign in an *ad hoc* authorisation; the information so gathered by the financial institutions would be transferred to the Swiss Tax Administration which in turn would forward it on an automatic basis to the Tax Administration of the State of residence of the investor.

However, the most striking and original feature of the "solution for the future" embedded in the Rubik system is to be found in the anonymous withholding mechanism.

7.4.5 The anonymous withholding mechanism

The anonymous withholding mechanism appears very simple as it is the same applied in relation to the Savings Agreement between the EU and Switzerland, so that a withholding tax is applied by the paying agent on the items of income deriving from the relevant assets covered by the objective scope of application of the treaties and the proceeds of the withholding tax are transferred to the Fisc of the State of residence of the investor. The main distinguishing features of the Rubik anonymous withholding lie in the circumstance that:

- the withholding tax is applied at rates set by the State of residence of the investor and crystallised in the treaties;[922]

[921] Reported by Terlizzi L., *Berna dribbla l'euroritenuta*, Sole24Ore, 11 agosto 2011

[922] In particular, the Agreement with Austria would foresee a 25% withholding rate for all typologies of income; the Agreement with Germany would foresee the application of a 26.375% rate (deriving from the combination of the 25% German rate and the solidarity contribution) except for interests not falling within the scope of application of the

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- unlike the withholding tax set forth under the Savings Agreements, the Rubik withholding would be final;
- unlike the withholding tax set forth under the Savings Agreement, the Rubik withholding would be totally transferred to the State of residence of the investor.

These unique features are directly linked to the stated objective of the Rubik agreements, which would be to reach equivalent to those that could derive from automatic exchange of information. The stated aim would concretise by ensuring that the income deriving from the relevant assets be taxed at the same rate it would be taxed in the State of residence of the investor and, even more remarkably, guaranteeing that the exactly the same revenue be collected by the same State of residence.

In this regard, it could be said that Switzerland could be regarded as a somewhat unique case, of a jurisdiction willing to provide actual assistance in collection but objecting to the, usually perceived as less burdensome, information-based administrative assistance.

7.4.6 Control and anti-abuse mechanisms

In order to monitor the correct implementation of the Agreement,[923] the Agreements signed with Germany and the United Kingdom[924] Swiss Tax Administration shall, on request, provide information to the competent authority of the other Contracting State.

The standards and limits for the filing of the request for information are not defined by means of a *renvoi* to the relevant provision on exchange of information found in the double taxation Convention between Switzerland and the concerned Country but rather, an autonomous exchange of information clause is embedded in the agreement. In particular, it appears that information can be granted only if the identity of the taxpayer of the other State and plausible grounds are provided.[925]

Interest Savings Directive, in relation to which a 35% rate would apply. The Agreement with the United Kingdom foresees on the contrary different rates depending on the concerned typology of income: in particular, dividends would undergo a 40% rate; interest income would be subject to a 48% rate (of which, 35% in pursuance of the Interest Savings Agreement) and 27% for other investment income, including capital gains. Besides rates applied to the above mentioned categories, Germany and the United Kingdom have also included in their Rubik Agreements provisions dealing with inheritance taxes: in particular, the Agreement with Germany foresees he application of a 50% rate for inheritance taxes while the Agreement with the United Kingdom fixes the rates at 40%.

[923] In this regard, the wording of the Agreements would seem to adopt an euphemism, as it refers to the safeguard of the “Agreement’s purpose”. See Art. 31 of the Agreement with Germany and Art. 32 of the Agreement with the United Kingdom.

[924] Austria renounced such a possibility and no analogous clause is included in the Agreement with Austria. This omission may likely be explained by the circumstance that Austrian Tax Authorities do not have access rights to bank information on Austrian residents for their domestic tax purposes, thus*, a fortiori*, they could not rely on foreign sourced bank information for carrying out their assessment activities.

[925] See Art. 31 of the Agreement with Germany and Art. 32 of the Agreement with the United Kingdom.

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A further and more peculiar limitation is the foreseeing of a "cap" to the number of information requests that can be made in every calendar year. The Agreements allow a certain flexibility in the long run as the maximum number of requests will be defined by mutual agreement between the Contracting States, however, for the first two years of the Agreement a fixed cap has been foreseen, numbering between 900 and 1300 in the concerned period for Germany and totaling 500 requests per annum for the United Kingdom.

On the other hand, the Agreements do not oblige the requesting State to identify in their request the concerned Swiss paying agent.

The inclusion in the Agreements of an effectively different exchange of information clause than that constituting the epitome of the international standards of exchange of information, that is, Art. 26 of the OECD Model Convention, appears somewhat in contrast with the stated endorsement and commitment by Switzerland to implement said international standards, given the circumstance that the objective scope of application of Rubik Agreements embraces an area, such as cross-border portfolio investment, that appears particularly critical. It could then be concluded that, whereas a Rubik agreement is in place, it would have the effect to carve out of the scope of application of ordinary exchange of information provisions all items of income included in the scope of application of the same Rubik agreement.

Further to this, the Agreement also includes a declaration by Germany, according to which Germany will refrain from the active purchase of stolen data on Swiss bank clients in the future.

On the other hand, it is foreseen that "Swiss paying agents shall not knowingly manage or encourage the use of artificial arrangements whose sole or main purpose is the avoidance of taxation of the relevant persons under the provisions of this Agreement in respect of relevant assets".[926] Paying agents contravening to such an obligation will have to pay the taxes evaded by the Client. However, in the absence of external mechanisms of monitoring, ascertaining the amount of the evaded taxes would be more arduous. Moreover, it could be argued that the concerned penalties would apply only to paying agents as defined in the Agreements, however there are many other persons outside paying agents who may provide consulting that could also involve the use of artificial arrangements. Unless the anti-abuse provision is extended, it then appears that it might lead to less remarkable results than what may derive from a plain reading of the Agreements.

[926] See Art. 32 of the Agreement with Germany and Art. 33 of the Agreement with the United Kingdom.

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7.4.7 *Relationship with European initiatives in the area of the taxation of savings*

As anticipated, Switzerland and the European Union have been sympathetic partners as far as the conclusion of landmark negotiations has been concretised within the framework of the so-called Bilateral Agreements II. It may then be argued why Switzerland seems to have discarded such a “multilateral” approach in favour of a bilateral approach. It is not counterintuitive to argue that Switzerland may have either been interested in concluding this Agreement only in relation with some EU Member States, or may have found more strategic to negotiate the Rubik agreements only with some Countries. In either case one it may be questioned on the other hand whether EU Member States should have refrained from entering into negotiations with Switzerland on a bilateral basis and how the omitted prior consultation with European institutions should also be questioned, bearing in mind that the Rubik Agreements clearly tend to a direction different, or better said, opposite and, in neutral terms, regressive, when compared with the prospected goal of implementing a fully functional system of automatic exchange of information. This is a very important aspect to take into consideration as, in the purview of ensuring Union loyalty, Member States are subject to the responsibility of ensuring that their unilateral initiatives do not conflict with supranational law.[927]

The issue at stake would then not qualify as a mere policy speculation but as a punctual assessment of whether Rubik Agreements already interfere with the scope of the EU Savings Agreement or with any other measure of Union law.

Official positions inthis regard have not been consistently straightforward . In a letter by Commissioner Šemeta to the President of the European Parliament it was unambiguously stated that “while Member States are free to enter into international agreements, be they bilateral or multilateral, such agreements must not include any aspects which overlap with areas in which common action by the European Union has been taken”. In response to such warnings, ad hoc Protocols were signed by Switzerland with Germany and the United Kingdom, in order to remove this problem. In particular, the wording of the relevant provisions contained in such protocols provides for a carve-out of all matters falling within the Agreement on the taxation of savings.[928]As a result, the same Commissioner Šemetapublished a Communiqué on

[927]In this regard and, in broader terms, with reference to the interaction between Rubik Agreements and EU Law reference can be made to Pistone P., *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, forthcoming on Bulletin for International Taxation 4-5 (2013)

[928] Considered not only as it currently stands but also in the purview of possible future evolutions. The wording of the concerned amendments thus takes into account the dynamic nature of European Union law and, in the view of this author, thus come out as suitable for allowing the Agreement on the Taxation of Savings to prevail by default on the Rubik Agreements under any circumstance.

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18th April 2012 where it was very explicitly declared that the amendments to the Rubik Agreements were now to be considered as fully compliant with European Law. In any case, it should be remarked that the final say in this regard would be in the prerogative of the European Court of Justice; at the same time, unless the matter be made the subject of a preliminary ruling, it appears unlikely that the Commission would risk to incur in a possible inconsistency and refute the conclusions reached by Mr Šemeta by setting forth an infringement procedure against the concerned Member States.

Even in the presence of such unambiguous protocols to the Agreements, the a main issue would remain on the floor with regard to "broader picture" of the long-term policy orientations of the European Union.

In particular, doubts on the compatibility of the Rubik agreements with the Savings Agreements and with EU law at largewould arise when taking into consideration a long-term policy horizon, given the circumstance that the protection of anonymity ensured to investors by the Rubik framework may enter in direct contradiction whereas, as it may be foreseeable based on recent developments at the EU, US and OECD level, automatic exchange of information be wholly incorporated in the future evolution of the international standards of transparency and exchange of information. In this regard, a straightforward example is represented by the new Directive on administrative co-operation which, starting from 2015 will provide for automatic exchange of information on items of income that are wholly outside the scope of the Savings Agreements; thus, a latent issue of compatibility *in potentia* can already be sensed in the current wording of the amended Rubik Agreements.

7.4.8 Historical forerunners and future perspectives for Rubik Agreements

As a matter of fact, while the Rubik system indeed stands out as a very original attempt to combine different instruments with different policy objectives in order to create a cohesive mechanism, its more debated feature, namely the system of anonymous withholding could not be defined as brand new but rather, stands out as an upgrade of a mechanism already applied with regard to the relationship between Swiss banks and the IRS. A forerunner role, as much obscure and not far reaching it may have been, could be attributed, in particular, to the "additional withholding U.S. regime" employed by Switzerland, under which, in certain circumstances, the Swiss Federal Tax Administration apparently collected, on an anonymous basis, the excess of the statutory 30% U.S. withholding rate over the treaty rate applied by the U.S. payor, and remitted such amounts to the IRS.[929]

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[929]See SchneiderH., Hubschmid A., *Swiss Banks Say They Will Resist Elements of Proposed Regs (Section 1441—Nonresident Alien Withholding)*, Tax Notes Today (1996), at 161

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A very similar proposal can also be found in some studies elaborated by policy analysts, who suggested combining the Q.I. system with the anonymous withholding system featured by Dutch law in order to develop a mechanism that would yield to the same results of automatic exchange of information while reducing compliance costs.[930]

Based on the circumstance that the Rubik system shares some apparent similarities with previous mechanisms implemented within the framework of the bilateral tax relations between Switzerland and the United States, it may be argued why Switzerland did not propose the Rubik Agreement to the United States but only to its European neighbours. The circumstance that the UBS scandal matured within the similar context of Q.I. arrangements could suggest why the United States would have considered such a proposal with suspicion. The circumstance that massive examples of fraud, such as those offered by the UBS case, took place when a similar system was in place could probably argue against the alleged full-proof nature of the new Rubik agreements.

In this regard, the growing skepticism which has surrounded Rubik agreements in the public opinion of the Countries that have already signed the Agreeements, so that, as of December 2012, only Austria has ratified the Agreement it has concluded with Switzerland, while the German Bundesrat, on 23rd November 2012 rejected the ratification of the Agreement, following vocal opposition by some key Federal States as well as by influential voices within civil society. In Germany, the bilateral deal with Switzerland had already won ministerial approval and cleared Germany's lower house of parliament, the Bundestag but in the Bundesrat opposition to the tax proposal came from the Social Democratic Party (SPD) and the Greens, who form coalition governments in several of Germany's key states, including the most populous, North Rhine-Westphalia, and Baden-Württemberg. The divergent outcome of the ratification process will then be transferred to a committee which arbitrates between the two Chambers. It is apparent that in case Germany eventually steps back from the ratification of its Rubik Agreement, other Member States will not be encouraged to further negotiations.

7.4.9 A provisional assessment of the Rubik Agreeements

The analysis carried out within this chapter and its juxtaposition with the analysis of the international standards of transparency and exchange of information as well as

[930] In particular, the system advocated the introduction of a system based on the application of a withholding tax, whose rate would be determined by the State of residence and applied by financial intermediaries in the State of source. The main difference of this policy proposal when compared to the Rubik mechanism is that not only the withholding rate but also the tax base would be determined, on a presumptive basis by the same State of residence. See Gérard M., *Combining Dutch Presumptive Capital Income Tax and US Qualified Intermediaries to Set Forth a New System of International Savings Taxation*, CESifo Working Paper No. 1340, 2004.

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with other frameworks of reference (including supranational ones) shows that the conclusion of Rubik agreements is undesirable for a series of legal shortcomings, especially in relation to possible interactions with European law and, more fundamentally, from a policy perspective as they stick to a no longer acceptable defense of anonymity at odds with the current international standards of exchange of information, to which nonetheless Switzerland has subscribed. Similarly, Rubik would provoke tensions and might be difficult to reconcile with other international arrangements concerning the taxation of cross-border portfolio income, including F.A.T.C.A.[931]Problems would perhaps also arise for a country concluding a Rubik agreement, such as the United Kingdom, which has also subscribed to F.A.T.C.A. by signing an intern-governmental agreement with the United States: in particular, there may be triangular situations in which the supply of information to the US Tax Authorities, as required by said intergovernmental agreement would not be possible due to the lack of such information.[932] In conclusion it could be argued that the inherent pitfall of the Rubik Agreement would be that, even though it shares several features with more recent initiatives that leverage on the role of cross-border tax intermediaries, it would nonetheless be irreconcilable with said alternative initiatives focusing on exchange of information and, in particular, on automatic exchange of information.

7.5 International Tax Intermediaries and Automatic Exchange of Information

7.5.1 The Automatic Exchange of Information Model Within the European Interest Savings Directive

First of all, it should be made clear that, when the Interest Savings Directive was introduced in 2003, the Member States were already under the obligation, derived from the provisions of the Mutual Assistance Directive[933], to exchange any information, either on request or automatically, that may enable them to carry out a correct assessment of taxes on income and on capital. The very Preamble of the Interest Savings Directive quotes this obligation at Art. 15. Thus, the Interest Savings Directive is then to be seen not only as a set of provisions governing the taxation of an important category of investment income, but it also features a mutual assistance import clearly embedded in its key provisions. In a way, the Interest Savings Directive goes even further than the

[931]To which the following Chapter will be devoted.
[932] In this sense, Pistone P., *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, forthcoming on Bulletin for International Taxation 4-5 (2013).
[933] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, in OJ *L 306*, 30th of November 1977, p. 34.

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Mutual Assistance Directive, as , in the former limits to exchange of information found in the latter are expressly not applied[934].

On the grounds of the principle of proportionality, the Directive focuses on a minimum amount of information requirements to be collected and transferred. The minimum information that the paying agent is asked to report to its own tax authorities is the identity and residence of the beneficial owner; the name and address of the paying agent; the account number of the beneficial owner, or, if none, the debt claims giving rise to the interest and the details of the interest payment.

In this scheme, the paying agent plays a leading role and cannot be seen as a mere collector of information. The paying agent has to *determine* the identity and the residence of the beneficial owner and is thus required to perform an interpretative effort. Unlike the proposal dating back to 1998, the approved version of the Directive does not refer to the national rules of the Member States, but rather sets up detailed rules and procedures for this purpose[935] under art. 3[936], mostly inspired by the criteria adopted by the Anti-money Laundering Directive[937]. Namely, the information required in order to establish the identity of the beneficial owner consists of name, address, tax identification number (or other identification numbers), or, failing such numbers, the date and the place of birth.

In order to establish the beneficial owner's residence, the criteria vary on a chronological basis. For contractual relations entered into before 1 January 2004, the paying agent shall establish the residence of the beneficial owner by using the information at his disposal, most likely linked to the requirements of the Anti-money laundering Directive. For contractual relations starting after 1 January 2004, the relevant criteria in order to define the paying agent's residence are the address mentioned on his passport or identity card or, shall the beneficial owner be a resident of a third country, the existence of documentary proofs such as a tax residence certificate issued by the competent authority in the third country.

It has been argued whether the paying agent is the subject best suited to collect information and whether the transaction costs related to "the burden of the proof" are excessive. An answer to the first question could be that it appears reasonable to assume that the paying agent will have access to the kind of information that is required by the Directive, at least as a consequence of the "know-your-customer-rule" already

[934] See Art. 9.3 of the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payment, effective since 1 July 2005.

[935] Larking B., *Another go at the Savings Directive-third time lucky?*, in *EC Tax Review* 2001/4, p. 220.

[936] Art. 4 of the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payment, effective since 1 July 2005.

[937] Directive 2005/60/EC of the European Parliament and Council of 26th October 2005 on the prevention of the use of the financial system for the purpose of money-laundering and terrorist financing, in *Official Journal* L 309, 25th November 2005, p. 15.

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introduced by the Anti-money laundering Directive[938]. The role of the paying agent certainly requires some effort, but there are at least two provisions that relieve the paying agent part of the informative burden. First of all the paying agent can limit itself to the information at its disposal, without looking for further information or documents[939]. Moreover any individual is regarded as a beneficial owner unless he demonstrates that he has not received the interest for his own benefit.

Most Countries have opted for sticking to the specific forms of evidence prescribed by the Directive, but there have been some examples of a more critical implementation, always within the limits allowed by the Directive. An emblematic case is that of the Netherlands, where there is a consolidated practice of determining residence on the basis of actual circumstances, including documents such as recent telephone or electricity bills, or tax assessment documentation. It has been argued that the strict approach of the Interest Savings Directive somehow conflicts with the Money Laundering Directive[940], according to which, along with identification directly grounded on documents and certificates[941], inferred identification is also made acceptable.

It is important to point out that, with respect to the “exchange of information” implementation, different paths have been taken, even though with substantially comparable final results. This kind of dynamics can be taken almost for granted whenever dealing with a normative text having no direct effect, such as an EU directive. The attempt to group out the different solutions adopted by Member States can be considered as a way to define the degree of sensitivity of the Member States to issues such as the taxation of financial income in the country of residence of the beneficial owner and the very existence of an “exchange of information”.

In the first group are included Countries that have been historically more sensitive to the above mentioned problems, namely Scandinavian Countries that are EU member States. Even before the adoption of the Mutual Administrative Assistance Directive[942], thus, even before joining the European Union, these Countries had introduced “broad exchange of information” clauses and procedures within their bilateral treaties. These Countries are the ones where the Directive has exerted the softest impact, as the very idea of a rigorous applicationof the residence taxation principle to financial income items was already rooted in their respective systems, namely being

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[938] Directive 2005/60/EC of the European Parliament and Council of 26th October 2005 on the prevention of the use of the financial system for the purpose of money-laundering and terrorist financing, in *Official Journal* L 309, 25th November 2005, p. 15.

[939] Marino G.,Melis G. , *Answers to the Questionnaire and Special Reports on the Interest Savings Directive,*EATLP Annual Conference Materials, Budapest, 2006, at 21.

[940] EC Directive 91/308/EEC.

[941] Dusuardujin R., *The Netherlands: National Report on the Interest Savings Directive*, EATLP Annual Conference Materials, Budapest, 2006, at 7.

[942] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

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Sweden the forerunner[943]. It is hard to say whether this regional trend can be considered a coincidence, or can be seen as an example of a spontaneous convergence of tax models; anyway, it is to be underlined that these Countries did not have to modify their existing systems, given that they were already completely consistent with the approach suggested by the Directive. In many cases existing measures even exceeded the requirements of the latter in terms of the amount of information required to what the Directive defines as a "paying agent", a concept already existing, although under different names, in Nordic Countries' tax jurisdictions[944].

A second group of Countries[945], incidentally the majority, has grounded the implementation of this aspect of the Interest Savings Directive on the existing set of procedures deriving from the Mutual Administrative Assistance Directive. This extension has been in some cases almost complete, while in other cases this path has been followed with some caution; for instance, in most Countries the restrictions of art. 8 of the Mutual Administrative Assistance Directive[946] do not apply to the exchange of information as meant within an Interest Savings Directive context[947].

An intermediate position can be found with reference to Countries such as the Netherlands and Spain, where reporting systems already existed for banks, stressing compliance at the expense of privacy[948]. These reporting systems were not viewed, at least at first, under an exchange of information perspective, but they were mostly designed for internal purposes related to tax assessment enquiries. These measures were then extended and partially modified to be consistent with the Mutual Administrative Assistance Directive. These very systems are now going to be partially modified in order to adapt to the conceptual framework of the Directive, with particular reference to innovative definitions such as that of "beneficial owner".

Finally, there is a fourth group of Countries, such as Greece, Italy and Portugal as well as Central-European Countries, where the implementation of the Directive has resulted being more troublesome. In all these cases new information exchange systems had to be (re)built from scratch, either because non-existent (e.g. Poland, Slovakia) or not suitable for the implementation of the Directive. In Italy, the channel chosen to

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[943] Lamm J., Persson Osterman R., *The Swedish Report*, EATLP Annual Conference Materials, Budapest 2006, at 5.

[944] Vanistendael F., *General Report on the Interest Savings Directive*, EATLP Annual Conference Materials, Budapest, 2006, at 16.

[945] Czech Republic, Germany, Hungary , Ireland, United Kingdom

[946] Art. 8 Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation. The article states that there is no obligation to provide information if the Member State is prevented by its law or administrative practice from collecting the information, even for its own purposes.

[947] O' Shea T., *The Implementation of the Interest and Savings Directive in the UK* , EATLP Annual Conference Materials, Budapest, 2006, at 28.

[948]Ibanez Marsilia R., *Savings Taxation-Spanish Report*, EATLP Annual Conference Materials, Budapest, 2006, at 12.

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implement the exchange of information requirements is common to the one already existing for indirect taxes, this seems to reproduce a frequent national tendency of intermingling indirect and direct taxation, at least with reference to tax assessment issues. In some Central-European Countries, such as Poland and Slovakia, the implementation of the Interest Savings Directive represented a chance to introduce an exchange of information system[949], which took the form of an automatic exchange of information procedure between competent authorities. Other Countries already having an exchange of information system into place that eventually proved to be not suitable for the purposes of the Directive, are now provisionally relying on existing tax treaties' clauses. Most of those Countries are in fact waiting for the conclusions of the " Working Party no. 4 " of the European Commission, whose task is to develop standardised systems and certificates explicitly designed to meet the requirements of the Directive[950].

A long debate has taken place during the last months prior to the final approval of the text of the Directive. It was easy to forecast that the relative freedom awarded by the Directive could eventually lead to considerably diversified and even inconsistent patterns of exchange of information and reporting. This aspect was however eventually seen as a lesser evil, being deemed as counterproductive the suppression of already existing and often substantially successful systems of exchange of information. As already mentioned, in order to prevent Member States not featuring such systems from hindering the overall effectiveness of the Directive, the project of a "Working Party" dealing with such issues has been developed.

All Member States have either already opted for electronic systems or are converting their paper systems into electronic ones. Beyond the practical and technological issues, some national differences seem to be particularly relevant for the fulfilment of the Directive's purposes. This is true with reference to limitations for keeping the collected information, a field where differences in timing among Member States seem to be the rule[951]. It is apparent that some attempts of harmonisation should be carried out in order to make sure that the documentation collected in the state of source is keptat least as long as required by the State of residence. However, Member States seem to be particularly conservative in relation to this topic[952] and it cannot be denied that this state of uncertainty may lead to the creation of substantial loopholes within the system.

In comparative terms, the Directive has led to a substantial tax convergence with reference to the aforementioned topics. Same problems and same solutions can

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[949] Zalasinski A., *Interest Savings Directive- Polish National Report,*EATLP Annual Conference Materials, Budapest, 2006, at 5.
[950] Vanistendael F., *General Report on the Interest Savings Directive*, EATLP Annual Conference Materials, Budapest, 2006, at 17.
[951] Ibidem
[952] Ibidem

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ultimately be found, although with sometimes differing formal rules[953]. The Directive acted as a unifying force, since, if it is true that the same problems already existed, the solutions differed quite dramatically before the implementation of the Directive.

A major hindrance to the effectiveness of the Directive may arise from the fact that, at the moment, the exchange of information with the US is rather asymmetric[954]. However, several proposals have been made with reference to the hypothesis of exchange of information upon request for the special purposes of the Interest Savings Directive. In January 2001, the US Internal Revenue Service proposed some regulations requiring the reporting of all bank interest payments to non-residents. Nowadays, however, this cooperative effort has been discarded and no system of automatic exchange of information is in action. Nevertheless, the ECOFIN[955] Council concluded that the United States can be deemed to apply equivalent measures to those in the Interest Savings Directive.

It is well known that when valuing the effectiveness of a tax model, a particular attention ought to be devoted to the degree of compliance and to the measures encouraging such compliance. When the tax administration of the beneficial owner's State of residence finds out that the information coming from the paying agent is not adequate or sufficient, it shall require the Tax Administration of the source State to put pressure on the paying agent in order to cooperate more effectively. In such a scenario, the Tax Administration of the source State would basically act on behalf of the Tax Administration of the State of residence of the beneficial owner. This is maybe the most innovative and somehow unsettling implication of the Directive .It has been argued that such a conclusion cannot be taken for granted and it would require at least another dedicated Directive or Regulation in order to be deemed as acceptable[956].

In order to circumvent this problem, there could be some attempts of making the source Country the first "judge" of the adequacy of the information provided by the paying agent. How such a system could be put into practice is a tough question. There is no doubt that only the State to which the information has to be transferred and which needs that very information in order to levy a tax can be able to judge whether the provided information is actually adequate. Since the ultimate source of information is the beneficial owner, it has been discussed whether sanctions should be introduced, shall he not fully cooperate with the paying agent. It has been correctly argued, however, that these measures could potentially affect the free movement of capitals and that the only

[953] Conceptual framework derived from Garbarino C., *Le Basi Teoriche ed i Metodi del Diritto Tributario Comparato*, Dir.Pubbl.Comp.Eur. 3 (2006) , at 1059.

[954] Marino G., Melis G., *Answers to the Questionnaire and Special Reports on the Interest Savings Directive,*EATLP Annual Conference Materials, Budapest, 2006, at 6.

[955] ECOFIN Meeting of 21 January 2003.

[956] Vanistendael F., G*eneral Report on the Interest Savings Directive*, in *EATLP Annual Conference Materials*, Budapest, 2006, at 17.

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way of introducing effective sanctions would have been to impose them through the action of the paying agent, but this would lead to the even more questionable situation of having a paying agent residing in one State imposing sanctions on behalf of the Tax Administration of the State of residence of its clients[957]. However, it must be pointed out that such a situation would not be so different from what already happens with the US "Qualified Intermediary" regime. An alternative could also be to impose sanctions on the beneficial owners in their State of residence, through the action of the responsible tax administration.

In case of non-compliance at a state level with reference to the exchange of adequate information, measures can be taken according to art. 10 of the EC Treaty[958]. Along with these measures, art. 18 of the Directive[959] introduces a review to be performed every three years by the European Commission on the results achieved by the Directive. This review should lead to amendments of the text of the Directive, whereas the latter shall prove ineffective. There is a wide consensus that the Commission can also introduce procedures before the European Court of Justice in case of non-compliance[960].

7.6 The US "F.A.T.C.A." Agreements

7.6.1 Historical Background

F.A.T.C.A. legislationhas introduced some innovative features to the previous landscape of withholding and reporting mechanism and it could be argued to serve as a complement and upgrade of the Q.I. system described in the previous chapter.

The historical context into which the new F.A.T.C.A. regime developed is one rife with various financial scandals and high profile offshore tax evasion cases. During the 1999-2003 period, two events occurred that are particularly worth noting in order to understand the background in which F.A.T.C.A. developed..

First, the IRS started to have some success pursuing offshore accounts when it obtained credit card information from John Doe summons; later, in 2003, the IRS offered its first offshore voluntary compliance initiative (O.V.C.I.). The 2003 O.V.C.I.

[957] Dusuarduijn R., *The Netherlands: National Report on the Interest Savings Directive*, EATLP Annual Conference Materials, Budapest, 2006, at 9.

[958] Treaty establishing the European Community, 25 March 1957, effective since 1 January 1958

[959] Art. 18 of the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payment, effective since 1 July 2005.

[960] Vanistendael F., *General Report on the Interest Savings Directive*, EATLP Annual Conference Materials, Budapest, 2006 , at 27.

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resulted in approximately 1,300 individuals identifying themselves to the IRS with approximately $75 million collected through July 2003.[961]

In this climate, US tax policy makers realised that the Q.I. system in place since 2001 offered no tools to monitor the following situations: A US taxpayer could invest in US source assets with a foreign financial institution, but the foreign financial institution was not required to report anything to the IRS. Basically, the US withholding agents (e.g., US banks) were not obtaining adequate documentation from foreign financial institutions to document a reduced US withholding tax rate on payments to foreign customers of such foreign financial institutions. This result wasnot surprising given that the foreign financial institution had the customer relationship, and the US withholding agent did not. Moreover, the foreign financial institution was not anxious to share the identity of its clients with a potential competitor (for instance, a US bank).

Against such a background, the last years of the ‘00s were also characterized by high profile standards. In February 2008, it became public that German tax authorities had purchased customer account information from an employee at LGT, a bank in Lichtenstein with close ties to the royal family in Lichtenstein. The German authorities apparently shared the information with Countries around the world and the IRS announced on February 26, 2008 that it was initiating enforcement action against over 100 US taxpayers with offshore accounts at LGT.[962]

In May 2008 an even bigger scandal erupted when the US arrested a former UBS private banker who subsequently pleaded guilty one month later to helping US taxpayers evade US tax through the use of offshore accounts.

As a result, also on the grounds of additional information retrieved from the suspect, on June 30, 2008, the IRS filed a John Doe summons with the Southern District Court of Florida requesting that UBS disclose to the IRS all its US customers that had potentially been avoiding US tax. However, UBS refused to comply with the summons arguing that under Swiss bank secrecy law, they were not allowed to disclose customer information.

On July 17th and 25th 2008, the U.S. Senate Permanent Subcommittee on Investigations held highly publicized hearings on offshore accounts which resulted in UBS being subject two a two-pronged approach.

On the one hand, the Department of Justice and the IRS were pursuing enforcement of the civil John Doe summons as well as criminal charges for tax evasion and securities violation.

Ultimately in February 2009, UBS agreed to:

- a deferred prosecution agreement (DPA) of the criminal charges;

[961] See Harvey R.J., *Offshore Accounts: Insider’s Summary of FATCA and its Potential Future*, *Villanova Law/Public Policy Research Paper No. 2011-24, at 10.*
[962] Ibidem

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- the payment of a $780 million fine, and
- the disclosure of an unknown number of accounts.[963]

On the other hand, the Department of Justice proceeded to file a motion with the Southern District Court of Florida to enforce the John Doe summons to obtain information on up to 52,000 accounts.[964]

Following an initially recalcitrant behavior by UBS, instead of allowing the Court to decide the conflict of laws issue between US and Swiss law, the IRS and UBS ultimately settled the John Doe summons in August 2009. The result was that UBS agreed to disclose information on approximately 4,450 US customers. The criteria for determining US customers that would be disclosed were carefully chosen to insure the US would get information on the largest and potentially most abusive accounts.[965]

Based on the circumstance that the UBS was among the first financial institutions to sign in to the Q.I. system, whose shortcoming have already been illustrated in the previous chapter, there was general agreement among senior IRS officials that something had to be done to fill up its loopholes. The whole F.A.T.C.A. project then originally started out as an attempt to upgrade the Q.I. system in the wake of some major international standards and in particular, with the need to develop a system that should in particular entail:

- the reporting of both US and foreign source income for US taxpayers;
- the determination whether US taxpayers are the beneficial owners of foreign shell entities;
- the review of all all customer accounts within the affiliated group to identify US taxpayers.

Subsequently, following the 2009 President's Fiscal Budget and the 2010 Fiscal Green Book, legislation was ultimately introduced in October 2009, modified again in December 2009, and finally adopted in March 2010 as part of the earlier cited H.IR.E. Act.

7.6.2 Goals and Key Mechanisms of the System

[963] See www.bloomberg.com/news/2011-08-15/credit-suisse-likely-to-settleu-s-probe-than-risk-charges-lawyers-say.html.
[964] Reported by Harvey R.J., *Offshore Accounts: Insider's Summary of FATCA and its Potential Future*, Villanova Law/Public Policy Research Paper No. 2011-24, at 8.
[965] Ibidem

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The principal goal of the F.A.T.C.A. provisions is to "detect, deter and discourage"[966] evasion of U.S. taxes through the use of foreign accounts and investment vehicles.[967]

Because detection of evasion was one of the main downfalls of pre-F.A.T.C.A. tax enforcement, increased reporting requirements are designed to achieve a more integrated system of information so that evasion can be more readily ascertained. [968]

Appyling the two general categories of tax information exposed in the First Part of this thesis, it can be argued that F.A.T.C.A. serves the purpose of enabling the IRS to carry out *ex ante* observation. In this regard, F.A.T.C.A. does not appear to be meant to substitute exchange of information based on general tax treaties and T.I.E.A.s. but, rather, on the one hand to act on a different plan and on the other hand to serve as a prodromic activity to the filing of requests for information, also bearing in mind the need to avoid incurring in fishing expeditions.

In addition to aiding observation, F.A.T.C.A. seeks to deter future evasion of U.S. taxes. Thus, one of F.A.T.C.A.'s primary goals is to aid in early detection of offshore tax evasion by introducing a conflict of interest between financial institutions and potentially non-cooperative (so called "recalcitrant") clients so that scenarios such as those disclosed by the UBS case should not materialise anymore.

Unlike other analogous systems, these objectives are not pursued by providing to the involved financial intermediaries an incentive to report but, rather, by giving them a *disincentive* for *failure* to report on their U.S. account holders.

Although the requirements on financial intermediaries adhering to the F.A.T.C.A. system are extremely complex the relevant core items can be summarised as follows.

First of all, the scope of application of the system involves any US-owned accounts maintained both by a qualified foreign financial intermediary (hereinafter, also F.F.I.) and, in general terms,[969] by foreign financial intermediaries who are members of the same "expanded affiliated group", i.e., an affiliated group where as a general rule there is a common ownership of more than 50%. A partnership or any other entity that is not a corporation is treated as a member of an expanded affiliated group if the entity is controlled by members of the group.

On the one hand, pursuant to the above policy orientation of providing a "disincentive" to non-compliance, F.A.T.C.A. foresees an obligation to apply a 30% withholding tax on all foreign financial intermediaries in relation to all "withholdable payments", that is, any payment of interest (including original issue discount), dividends,

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[966] Dizdarevic M.A., *The FATCA Provisions of the Hire Act: Boldly Going Where No Withholding Has Gone Before*, Fordham Law Review, Vol. 79, at 2984.

[967] Ibidem

[968] Ibidem

[969] The following extension of the scope of application of the provision to the expanded affiliated group would not apply in case the affiliated foreign financial intermediary concludes its own agreement with the IRS.

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rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments and other fixed or determinable annual or periodical gains, profits and income from sources within the United States; interest paid on deposits by non-US branches of US banks and gross proceeds from the sale or other disposition of US stocks and securities.

The above reported obligation to apply a withholding tax is waived if the foreign financial intermediary enters into an agreement with the IRS to be treated as a qualified foreign financial intermediary.

The above mentioned agreement generates an obligation on the head of the qualified foreign financial intermediary to comply with certain verification and due diligence procedures with respect to the identification of US-owned accounts as well as annually reporting certain information with respect to any identified US-owned account. In this regard, the notion of "US-account" as defined by F.A.T.C.A. is very broad as it comprises any financial account held by one or more specified US persons or US-owned foreign entities. On the other hand, the notion of "financial account", ordinarily includes any depository account maintained by the foreign financial intermediary as well as any custodial account maintained by the foreign financial intermediary. The objective scope of application of F.A.T.C.A. would also extend to any non-publicly traded debt or equity interest in the same foreign financial intermediary.

In order to determine whether an account is US-owned, a foreign financial institution could rely on a certification provided by the same account holder as well as identification details retrievable from applicable due diligence procedures.

The F.A.T.C.A. mechanism however goes one step further in requesting qualified foreign financial intermediaries to act as "guardians" to the same system by ostracising and penalising financial intermediaries that are not compliant with F.A.T.C.A. by means of a "viral" withholding tax. In particular, qualified foreign financial intermediaries would firstly be required to apply a 30% withholding tax on any "passthru payments" to a recalcitrant account holder, that is, an account holder which:

- fails to comply with reasonable requests for information necessary to determine if the account is a US owned account;
- fails to provide the name, address, and tax identification number of each specified US person and each substantial US owner of a US-owned foreign entity; or
- fails to provide a waiver of any foreign law that would prevent the qualified foreign financial intermediary from reporting any requisite information.

Even more remarkable from a policy perspective in relation to the design of the system, is the obligation to apply an analogous withholding tax also to a non-qualified foreign financial intermediary or even to a qualified foreign financial intermediary which has elected to undergo the 30% withholding tax in relation to the portion of payments

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directed to persons or intermediary that are outside the perimeter of the F.A.T.C.A. system, such as a recalcitrant account holder or a non-qualified foreign financial intermediary.

A further, rather critical, feature of the F.A.T.C.A. system is that it requires qualified foreign financial intermediaries to attempting to obtain a waiver in any case in which

any foreign law would otherwise prevent the reporting of the information required with respect to any US-owned account maintained by the same intermediary. It is also foreseen that, in case no waiver is granted, the concerned qualified foreign financial intermediary should proceed to close the account.

The "steep penalty" of thirty percent withholding for nondisclosure seems also to hold a signaling function on top of merely serving as a proverbial "stick" (as opposed to the carrot embedded for instance in the Q.I. arrangements) to promote compliance, namely the heftiness of the penalty has been especially designed to discourage financial institutions from engaging in the kind of evasion-aiding behavior which caused such an outrage in the aftermath of the earlier referred UBS affair.

7.6.3 F.A.T.C.A. proposed regulations

On 8th February 2012 a Proposal of Regulations addressing F.A.T.C.A. legislation was published. The proposed Regulations provide relief in many areas, I more immediate terms, by providing further extensions for the implementation of F.A.T.C.A..

In particular, withholding on payments of US "fixed, determinable, annual or periodical income"[970] would be deferred until payments made on or after 2 January 2014 and on gross proceeds beginning on or after 1st January 2015. Moreover, withholding on payments made on pre-existing obligations that are made to undocumented foreign entities that are not "prima facie" foreign financial institutions (hereinafter, also abbreviated as FFI) would be extended to payments made on or after 1 January 2015.[971]

Similarly, the US Treasury has made an attempt at downplaying some of the most controversial concepts set forth by the new legislation, for instance, it has reserved

[970] This category refers to any item of income other than gains derived from the sale of real or personal property (including market discount and option premiums, but not including original issue discount) and tems of income excluded from gross income, without regard to the U.S. or foreign status of the owner of the income, such as tax-exempt municipal bond interest and qualified scholarship income.

[971] Proposed Treasury Regulation, Para. 1.1471-2(a)(1).

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on the definition of "foreign passthru payments"[972] and deferred withholding on such payments to no earlier than 1 January 2017.

Additionally, significant exclusions for financial arrangements deemed worthy of specific attention have been introduced, for instance, retirement plans have been provided. Similarly, US multinationals will benefit from the "ordinary course" payment rule, an exception for short-term obligations from the definition of "U.S. account", an exception from the F.A.T.C.A. default treatment for offshore treasury centres, and an exception from non-financial foreign entity (hereinafter, also abbreviated as NFFE) status for "active" businesses.

The personal scope of application of the F.A.T.C.A. regime and, in particular, the perimeter of persons that may qualify as relevant foreign financial foreign entities has been amended in order to carve out some categories of companies. Namely, a holding company would be suitable to qualify as a foreign institution whereas more than 50% of its income for the past three years derives from "the business of investing or reinvesting".[973] Accordingly, a dividend from an operating subsidiary to a foreign holding company could give use to withholding. The proposed regulations, however, provide that a foreign entity that would be an FFI, as it meets the 50% income test, would not be considered an FFI or an NFFE if substantially all of its activities consist of owning the outstanding stock of one or more subsidiaries that each engage in a non-financial business.[974]

Other persons that would otherwise fall within the scope of application of the new rules but in relation to which application has been waived are the following:

- publicly traded corporations and members of the same expanded affiliated group;[975]
- certain territorial entities;[976]
- foreign governments, international organizations, central banks, governments of US possessions and retirement funds;[977]and
- certain start-up companies, non-financial entities emerging from bankruptcy, financial centres of a non-financial group and foreign entities as defined in section 501(c).[978]

[972] Although the proposed regulations do not provide a definition for the term foreign passthru payment, the reference is to the foreign-to-foreign payment made by an FFI to an account holder that has not identified its FATCA status or is a NPFFI. The meaning can be inferred from the definition of "passthru payment", which means any withholdable payment and any foreign passthru payment. See Proposed Treasury Regulations Para. 1.1471-5(h)(1).
[973] Proposed Treasury Regulations, Para. 1.1471-5(e)(4).
[974] Proposed Treasury Regulations Para. 1.1471-5(e)(5)(i).
[975] Proposed Treasury Regulations, Para. 1.1472-1(c)(i).
[976] Proposed Treasury Regulations, Para. 1.1472-1(c)(iii).
[977] Proposed Treasury Regulations, Para. 1.1472-1(c)(iv).
[978] Proposed Treasury Regulations, Para. 1.1472-1(c)(vi).

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The proposed Regulations also made significant changes to the due diligence procedures applicable to pre-existing individual accounts announced in e Notice 2011-34. Most significantly, the proposed regulations permit one-time electronic searches for accounts of USD 1 million or less. For high value accounts of more than USD 1 million, an FFI would have to perform an "enhanced review", which means that the FFI must also search its paper files and make an inquiry of the relationship manager. The paper files that are required to be searched are limited to the "customer master file", i.e. the primary customer file that maintains account holder information, such as information to contact customers and to satisfy anti-money laundering requirements. Where the FFI maintains electronic files that contain certain specified information such as the account holder's nationality or residence status, the FFI is not required to conduct an enhanced review. To the extent that an FFI does not already maintain electronic files that contain the necessary information, the FFI will establish electronic recordkeeping systems that will maintain the necessary information.

Because of the numerous classifications of entities for F.A.T.C.A. status, the proposed regulations provide different rules for pre-existing accounts of entities. Accounts of USD 250,000 or less held by entities are not subject to review until the account exceeds USD 1 million. For the remaining entities, an FFI generally may rely on the respective know-your client documentation (as sanctioned by anti-money laundering legislation) to identify US owners. For accounts exceeding USD 1 million, an FFI must report all substantial US owners or receive a certificate that the entity does not have any substantial US owners.

The importance and impact of the identity of the payee is seen most dramatically in the asset management industry where investments are structured through partnerships and other flow-thru entities. In this context, a foreign entity that is a flow-thru entity would be considered as the payee if the flow-thru entity is one of the following:

- a "Non-Participating Foreign Financial Institution" (hereinafter, also NPFFI);
- an "active NFFE", that is an NFFE that conducts an active trade or business, if it is not acting as an intermediary;
- a withholding foreign partnership (a "WP") or foreign withholding trust (a "WT"); or
- a flow-thru entity that is receiving income that is effectively connected to a US trade business.

If the flow-thru entity is not within one of the above categories, it would not be considered as the payee, rather, the payees would be identified in the flow-thru entity's partners or beneficiaries.

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In general, payments to a foreign entity that is acting as an intermediary are treated as payments to the persons for whom the intermediary is acting (and not to the intermediary); accordingly, documentation would need to be provided with regard to the persons for whom the intermediary is acting to preclude withholding.

7.6.4 F.A.T.C.A. as a Basis for Inter-Governmental Agreements

The system set forth by the Foreign Accounts Tax Compliance Act is a peculiar piece of legislation with regard to its policy implications. Namely, on the one hand, the F.A.T.C.A. project started out as an exquisitely unilateral action by the US intended to ultimately provide transparency surrounding offshore accounts of US taxpayers. At the same time, recent developments would seem to suggest that the actual sustainability of the F.A.T.C.A. system is dependent upon the ability of the United States to reach out to other States and to convince them to set up systems analogous to F.A.T.C.A. or, more likely, to develop either a multilateral platform for F.A.T.C.A. or at least a network of bilateral agreements implementing F.A.T.C.A..

Namely, as far as the implementation of the F.A.T.C.A. system is concerned, it is quite intuitive the more serious issues may arise when confronting the F.A.T.C.A. provisions with the legal provisions of the Countries where the qualified foreign financial intermediaries are located.[979]

Leaving aside the tricky question of the extraterritoriality of the law, the main concerns arise with the conflict between F.A.T.C.A. and the national data protection laws as well as the civil laws with regard to the requirements to terminate certain customer relationships on the head of the so-called recalcitrant account holders. While a comprehensive comparative survey on a global level and even across Europe would be extremely burdensome, it is possible to anticipate some possible points of friction between what qualified financial intermediaries operating in Europe would be required to do and what European law would provide.

For instance, unless institutions have a specific clause in terms of business they have signed with their existing clients, it would not possible to hand over information to the IRS, insofar as Directive 95/46/EC66 bars from transferring personal data to other entities without the explicit consent of the concerned person.[980]

As far as the closing of accounts is concerned, it could generally be argued that if a financial institution breaches a contract without a contractual right, then they run the

[979] Soriano A.G., *Toward an Automatic but Asymmetric Exchange of Tax Information: the US Foreign Account Tax Compliance Act (FATCA) as Inflection Point*, 40 Intertax 10 (2012), at 540.

[980] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of November 23, 1995, pp. 31–50

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risk of legal action by the client for reinstatement of the contract and damages and sanctions by regulators.[981]

In the light of these concerns, the Treasury and the IRS have considered, in consultation with foreign governments, an alternative or intergovernmental approach to F.A.T.C.A., addressed to solve the compliance legal impediments, and to simplify

practical implementation as well as reduce costs.

The original structure of F.A.T.C.A. was changed substantially by a Joint Statement published on 8th February 2012 by the Government of the United States, and five foreign Governments, France, Germany, Italy, Spain and the United Kingdom.

Within the framework of the Joint Statement, the partner Countries agreed, on the one hand, to modify their legislation to compel FFIs in the respective jurisdictions to collect the F.A.T.C.A. required information and to apply the necessary diligence to identify US accounts. On the other hand, the Partner Countries foresaw that information be collected by local FFI but it would be processed and transferred to the United States on an automatic basis under their responsibility.

This commitment would be more consistent with the overall design of international tax information sharing. Such an inter-governmental approach would also ensure that domestic Tax Authorities will have the same information that is being provided to the IRS on domestic taxpayers.

On the other hand, in pursuance of the agreement, FFIs would not be required to terminate the account of a recalcitrant account holder nor to apply passthru payment withholding on payments to these recalcitrant account holders or on others FFIs in its Country or other F.A.T.C.A. partner Countries.

The United States, in turn, will eliminate the obligation of each FFI established in the F.A.T.C.A. partner to enter into a separate comprehensive FFI agreement directly with the IRS and also will eliminate the withholding on payments to FFIs established in such Countries.

In brief, it could be said that the Joint Statement changes the unilateral nature of F.A.T.C.A., which will become an instrument for US bilateral automatic exchange of information.

On a different level, the Joint Statement would also appear to include synallagmatic “checks and balances” in a system that, in the perspective of the involved financial intermediaries as well as of that of their County of residence, would otherwise appear as merely “extractive”. In particular, agreements concluded in pursuance of the Joint Statement would, on the one hand, downplay some very burdensome and penalising implications for foreign financial intermediaries while at the same time

[981] Ibidem.

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ensuring that possible impediments to the implementation of the mechanism be removed.

The concrete policy implication of the Joint Statement has somewhat reduced the emphasis of the F.A.T.C.A. system on a new emerging role of financial intermediaries as tax intermediaries which, from the original project of a direct involvement also in the underlying automatic exchange of information procedures, has been re-focused, with some exceptions that will be illustrated further in this Paragraph, on the more consolidated function of acting as information-gathering and withholding agent, a feature that has already been put to test for instance within the framework of the European Interest Savings Directive, while leaving the actual transfer of information on a routine basis to the Tax Administration of the jurisdiction of establishment.

From a legal perspective, such an involvement of the Tax Administrations of the concerned jurisdictions would be ensured by the conclusion of an "Inter-governmental Agreement" (I.G.A.) to which the Joint Statement operates a *renvoi* as far as implementation is concerned.

In this regard, in July 2012 a Model I.G.A. has been published. From a legal and policy perspective, it could be argued that the Model I.G.A. would transform the net of bilateral contractual relations between the relevant financial intermediaries operating in a given jurisdiction into a legal obligation sanctioned by the same jurisdiction and binding on local financial intermediaries to identify and report information on US account holders.

On the other hand, the conclusion of an I.G.A. would carry along two important systemic implications for the financial sector of the contracting jurisdiction.

In particular, it would waive the obligation to apply the 30% withholding tax on "pass thru payments" as well as that of closing the accounts of recalcitrant account holders.

The Model I.G.A. has been published in two versions, a "reciprocal" and a "non-reciprocal" one.

Under the reciprocal version of the Model I.G.A., the United States will provide information to the tax authorities of the F.A.T.C.A. Partner jurisdiction on a reciprocal basis with respect to accounts of nationals of the F.A.T.C.A. Partner in the United States. In contrast, the non-reciprocal version of the Model I.G.A. does not involve any provision of information by the United States to the F.A.T.C.A. Partner jurisdiction.

The reciprocal version of the I.G.A. would be accessible only with regard to those jurisdictions bound to the United States by an international agreement, such as a double taxation convention incorporating and exchange of information clause or a T.I.E.A. and in relation to whom the Treasury Department and the Internal Revenue Service (IRS) determined, on a case-by-case basis, that the recipient government has in place robust

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protections and practices to ensure that the information remains confidential and that it is used solely for tax purposes.[982]

It is interesting to remark that the Model I.G.A. does not set up additional channels for exchanging information but rather refers to existing legal instruments, that actually constitute a pre-requisite to the exchange. This remark extends to the peculiar mode of co-operation of choice, centered upon automatic exchange of information: in this regard, the identified instrument would consist in an ad hoc Memorandum of Understanding, anchored to the existing treaty-based exchange of information provisions.

At the same time, from a policy perspective, it can be noted that the seeds of a potentially fruitful cross-pollination with other initiatives in the area of automatic exchange of information can be found. In this regard, the fourth Paragraph of Art. 6 of the Model I.G.A. calls for the commitment of the involved parties to working with other partners, in particular, the OECD and the European Union, on adapting the terms of the I.G.A. to a common model for automatic exchange of information, including the development of reporting and due diligence standards for financial institutions. In this regard, the importance of the Model I.G.A. from a policy perspective cannot be underestimated, not much for its specific contribution to making the F.A.T.C.A. system, which in itself could also appear as rather questionable, especially whereas it is not mitigated by some form of reciprocity, but rather because it would fall in the broader paradigm of what has been defined as the “snowball effect” that F.A.T.C.A. could potentially start.[983]

From an implementation perspective, the Model I.G.A. would introduce a significant mitigation of the obligations deriving from the F.A.T.C.A. framework.

First of all, with regard to timing and effective dates, the model I.G.A. would provide an additional six months (until 31 December 2013) in which to have new procedures in place that comply with the F.A.T.C.A. requirements.

With regard to the branches of financial institutions, the Model I.G.A. provides that branches of financial institutions will report to the Tax Authority in the jurisdiction where the branch is located and not where the company is incorporated.

The approach to the monitoring and sanctioning of the F.A.T.C.A. regime is twofold and depends on the entity of the recorded non-compliance. Namely, if there has been a minor or administrative error that leads to incorrect or incomplete information

[982] It is interesting to remark that a strict requirement of a “tax-only” use of the exchanged information would seem to be at odds with the more recent amendement made to Art. 26 of the OECD Model which would go in the direction of enabling, upon an explicit consent of the supplying jurisdiction, other authorities in the recipient State to access the information exchanged by virtue of the same treaty provision.

[983] At the Inaugural Lecture at the Institute for Austrian and International Tax Law of 18th May 2012, Professor Tracy A. Kaye vividly referred in the same sense to the “snowball effect” generated by F.A.T.C.A. through the spreading of I.G.A.s

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reporting IRS may directly contact the concerned FFI located in the partner Country. On the other hand, in the event of significant non-compliance, the responsibility to applydomestic law and penalties to non-compliant institutions located in their jurisdiction lies directly on the Tax Authorities of the concerned jurisdiction. Whereas the enforcement actions do not resolve the non-compliance within eighteen months from notification, the IRS will treat the institution as a non-participating FFI with all the earlier exposed consequences.

Financial institutions that are resident in a partner jurisdiction and that comply with the registration, due diligence and reporting requirements of the Model I.G.A. will be considered by default as complying with F.A.T.C.A. and will not be subject to F.A.T.C.A. withholding on US-source income paid to them. Such FFIs will not be required to withhold upon payments made to recalcitrant account holders, nor will they be required to close accounts of recalcitrant account holders.

F.A.T.C.A. Partner financial institutions that are Q.I.s assuming primary withholding responsibility, withholding foreign partnerships or withholding foreign trusts are required to withhold 30% of any US-source withholdable payments made to non-participating FFIs. Other F.A.T.C.A. Partner financial institutions that are acting as intermediaries with respect to payments to non-participating FFIs are required to provide information to the payers for purposes of F.A.T.C.A. withholding and reporting with respect to the payment.

For pre-existing accounts, taxpayer identification numbers will only be required to be reported if such numbers are in the financial institution’s files. However, the Model I.G.A. provides that procedures to gather such numbers will be required to be adopted by 1st January 2017.

Generally, information will be exchanged between the tax authorities within nine months after the end of the calendar year to which the information relates. However, an additional year’s time has been granted with respect to the timeline for the exchange of information for 2013, extending the deadline for that year to 30th September 2015.

The due diligence requirements applicable to F.A.T.C.A. Partner financial institutions are set forth in Annex I of the Model I.G.A.. The diligence requirements distinguish between pre-existing and new accounts and between individual accounts and entity accounts. For all accounts, financial institutions may not rely on certifications or documentary evidence if the financial institution (or, in the case of certain high-value accounts, a relationship manager) knows or has reason to know the certification or documentary evidence is incorrect or unreliable.

The due diligence requirements for pre-existing individual accounts set forth in Annex I of the Model I.G.A. provide some additional time and therefore will allow for better planning for compliance. The Model I.G.A. defines pre-existing accounts as accounts that are maintained as of 31 December 2013.

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The Model I.G.A. distinguishes between high-value accounts (over $1 million in value on 31 December 2013, or the last day of any subsequent year) and lower-value accounts.

For pre-existing, lower-value accounts, an electronic search alone may be relied upon until there is a change in circumstances that results in US indicia being associated with the account.

For pre-existing, high-value accounts, a paper records search and a relationship manager inquiry are also required. However, the paper records search is limited to the preceding five years. Moreover, such a search is not required if the electronic file contains sufficient information in electronically searchable format to cover all indicia.

For pre-existing accounts, if US indicia are found after the required review, the financial institution will be required to treat the account as a United States account unless it elects the option of soliciting documentary evidence to rebut US status. This approach, which differs from the procedure under the Proposed Regulations, may help reduce the compliance burden for P.F.F.I.s.

Once the review outlined above is complete, no further action will be required until there is a change of circumstances.

For new individual accounts (other than accounts eligible for the de minimis rule), the Model I.G.A. requires the financial institution to obtain a self-certification that allows the institution to determine whether the account holder is a US citizen or resident. The financial institution must then confirm the reasonableness of the self-certification based on the information obtained in connection with the opening of the account, including any documentation collected pursuant to applicable know-your-client procedures. Once the review has been completed, no further action is required until there is a change of circumstances.

For entity accounts, the Model I.G.A. focuses on entity classification and relies heavily on self-certification and information, also in this this case, such as those collected for local know-your-client procedures.

The above described Model I.G.A., in its reciprocal version, constitutes the faithful basis of the Agreement concluded by the United States and the United Kingdom on 12th September 2012. The conclusion of the agreement represents an important precedent which, according to the US Department of Treasury, should be followed up in the near feature with the conclusion of other I.G.A.s even with Countries outside the fold of the signatory of the 2012 "Joint Statement".

In particular, it has been reported[984] that additional jurisdictions with which Treasury is in the process of finalizing an intergovernmental agreement and with which Treasury hopes to conclude negotiations by year end include France, Germany, Italy,

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[984] See the Treasury Department press release of 8th November 2012, retrievable at the following website: http://www.treasury.gov/press-center/press-releases/Pages/tg1759.aspx

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Spain, Japan, Switzerland, Canada, Denmark, Finland, Guernsey, Ireland, Isle of Man, Jersey, Mexico, the Netherlands, and Norway. Jurisdictions with which Treasury is actively engaged in a dialogue towards concluding an intergovernmental agreements include Argentina, Australia, Belgium, the Cayman Islands, Cyprus, Estonia, Hungary, Israel, Korea, Liechtenstein, Malaysia, Malta, New Zealand, the Slovak Republic, Singapore, and Sweden. Treasury expects to be able to conclude negotiations with several of these jurisdictions by year end.

At the same time, possible alternative models may emerge in relation to other Countries, in particular, emerging and developing ones such as Brazil, Chile, India, Lebanon, Romania, Russia, Seychelles and South Africa.[985]

Besides the approach depicted so-far, which basically, on the one hand, makes F.A.T.C.A. requirements endogenous to the legal framework where financial intermediaries are called to operate, and, on the other hand, mitigates the foreseen requirements and institutionalizes the automatic exchange procedure by entrusting it to the Tax Administration of the State of establishment of the foreign financial intermediary, another approach to I.G.A.s can be foreseen.

In this regard, besides the "Treasury Model I" (which is the model encompassed by the above discusse Model I.G.A.), a "Treasury Model II" can be distinguished.

An anticipation of the "Treasury Model II" approach can be derived from the Joint Statement signed by the US, Japan and Switzerland on June 21st 2012. A Model I.G.A. based on the "Treasury Model II" approach has very recently been released by the Department of Treasury on November 15th 2012.

Under the "Treasury Model II" approach, the original focus on the role of financial foreign intermediaries also on transmitting information is maintained.In particular, within such a framework, financial institutions will provide information directly to the IRS, while the national Tax Administrations will conclude I.G.A.s encompassing exchange of information upon request in relation to additional items. The need for supplementing F.A.T.C.A.-sourced information with exchange of information upon request, which will take place based on the existing treaty provisions (either an exchange of information provision included in a double taxation convention or a T.I.E.A.) would be due to the circumstance that information concerning recalcitrant account holders would be provided on an aggregate basis.

7.7 Parallel OECD Initiatives

The ICG Report[986] basically recommended that OECD countries develop systems similar to QI. Financial institutions from Asia, Europe, and North America

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[985] Ibidem

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strongly endorsed the ICG Report, making clear their willingness and ability to serve as tax intermediaries cross-border.

The OECD System was developed based on the principle of consensus between governments and financial institutions. The resulting approach relied exclusively on incentives for financial institution participation rather than penalties. The OECD System could ask only so much of financial institutions in exchange for these incentives. The focus on reporting in exchange for benefits for investors limited the potential reporting benefit to residence countries to information on those kinds of payments, like dividends, that benefit from a reduced rate of tax withholding. However, many kinds of cross-border investment income, such as capital gains and certain interest income, generally are not subject to source country taxation and therefore withholding. This means they are not covered by, or reported in, a QI-like system.

Recognising the various weaknesses with the OECD System as a means to address the concerns of the residence Countries, the senior international tax officials of the OECD governments decided to further develop theOECD System through an initiative known as the Treaty Relief and Compliance Enhancement ("TRACE") project.[987] This group will be made up of government delegates and will continue to consult regularly with a standing advisory group of business representatives as it pursues the work.

7.8 Comparing Withholding Tax and Exchange of Information. Economic, Legal and Policy Perspectives

Models elaborated by economic theorists would seem to suggest that exchange of information generates larger revenues for the two Countries involved than the mere levying of a withholding tax by the source State. However, this general proposition seemed to find no empirical proof, since high-tax or larger Countries typically preferred information exchange system, while low-tax or smaller countries preferred to levy a plain withholding tax.[988] More precisely, this preference does not refute the general efficiency of information exchange, but it simply suggests that Countries do not necessarily have the interest to adopt the solution which is proved to be more efficient on an aggregate basis.

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[986] See OECD, Report of the Informal Consultative Group on the Taxation of Collective Investment Vehicles and Procedures for Tax Relief for Cross-border Investors on Possible Improvements to Procedures for Tax Relief for Cross-Border Investors, OECD, published on 12th January 2012, retrievable at the following website: http://www.oecd.org/dataoecd/34/19/41974569.pdf

[987] See OECD, Treaty Relief and Compliance Enhancement (TRACE), available at http://www.oecd.org/document/9/0,3746,en_2649_33767_45700745_1_1_1_1,00.html.

[988] Keen M., Lighthart J.E., *Incentives and Information Exchange in International Taxation*, CenTER Discussion Paper, Tilburg University,2004, at 15.

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Economists who have analysed the Interest Savings Directive[989] have focused in particular on the innovative revenue sharing scheme in case of application of the special withholding tax and have interpreted such measure as an effective incentive to make exchange of information more attractive to smaller Countries. It is quite unusual that such a major portion of the revenues be transferred to the Country of residence of the beneficial owner and this may induces source Countries not to oppose the voluntary disclosure if required by the beneficial owner.

Some researchers have suggested that a better incentive would be represented by extending revenue sharing also to revenues collected thanks to the transferred information.[990] In such a context, source States would be encouraged to put a remarkable effort into collecting and transferring information.[991] This method would also help bypassing problems deriving from possible lack of cooperation of the paying agent/beneficial owner. For the time being, the chances of effective measures are limited by the fact that source States have no interest in sanctioning non-complying paying agents, while residence States, which would be willing to do so, are obviously not entitled to sanction non-residents.

More recent studies[992] have questioned either the empirical evidence suggesting that preference for exchange of information or withholding tax vary according to the average tax rate and the size of Countries, concluding in favour of introducing a revenue sharing mechanism with reference to revenues deriving from exchange of information. It has also been suggested that both low-tax and high-tax Countries may prefer information exchange, even without revenue sharing.[993] The underlying reason is that high-tax Countries tend to respond to higher attractions of savings abroad deriving from exchange of information by raising taxes charged on residents, a decision which benefits low-tax Countries, as they are then eligible to attract more savings.[994]

Alongside this conclusion, it has been demonstrated that in a regime of exchange of information, tax revenues in both Countries increase in the proportion of revenues deriving from information exchange that are effectively collected by the residence Country.[995] As a consequence, it has been suggested that source countries shall not be

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[989] Ibidem

[990] Gerard M., *Combining Dutch Presumptive Capital Income Tax and US Qualified Intermediaries to Set Forth a New System of International Savings Taxation*, CESifo Working Paper No. 1340, Munich, 2005, at 6.

[991] Keen M., Lighthart J.E.*, Incentives and Information Exchange in International Taxation, CenTER Discussion Paper, Tilburg University,2004,* at 10.

[992] Keen M., Lighthart J.E., *Revenue Sharing and Information Exchange under non-discriminatory taxation*, CenTER Discussion Paper, Tilburg University, 2005, at 12

[993] Huizinga H., Nielsen S.B., *Withholding Taxes or Information Exchange: The Taxation of International Interest Flows*, 87 Journal of Public Economics (2003), at 39.

[994] Keen M., Lighthart J.E., *Revenue Sharing and Information Exchange under non-discriminatory taxation*, CenTER Discussion Paper, Tilburg University, 2005, at 12

[995] Keen M., Lighthart J.E., *Revenue Sharing and Information Exchange under non-discriminatory taxation*, CenTER Discussion Paper, Tilburg University, 2005, at 12

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encouraged to exchange information by the means of providing them with part of the revenues.

On the other hand, it should be noted that no economic research has apparently been conducted with reference to one of the most innovative features of the Q.I. system and of the Savings Directive and, not least and even more heavily,[996] F.A.T.C.A., namely the fact that the collecting of information is not achieved through the usual tax administration channels, but by imposing transaction costs on private entities in their role of paying agents.

Besides economic analysis considerations, it is also possible to weight automatic exchange of information against withholding taxation in relation to a wealth of policy considerations.

In particular, automatic information reporting systems and cross-border anonymous withholding systems both clearly break from past practice, moving towards a global paradigm defining financial institutions as cross-border tax intermediaries.[997] Neither system represents the most comprehensive solution to address offshore accounts, which would involve non-anonymous cross-border refundable withholding (the hefty withholding tax to be refunded upon the showing that the income subject to the withholding has been reported in the Country of residence of the beneficiary) by the in combination with information reporting.[998]

However, when choosing between the two systems presently under consideration, an information reporting model would appear as superior to an anonymous withholding model.

Namely, information reporting would be able to address concerns regarding the accretion of untaxed principal, whereas withholding solutions would not yield to such a result,[999] so that the gap should be filled by means of a more or less explicit form of “tax shield”, which indeed is what the “solution for the past” foreseen by Rubik agreements sets forth. In this regard it could be observed that, within the context of Rubik, none of

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[996] It has been estimated that the implementation cost of F.A.T.C.A may near USD 235 million per financial institution. See Meek F., *Banks fear Fatca raises operational and systemic risks*, Operational Risk & Regulation, Sept. 26, 2011, retrievable at the following website: http://www.risk.net/operational-risk-and-regulation/feature/ 2109648/banks-fear-fatca-raises-operational-systemic-risks. As the main cost driver for implementation would be represented by the number of account holders, in relation to each of which identification, monitoring and reporting tasks should be provided, it may be argued that the kinds of financial institutions for which F.A.T.C.A. would be more burdensome are large retail banks; on the other hand, for very specialised, less crowded (and often very endowed in terms of assets) private banks dealing with high net worth individuals, arguably the most critical category in view of the objectives of the new system, the aggregate impact of F.A.T.C.A. may possibly result less dramatic.

[997] See Grinberg I., *The Battle Over Taxing Offshore Accounts*, 60 UCLA Law Review (2012), at 347.

[998] See Avi Yonah R., *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, 34 Brooklyn International Law Journal 3 (2008-2009), at 793. A similar proposal was set forth also by Burke W.L., *Tax Information Reporting and Compliance in the Cross-Border Context*, 27 Virginia Tax Review (2007-2008), at 426.

[999] Grinberg I., *The Battle Over Taxing Offshore Accounts*, 60 UCLA Law Review (2012), at 347.

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the elements that would make a tax amnesty a "necessary evil" and, most of all, an "optimal" tax amnesty are present.[1000]

Furthermore, as it has already been noticed when introducing the Rubik model, such an arrangement would constitute a form of assistance to the collection of taxes, which, as anticipated in the second Part of this work, has typically met with strong legal and policy opposition in the light of the enduring legacy of the so-called "revenue rule".

From a tax policy perspective, it could be argued that where anonymous withholding reduces policy flexibility and sovereign authority, information reporting preserves sovereign policy autonomy;[1001] this is due to the circumstance that the applicable withholding taxes would be anchored to the rates foreseen by the Country of residence of the investor at the date of implementation of the agreement. Although it goes without saying that such rates should be adjustable over time, it is easy to foresee that such a system would introduce some elements of rigidity to the tax policy options of the resident State, given the circumstance that, while important, rates are not the only the only building blocks of the tax policy of a Country. Namely, such unintended rigidity may be avoided, by means of timely adjustment, only whereas the concerned items of income be taxed at a flat rate, while in all those cases where income be taxed on analytical basis, the only available option would be either to foresee a differentiated treatment for foreign sourced and domestic income (a flat rate in the former case and and progressive taxation in the latter case) or, in order to avoid such a differential treatment, univocally shift towards a flat rate.

From a compliance policy perspective, as it has aptly been remarked, anonymous withholding would institutionalise differentiated treatment of the most sophisticated taxpayers from the rest of society, thus undermining the tax morale and the expressive role in citizenship that taxation plays in a democratic polity.[1002]

As a conclusion to the present cross-assessment, which points to exchange of information as the most desirable approach to monitoring and promoting cross-border compliance, especially with regard to investment income, it seems that the words of a noted economist, pronounced almost twenty years ago, still appear topical; in particular, Professor Slemrod argued that " although it is not desirable to tax capital income on a

[1000] In this regard, useful inputs can be derived from the US tax policy literature that anticipated the earlier described 2009 Offshore Voluntary Disclosure Programme. In particular, Professor Boise developed a very useful list of characteristics for an optimal tax amnesty, according to which, such an amnesty should: (1) be accompanied by reform that will discourage evasion in the future; (2) be accompanied by greater enforcement; (3) be offered only once; (4) minimize perceptions of unfairness by not being offered to known tax evaders and waiving few penalties, ideally only criminal prosecution; and (5) not be relied on principally to raise revenue. See Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 George Mason Law Review (2007), at 696. There is no need to underline that the "solution for the past" set forth under Rubik would seem to almost purposefully contradict all the above propositions.

[1001] Grinberg I., *Beyond FATCA: An Evolutionary Moment for the International Tax System*, Georgetown Law Commons (2012), at 33.

[1002] Ibidem.

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source basis (because source-based taxes are distortionary), it is administratively not feasible to tax capital on a residence basis" .[1003] It is yet to be seen whether the momentum reached by exchange of information on the international tax policy agenda, coupled with the consolidating role of cross-border tax intermediaries will jointly offer the chance to confute such a statement.

[1003] Slemrod J., *Preface* to Tanzi V., *Taxation in an Integrating World*, Washington DC, Brookings Institution, 1995.

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8 CONCLUSIONS

This thesis first addressed the evidence according to which unilateral mechanisms for gathering extraterritorial tax information abroad all undergo shortcomings, at least in terms of sustainability; as such, the only way through which States can fulfil their informational needs is by engaging in co-operation between each other.

Based on such an assumption, it can be observed that the history of administrative co-operation is relatively long even though apparently not very dynamic if it is true that upon a deeper insight, some of the policy issues inherent to this practice and that are currently perceived as extremely topical had been formulated already at the very beginning of this history.

In this regard, besides the actual standards and rules defining administrative co-operation - which nonetheless deserve in depth analysis due to the wealth of policy implications they carry along, not only on the horizontal level (i.e., among States) but also in a vertical perspective (i.e., in the relationships between taxpayers and States) – the greatest evolution can me mirrored in the kind of actors involved in the exercise of co-operation: namely, networking administrations interacting on a less formalised level instead of States acting through more traditional diplomatic channels.

The number of actors involved in administrative co-operation has however been further increased by the taking part into the process of actors drawn from the private sector, in particular of financial intermediaries acting as what could be defined as “cross-border tax intermediaries”.

Any development in the area of administrative co-operation will then inevitably be in a position that cannot do without the involvement of these three categories of players: tax administrations and taxpayers on the opposite poles of the spectrum and cross-border tax intermediaries serving an intermediate function concerned with what could be defined as “soft” or “horizontal” supervision.

Such a starting point has to be always borne in mind whatever substantive standards will eventually emerge.

At the moment, it seems that there are three models of co-operation that are competing to define the paradigm that will define any future action: a model based on exchange of information upon request chiefly implemented through a net of parallel yet non-communicating bilateral treaties (the status quo, under many respect); a model which would aim at doing without exchange of information in favour of anonymous withholding, whose costs would be externalised on the involved financial intermediaries (whose unique example is represented by the so-called Rubik model proposed by Switzerland) and, finally, a model based on automatic exchange of information heavily reliant, not unlike the earlier cited alternative, on the involvement of cross-border tax

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intermediaries (whose more topical epitome is currently represented by the U.S. promoted F.A.T.C.A system).

Among these three alternatives, the second one, not relying on exchange of information appears to present some serious pitfalls and to raise considerable implementation difficulties from both a policy and legal perspective.

On the other hand, the alleged dichotomy between an “outdated” form of administrative co-operation based on exchange of information upon request and a “progressive” approach based on automatic exchange of information appears as a one to reject, the two approaches being complementary rather than mutually exclusive.

Namely, exchange of information upon request and automatic exchange of information would seem to serve two distinct and non-substitutable purposes: ex post investigation on the one hand and ex ante observation on the other hand. Thus, even whereas automatic exchange of information be implemented, form of ex post co-operation will always be necessary.

By presenting an inexistent dichotomy attention is taken away by other potential steps forward in the area of administrative co-operation, such as, in particular, the practice of data sharing among Tax Administrations, well exemplified by the J.I.T.S.I.C. initiatives promoted by some European, North American and Pacific Tax Administrations (which nonetheless precedes the tide of the international standards) and the practice of tax examinations abroad, which could prove being a very useful tool especially when the State where the necessary information is located is a developing Country: in such a way, the latter Country would not have to bear the costs of assistance and would also be in a position to monitor the practices of presumably more developed Tax Administration, thus receiving a stimulus to improve its own performance.

As it can be seen, none of the instruments quoted so far, with the partial exception of F.A.T.C.A. (of course not taken at face value but in its milder form, as expressed in the related recently concluded Intergovernmental Agreements), feature traits of astounding innovation but have been there for many years.

What needs to be addressed in order to have administrative co-operation reach a new dimension would consist in two different lines of action, one geared towards the institutional design of the current framework and another one concerned with making administrative co-operation less alien with respect to the domestic framework of the different jurisdictions.

With reference to the first course of action, the main pitfall of the current system would seem to lie in the outdated and practically unachievable, at least when taking into consideration the huge diversity in terms of informational needs of the various jurisdictions, paradigm of “reciprocity” that is so often found in many legal instruments dealing with administrative co-operation and the need to foresee the introduction of

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some form of remuneration for those jurisdiction that are likely to end up being "net exporters" of tax information.

Another course of action in the institutionalrealmmay consist in promoting the overcoming of the strictly bilateral pattern of co-operation, which is still currently prevalent. The antipathy for the bilateral dimension of administrative co-operation expressed in this study does not actually stem from ideological motives, as it is often the case with its proponent but, rather, on the simple observation that administrative co-operation aimed at fulfilling ex post investigation needs often needs to take into consideration more than two jurisdictions in order to gather a clearer picture of the behaviours under scrutiny. In this regard, the most useful design would not seem to lie in an "unqualified" global multilateralism but, rather, in a set of mutually communicating yet cohesive clusters of tax administrations jointly operating at a regional level (J.I.T.S.I.C., the CIAT and the Nordic Convention appear as success stories as far the promotion of regional administrative co-operation is concerned). As these agreements may not be considered as treaties, the issue of a suitable juridical basis would remain. In this regard, a very valuable role as a "legal umbrella" may be provided by the Strasbourg Convention on mutual administrative assistance that is the only multilateral non-regional legal instrument of co-operation presently available and which can also be understood, following its amendment and radical review in 2010, as an example of codification of the in the meanwhile emerged standards, that, on the other hand, would probably need to be expanded in order to be in tune with evolving forms of co-operation.

With reference to the interrelations between administrative co-operation and domestic rules, it can be observed that the main difficulties would seem to stem from the circumstance that while the former are conveyed through rather rules that rely take into account a municipal perspective, the segments of legislations that are put into contact by means of administrative co-operation are among the most peculiar one can find in the tax legal system of any jurisdiction.[1004] In this regard, forms of harmonisation on issues such as the availability of information and the access prerogatives to such information by Tax Administrations as well as the sphere of rights to be enjoyed by taxpayers (either in the administrative enquiry phase as well as in the contentious phase) would seem to stand out as the more urgent ones.

[1004] Reference is hereby made to domestic procedural rules.

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9 BIBLIOGRAPHIC REFERENCES

The Protection of Confidential Information, Cahiers de droit fiscal international, Vol. 76a, IFA, Amsterdam, 1991

International Mutual Assistance through Exchange of Information, Cahiers de droit fiscal international, Vol. 75b, IFA, Amsterdam, 1990

The Assessment and Collection of Tax from Non-Residents, Cahiers droit fiscal international, Vol. 70a, IFA, Amsterdam, 1985

"Il segreto bancario nella tempesta. Il nuovo volto della Svizzera dopo il G20", Proceeds of the Conference held on May 4th 2009

Tax Havens, Materials from the Executive Week held at the European University Institute, 2011

From Tax Havens to International Tax Coordination, Materials from the Executive Week held at the European University Institute, 2012

Abbott K.W. et al., *The Concept of Legalization*, 54 International Organization (2000), at 401

Addison T.V., S*hooting Blanks: The War on Tax Havens*, Indiana Journal of Global Legal Studies 2 (2009), at 721

Adonnino P., *Lo scambio di informazioni tra amministrazioni finanziarie*, Diritto e pratica tributaria (2008), at 705

Adonnino P., *Lo scambio di informazioni tra amministrazioni finanziarie*, Uckmar V. (Ed.), Diritto tributario internazionale, CEDAM, Padova, 2005, at 1125

Adonnino P., *La cooperazione tra le amministrazioni finanziarie*, Uckmar V. (Ed.), *L'evoluzione dell'ordinamento tributario italiano*, Padova, 2000, at 717

Albanese S., Patrizi G., *Gli scambi di informazioni fiscali tra paesi UE quale strumento di cooperazione amministrativa per combattere l'evasione*, Il Fisco (2006), at 4458

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Alink M., van Kommer V., *Handbook on Tax Administration*, Amsterdam, IBFD, 2011

Almahameed M., *National Legislation Safeguarding Bank Secrecy and The Steps Needed to Comply with the Effective Exchange of Information Standards: A Comparative Study*, Business Law Review *1 (2012),* at 1

Alpert H. (Rapporteur), International Tax Havens. Exchange of Information, Part I, Ad Hoc Group on Tax Treaties between developing and developed Countries, 3rd meeting, Geneva, 25 Oct-5 Nov 1971

Ambrosanio M., Caroppo M., *Eliminating Harmful Tax Practices in Tax Havens: Defensive Measures by Major EU Countries and Tax Haven Reforms*, 53 Canadian Tax Journals (2005), at 685.

Anarmoulis T., Nethercott L., *The EU-US ("Brussels") Agreement on European Banking Secrecy and the Effect on Tax Information Exchange Agreements*, IBFD Bulletin 1 (2011) (online version)

Andreoli F., *Accordi amministrativi bilaterali per le verifiche simultanee in materia di imposte sui redditi*, Rivista di diritto tributario (1998), at 149

Anthony G. et al.(Eds), *Values in Global Administrative Law*, Oxford, Hart, 2011

Antonini M., *Le novità apportate al Modello ed al Commentario Ocse in tema di imposte sul reddito e sul capitale*, Rivista di diritto tributario (2006), at 25

Ardito F., *La cooperazione internazionale in materia tributaria*, CEDAM, Padova, 2007

Arnone M., Borlini L., *International Anti-Money Laundering Programs: Empirical Assessment and Issues of Criminal Regulation*, 13 Journal of Anti-Money Laundering Control 2 (2010), at 226

Aujean M., Savings Taxation: Is Automatic Exchange of Information Becoming a Panacea?, EC Tax Review, 1 2010,

Aumayr E., Marchgraber C., *Der Anwendungsbereich des Art. 26 OECD-MA mit kleiner Auskunftsklausel*, 21Steuer und Wirtschaft International 5 (2011), at 199.

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Avery Jones J. , *The David R. Tillinghast Lecture: Are Tax Treaties Necessary?*, 53 Tax Law Review 1 (1999), at 1

Avi Yonah R., Halabi O., *Real Time Audit: Is it the Time to Act?*, University of Michigan Law School, Working Paper No. 242, retrievable on www.ssrn.org

Avi Yonah R., Guttentag J., *Closing the International Tax Gap*, in Sawicky M. (Ed.), Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration, Washington, EPI, 2005

Avi Yonah R., Margalioth Y., *Taxation in Developing Countries: Some Recent Support and Challenges to the Conventional View*, Virginia Tax Review 1 (2007), at 1

Avi Yonah R., *Globalization, Tax Competition and the Fiscal Crisis of the State*, 113 Harvard Law ReviewMay (2000), at 1573

Avi Yonah R., *Tax Competition, Tax Arbitrage and the International Tax Regime*, Bulletin for International Taxation 4 (2007), at 130

Avi Yonah R., *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, Brooklyn Journal of International Law 3 (2009), at 783

Avi Yonah, R., *Globalization and Tax Competition, Implications for Developing Countries* , Working Paper, Banco Interamericano de Desarrollo, retrievable at www.fiscalreform.net

Avi Yonah R., *International Tax as International Law: An Analysis of the International Tax Regime*, Cambridge, Cambridge University Press, 2007

Avi Yonah R., *The Structure of International Taxation: A Proposal for Simplification*, 74 Texas Law Review (1996), at 1301

Bacchetta P., Espinosa M., *Exchange of Information Clauses in International Tax Treaties*, International Tax and Public Finance (2000), 275

Bacchetta P., Espinosa M.P., *Information Sharing and Tax Competition among Governments*, 39 Journal of International Economics 1-2 (1995), at 103

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Bagnardi B., *Cooperazione svizzera in materia fiscale: novità storiche negli accordi bilaterali bis con l'Unione europea*, Diritto e pratica tributaria internazionale(2004), at 605

Barassi M., *Cooperazione tra amministrazioni fiscali*, (Cassese S.) Dizionario di diritto pubblico, II,2006, Milano, Giuffrè, at1529

Barnard J., *Former Tax Havens Prepared to Lift Bank Secrecy*, Bulletin for International Taxation 1 (2003), at 9

Battini S., *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003

Bavila A., *Brevi note in tema di scambio di informazioni tra amministrazioni finanziarie*, Rivista di diritto tributario (2002), at 153

Becker H., *Limits on Exchange of Information in Connection with Tax Audit Practice*,Intertax 2 (1982), at 136

Bell S., *EU Directive on the Taxation of Savings Income*, Derivatives and Financial Instruments (5) 2003, at 201

Belotsky V.P., *The Prevention of Tax Havens Via Income Tax Treaties*, California Western International Law Journal (1987), at 80

Bernardi L., *A Family of Tax Big Brothers That Do not Talk to Each Other*, Rivista di diritto tributario e scienza delle finanze 4 (2006), at 573

Bernasconi M., *Gli accordi bilaterali II e lo scambio di informazioni fiscali. L'accordo sulla fiscalità del risparmio*, SUPSI, Manno, 2005

Bernasconi M., *L'assistenza fiscale amministrativa. La politica della Svizzera dal 1951 in poi e prospettive future*, Diritto senza devianza. Studi in onore di Marco Borghi, Edizione speciale della rivista ticinese di diritto, 2006, at 107

Bernasconi P., *Svizzera: i nuovi accordi fiscali con la Germania e con il Regno Unito (il sistema Rubik*), Diritto e pratica tributaria internazionale 3 (2011), at 861

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Bernasconi P., Scambio italo svizzero di informazioni fiscali. Rogatorie e convenzioni contro la doppia imposizione, Diritto e pratica tributaria internazionale 1 (2011), at 15

Bernasconi P., *Le raccomandazioni OCSE/GAFI del 2003 recepite nel diritto svizzero*, Il Fisco (2009), at 6139

Bernasconi P., *Berlin Vs. Vaduz. Effetti fiscali del trafugamento di informazioni dal Liechtenstein a favore delle autorità fiscali di paesi dell'Unione europea*, Diritto del commercio internazionale 2 (2008), at 259

Bernasconi P., *Quo vadis rogatoria?, dal beneficial owner alla global fishing expedition passando attraverso i mass media*, Diritto senza devianza. Studi in onore di Marco Borghi, Edizione speciale della rivista ticinese di diritto, 2006, at 20

Bernasconi P., *Cooperazione svizzera in materia fiscale: novità storiche negli accordi bilaterali bis con l'Unione europea*, Diritto e pratica tributaria internazionale (2005), at 379

Bernasconi P., *Accordi bilaterali bis fra l'Unione europea e la Svizzera: conseguenze per banche ed altri intermediari finanziari in Svizzera e per i loro clienti*, Il Fisco (2004), at 7744

Biscottini G., *Diritto amministrativo internazionale*, Trattato di diritto internazionale, Padova, Cedam, 1996

Blum C. , *Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, Florida Tax Review (2004), at 579

Bock G., Hoor O., *Exchange of Information: Issues and Developments in Luxembourg*, European Taxation 8 (2010), at 387

Boise C.M., *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, George Mason Law Review (2007), at 667

Bondi B.J., *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?*, 30 Northwestern Journal of International Law and Business 1 (2010), at 3

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Borsi U., *Carattere e oggetto del diritto amministrativo internazionale*, Rivista di diritto internazionale(1912), at 384

Boston Consulting Group, *Global Wealth 2011: Shaping A New Tomorrow 13* (June 2011), retrievable at the following website: http: www.bcg.com.pl/documents/file77766.pdf

Boyle A., *Soft Law in International Law Making*, Evans M.D. (Ed.), *International Law*, Oxford, Oxford University Press, 2006, at 142

Bracewell-Milnes B., *The Economics of International Tax Avoidance: Political Power Vs. Economic Law*, Amsterdam, 1980

Brodersen C., *Limits on the International Exchange of Tax Information*, European Taxation 6 (1987), at 175

Burgess P., *Globalization comes to tax collection*, Tax Notes International (2004), at 645

Burke W. , *Tax Information Reporting and Compliance in the Cross-Border Context*, 27 Virginia Tax Review(2007-2008), at 399

Calderon J.M., *Taxpayer Protection within the Exchange of Information Procedure Between State Tax Administrations*, Intertax 6 (2000), at 472

Capostagno R., *L'Italia e la Francia ratificano la convenzione congiunta dell'OCSE e del Consiglio d'Europa relative all'assistenza amministrativa reciproca in materia fiscale*, Rivista di diritto tributario internazionale 1 (2005), at 196

Caram A., *Enhancing International Cooperation Among Tax Authorities in the Assessment and the Recovery of Taxes: The Proposal for New European Directives*, Intertax 11 (2009), at 630

Carelli F., *The New Tax Agreement Between Switzerland and the United Kingdom – An Analysis*, European Taxation 6 (2012), online version

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Castiglione R., *Cooperazione tra autorità fiscali, accertamento tributario e garanzie del contribuente*, Giustizia tributaria 3 (2009), online version

Castiglione R., *I poteri delle autorità fiscali nazionali nelle verifiche extraterritoriali*, Diritto e pratica tributaria internazionale 3 (2008), at 1109

Cerioni L., *The New EU Tax Directive On Administrative Cooperation Between Member States: A Key Step Against Tax Distortions In The Internal Market?*, Diritto e pratica tributaria internazionale 3 (2011), at 877.

Chiti E., *Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies*, European Law Journal 10 (2004), at 402

Chiti E., *Le Agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Padova, Cedam, 2002

Christians A., *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, Northwestern Journal of Law and Social Policy5 (2010), at 455

Christians A,, *Networks, Norms and National Tax Policy* Washington University Global Studies Law Review 9 (2010)

Christians A., *Hard Law and Soft Law in International Taxation*, Wisconsin International Law Journal2 (2007), at 55.

Cockfield A., *The Rise of OECD as informal "World Tax Organisation" Through National Responses to E-Commerce Tax Challenges*, Yale Journal of Law and Technology 8 (2006), at 175

Cole R., Gordon R., Venuti J., *Exchange of Information and Assistance in Tax Collection*, Tax Management International Journal (1994), at 600

Consiglio P, Pezzuto G., *Verifiche simultanee e cooperazione internazionale finalizzata allo scambio di informazioni in materia di transfer pricing*, Il Fisco 12 (2009), at I-1887

Contrino A., *Le Convenzioni tra l'Italia e la Svizzera contro le doppie imposizioni*, Garbarino G. (Ed.), Le Convenzioni dell'Italia in materia di imposte su reddito e patrimonio, Milano, Egea, 2005, at 855

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Contrino A., *Elusione fiscale, evasione e strumenti di contrasto*, Milano, Cisalpino, 1996

Corso P., *Inutilizzabili i risultati di una verifica fiscale illegittima*, Corriere Tributario (2005), at 58

Courtois C.H., *The Impact of the European Commission on the Council of Ministers' Decision in the Field of European Taxation: The Case of the European Savings Directive*, 29 International Public Policy Review 2 (2006), at 62

Cox N., *Tax and Regulatory Avoidance Through Non-Traditional Alternatives to Tax Havens*, New Zealand Journal of Taxation Law and Policy 3 (2003), at 305

Crazzolara A., Lurà F., *Lo scambio internazionale di informazioni in materia tributaria e la giurisprudenza svizzera*, Diritto e pratica tributaria internazionale 1 (2010), at 547

Crazzolara A., Lurà F., *Lo scambio internazionale di informazioni in materia tributaria e la giurisprudenza svizzera – Parte II*, Diritto e pratica tributaria internazionale 2 (2010), at 1019

Crazzolara A., Lurà F., *Lo scambio internazionale di informazioni in materia tributaria e la giurisprudenza svizzera* – Parte III, *Diritto e pratica tributaria internazionale* 3 (2010), at 1505

Crinion G.P., *Information Gathering on Tax Evasion in Tax Haven Countries*, 20 International Lawyer (1986), at 1209

Cuocolo L., Miscia V., *Time for Sovereignty: Sovereign Wealth Funds and Sovereign Ratings*, The Journal of Regulation (2012), retrievable at the following website: http://www.thejournalofregulation.com/l-1-44-Time-for-Sovereignty.html

Dagan T., *The Costs of International Tax Cooperation*, *Michigan Law and Economics Research Paper No. 02-007*, retrievable on www.ssrn.org

Dagan, T., *National Interests in the International Tax Game*, 18 Virginia Tax Review (Fall 1998), at 363

Daniels A., *Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters*, Intertax (1988), at 102

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Daniels, A., *Sovereign Affairs*, Intertax 1 (2000), at 2

Dean S., *The Incomplete Global Market for Tax Information*, Boston College Law Review, 2008, at 49

Dean S., *Philosopher Kings and International Tax*, *Hastings Law Journal* 58 2007, 911

Dean. S., Neither Rules nor Standards, Notre Dame Law Review, 87.2 2012, p. 537

De Cooker C., *International Administration. Law and Management Practices in International Organisations*, Dordrecht, Martinus Nijhoff, 2009

De Goede J., *Efficiency of Mutual Assistance in Tax Matters; What is in a Name?*, Seer R., Gabert I. (Eds), Mutual Assistance and Information Exchange, Amsterdam, IBFD, at 121

Del Federico L., *Le verifiche transnazionali: scambio di informazioni fra autorità fiscali e tutela del contribuente*, Neotera 2 (2011), at 32

Dell'Anese L., *Tax Arbitrage and the Changing Structure of International Tax Law*, Milano, EGEA, 2006

Diver C.S., *The Optimal Precision of Administrative Rules*, 93 Yale Law Journal (1983), at 71

Djelic .M.L., Quack S*., Transnational Communities. Shaping Global Economic Governance*, Cambridge, Cambridge University Press, 2010

Dorigo S., *La cooperazione fiscale internazionale dopo il protocollo di modifica alla Convenzione di Strasburgo: qualche luce e molte ombre*, Rivista di diritto tributario 9 (2011), at 157

Dourado A.P., *The EC Draft Directive on Interest from Savings from the Perspective of International Tax Law*, EC Tax Review 4 (2000), at 144

E. Duvoisin, M. Moniez, *The Netherlands – Switzerland Income Tax Treaty (2010) – An Analysis*, Bulletin for International Taxation (2011), at 444

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Easson A., *Harmful Tax Competition: An Evaluation of the OECD Initiative*, Tax Notes International, 7 June 2004, at 1037

Eden L., Kurdle R.T., *Tax Havens: Renegade States in the International Tax Regime?,* Law and Policy 1 (2005), at 100

Ehrlich I., Posner R.A., *An Economic Analysis of Legal Rulemaking*, Journal of Legal Studies 3 (1974) at 257

Einaudi L., *La cooperation internationale en matière fiscale*, Recueil des Cours, 1928-V, Volume 25, The Hague

Emberland M., The Human Rights of Companies, Oxford, Oxford University Press, 2006

Falcão T., *Exchanging Information with the Developing World: A Digression on the Global Forum Exchange of Information's Interaction with Developing Economies*, Intertax12 (2011), at 603

Fedele A., *Prospettive e sviluppo della disciplina dello «Scambio di informazioni» tra Amministrazioni finanziarie*, Rassegna tributaria 1 (1999), at 49

Ferguson M.C., *Tax Havens*, Bulletin for International Fiscal Documentation, 12 (1980), at 539

Ferlazzo Natoli L., *La tutela dell'interesse legittimo nella fase procedimentale dell'accertamento tributario*, Rivista di diritto tributario (1999), at 772

Ferlazzo Natoli L., *Limiti all'acquisizione di conoscenza nel procedimento probatorio fiscale*, in Rivista di diritto tributario 1 (2002), at 25

Fernandez Marin F., *Scambio di informazioni tra garanzia di armonizzazione e limiti all'attività nazionale di controllo*, Di Pietro A. (Ed.) *Lo stato della fiscalitànell'Unione europea. L'esperienza e l'efficacia dell'armonizzazione*, Roma, 2003

Ferrarese M.R., *Le istituzioni della globalizzazione*, Bologna, Il Mulino, 2000

Fiechter J.R., *Exchange of Tax Information: The End of Banking Secrecy in Switzerland and Singapore*, International Tax Journal6 (2010), at 55

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Figge C., *The European Conventions on Mutual Assistance in Criminal Matters and on Extradition and the Exchange of Information in Tax Matters* , Intertax (1980), at 86

Fleming J.C., Peroni R.J., Shay S.E., *Perspectives on the Worldwide Vs. Territorial Taxation Debate*, Tax Notes International 1 (2010), at 75

Floridi L., *Is Information Meaningful Data?*, 70 Philosophy and Phenomenological Research 2 (2005), at 351.

Floridi L., *Information. A Very Short Introduction*, Oxford, Oxford University Press, 2010

Franck T.M., *The Power of Legitimacy Among Nations*, New York, Oxford University Press, 1990

Franck T.M., *Legitimacy in the International System*, 82 American Journal of International Law (1988), at 705

Fuest C., Bilicka K.A., *With which Countries do Tax Havens Share Information?*, EUI-RSCAS Working Papers 6, European University Institute (EUI) (2012)

Fuxa D., *Lo scambio di informazioni e i regimi fiscali dannosi: recenti sviluppi in ambito OCSE*, Fiscalità internazionale (2008), at 202

Gabert I., *Council Directive 2011/16/EU on Administrative Co-operation in the Field of Taxation*, European Taxation8 (2011), at 342

Gaffuri A.M., *Le nuove disposizioni sui paradisi fiscali*, Fiscalità internazionale, 5 (2009), at 381.

Gaffuri A., *I limiti allo scambio di informazioni nelle indagini fiscali*, Fiscalità Internazionale 5 (2004), at 413

Gaffuri A. M., *I limiti all'utilizzo dei dati acquisiti nello scambio di informazioni*, Uckmar V. e Tundo F., *Codice delle ispezioni e verifiche tributarie*, Piacenza, 2005

Garbarino C., *Tax Transplants and Circulation of Corporate Models*, British Tax Review (2011), at 159

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Garbarino C, *An Evolutionary Approach to Comparative Taxation: Theory, Methods and Agenda for Research*, Bocconi Legal Studies Research Paper, 2007, retrievable on www.ssrn.org

Garbarino C., *Manuale di Tassazione Internazionale*, II Ed., Milano, Ipsoa, 2008

Garbarino C., *Le basi teoriche ed i metodi del diritto tributario comparato,*Diritto Pubblico Comparato ed Europeo 3 (2004), at 1059

Garbarino C., *La tassazione del reddito transnazionale*, Padova, Cedam, 1990

Garcia Prats F., *Exchange of Information under Article 26 of the UN Model Tax Convention*, IBFD Bulletin (1999), 541

Garufi S., *La tassazione dei cosiddetti "redditi da risparmio" (direttiva 2003/48/CE). Problematiche interpretative e operative*, Il Fisco (2007), at 4370

Gentili G., *Appunti sulla collaborazione amministrativa internazionale per contrastare l'evasione fiscale*, Diritto e pratica tributaria, 1 (1984), at 515

Gérard M., *Don't Run after Bankers' Imagination – An Economist's Reflections On Potential Regimes for Capital Income Taxation*, Bulletin for International Taxation10 (2009), at 474

Gérard, *Combining Dutch Presumptive Capital Income Tax and US Qualified Intermediaries to Set Forth a New System of International Savings Taxation*, CESifo Working Paper No. 1340, Munich, 2005

Global Forum For Transparency And Exchange Of Information For Tax Purposes, *Tax Transparency 2011 - Report on Progress*, Paris, 2011

Global Forum For Transparency And Exchange Of Information For Tax Purposes, *Revised Methodology for Member States and Non-Member Reviews*, Paris, 200

Gordon R.A., *Impact of Tax Havens on the U.S. Tax System*, Bulletin for International Fiscal Documentation, 1980/12, at 541

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Goulder R., *OECD Updates Tax Haven Black List, Claims Progress in Curbing Harmful Tax Competition*, Tax Notes International, 4/2002, at 375

Graetz M., Grinberg I., *Taxing Foreign Portfolio Investment Income*, 56 *Tax Law Review* (2003), at 538

Grau Ruiz M.A., *Mutual Assistance for the Recovery of Tax Claims*, , London, Kluwer Law International 2004

Grau Ruiz M.A., *Convention on Mutual Administrative Assistance in Tax Matters and Community Rules: How to Improve their Interaction?*, EC Tax Review 4 (2006), at 196

Grinberg I., *The Battle Over Taxing Offshore Accounts*, 60 UCLA Law Review (2012), at 306

Grinberg I., *Beyond F.A.T.C.A.: An Evolutionary Moment for the International Tax System*, Georgetown Law Commons (2012), retrievable on www.ssrn.org

Grueninger H., *Cross Border Exchange of Information and Administrative Assistance in Tax Matters, in Particular between Germany and Switzerland*, European Taxation 2 (1987), at 141

Grueninger H., Keller A., *Exchange of information in fiscal matters*, *Archiv für Schweizerisches Abgabenrecht* 2 (1996), at 139

Guglielmi S., *Scambio di informazioni: modifiche al Modello di Convenzione Ocse*, Fiscalità Internazionale 1 (2005), at 42

Gyonghi Vegh P., *Towards a Better Exchange of Information*, European Taxation 9 (2002), online version

Hart D., Dean G., Tzotchev V., *Through the Looking Glass: The New FATCA Reporting and Compliance Obligations are Anything but Illusion*, Tax Planning International Review 8 (2010), at 4

Hathaway O.A., Shapiro S., *Outcasting: Enforcement in Domestic and International Law*, 121 Yale Law Journal(2011), at 252

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Hathaway O.A., *Between Power and Principle: An Integrated Theory of International Law*, 72 University of Chicago Law Review (2005), at 469

Helfrich Laubrock J., *Critical Review of the OECD/Council of Europe Multilateral (Draft) Convention on Mutual Administrative Assistance in Tax Matters*, IBFD Bulletin (1987), at 393

Hemels S., *References to the Mutual Assistance Directive in the Case Law of the ECJ: A Systematic Approach*, European Taxation11 (2009), at 583

Hemmelgarn, T. and G. Nicodème , *Tax Coordination in Europe: Assessing the First Years of the EU-savings Taxation Directive*, European Commission TAXUD, Taxation papers, Working paper 18/2009

Hendricks M., *Internationale Informationshilfe in Steuerverfahren*, Köln, Otto Schmidt, 2004

Herman D., *Taxing Portfolio Income in Global Financial Markets*, Amsterdam, 2002

Heuberger R., Oesterhelt S*., Switzerland to Adopt OECD Standard on Exchange of Information*, European Taxation 2 (2010), at 58

Hofbauer I., *To what Extent does the OECD Harmful Tax Competition Project Violate the Most Favoured Nation Obligations Under WTO Law*?, European Taxation, 9/2004, at 400

Holzinger K., *Tax Competition and Tax Cooperation in the EU, the case of Savings Taxation*, EUI Working Paper 2003/7

Honegger P., Kolb A., *Amts- und Rechtshilfe: 10 Aktuelle Fragen*, Archiv für Schweizerisches Abgaberecht(2009), at 789

Hood C., *The 'Tax State' in the Information Age* in Paul T.V., Ikenberry G.J., Hall J. (Eds) The Nation-State in Question, Princeton, Princeton University Press, 2003, at 213

Huber M.F., Duss F., *Switzerland: Recent Developments in International Tax Law*, Bulletin for International Taxation12 (2009), at 567

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Huizinga H., Nielsen S., *Withholding Tax or Information Exchange: The Taxation of International Interest Flows*, Journal of Public Economics 1 (2003), at 39

Illiano M., *L'imposizione sui redditi e la cooperazione internazionale fra Amministrazioni fiscali*, Corriere tributario (2002), at 2831

Iorio A., *L'Acquisizione di informazioni bancarie in Svizzera da parte dell'Amministrazione italiana*, Il Fisco (2008), at 5057

Jayasuriya K., *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, Indiana Journal of Global Legal Studies 6 (1999), at 439.

Jeffery R., *The Impact of State Sovereignty on Global Trade and International Taxation*, The Hague, Kluwer Law International, 1999

Jiménez, A.M., *Loopholes in the EU Savings Tax Directive*, Bulletin for International Fiscal Documentation (December 2006), at 480

Jogarajan S., *Prelude to the International Tax Treaty Network: 1815-1914 Early Tax Treaties and the Conditions for Action*, 31Oxford Journal of Legal Studies 4 (2011), at 679

Johnson J., *Blacklisting: Initial Reactions, Responses and Repercussions*, Journal of Money Laundering Control 3 (2001), at 211

Johnson J., Lim Y.., *Money Laundering: Has the Financial Action Task Force Made a Difference?*, Journal of Financial Crime 1 (2002), at 7

Kampen T.A., de Rijke L.J., *The Kreditetbank Luxembourg and the Liechtenstein Tax Affairs: Notes on the Balance between the Exchange of Information between States and the Protection of Fundamental Rights*EC Tax Review (2009), at 221

Kapalle U., *Amts und Rechtshilfe in Steuersachen nach den Bilateralen II*, StRev., 2005, at 418

Kaplow L., *Rules Versus Standards: An Economic Analysis*, 42 Duke Law Journal (1992), at 567

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Kelly C.R., *Realist Theory and Real Constraints*, 44 Virginia Journal of International Law (2004), at 545

Klabbers J., *The Concept of Treaty in International Law*, London, Kluwer Law International, 1996

Krasner S. D., *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 International Organization (1982) , at 185

Keen M., Ligthart J. , *Information Sharing and International Taxation. A Primer*, International Tax and Public Finance 12 (2006), at 98

Keen M., Ligthart J., *Incentives and Information Exchange in International Taxation*, CenTER Discussion Paper, Tilburg University,2004

Keen M., Ligthart J., *Revenue Sharing and Information Exchange under Non-Discriminatory taxation*, CenTER Discussion Paper, Tilburg University, 2005

Keen M., Simone A., Is Tax Competition Harming Developing Countries more than Developed? Tax Notes International 13 (2004) (supplement), at 1317

Knobbout R., *Exchange of Information and Other Mutual Assistance Instruments*, European Taxation 7 (2000), at 281

Kofler G.W., *Most-Favoured-Nation Treatment In Direct Taxation: Does Ec Law Provide For Community Mfn In Bilateral Double Taxation Treaties?*, 5 Houston Business and Tax Law Journal (2005), at 1.

Kurdrle R.T., *The OECD's Harmful Tax Competition Initiative and the Tax Havens*, Global Economy Journal 1 (2008), at 1

Kurdrle R.T., *Did blacklisting Hurt the Tax Havens?*, Journal of Money Laundering Control 1 (2009), at 33

Lafarge F., *Administrative Co-operation Between Member States and Implementation of EU Law*, European Public Law 4 (2010), at 597

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Lang M., *The Legal and Political Context of ECJ Case Law on Mutual Assistance*, European Taxation 5 (2012), online version

Lang M. et al., *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties*, Cambridge University Press, Cambridge, 2012

Lang M. et al. (Ed.), *Introduction to European Tax Law on Direct Taxation*, II Edition, Vienna, Linde, 2010

Lang M. et al. (Ed.), *Introduction to the Law of Double Tax Conventions*, Linde, Vienna, 2010

Lang M., *The Procedural Conditions for the Implementation of Tax Treaty Obligations Under Domestic Law*, Intertax 3 (2007), at 146

Lang M., *The Concept of a Multilateral Tax Treaty,* Lang M., Loukota H, Multilateral Tax Treaties*,* Vienna, Linde, 1998, at 187

Larking B., *Another go at the Savings Directive-third time lucky?,* EC Tax Review 4 (2001), at 220.

La Rosa S., *Sui riflessi procedimentali e processuali delle indagini tributarie irregolari*, *Rivista di diritto tributario* 4 (2002), at 292

Lecocq A., *Belgium and Liechtenstein: Current Judicial Cases, TIEAS and the New Tax Havens Lis*t, Tax Planning International: European Tax Service, 6/2010, at 16

Lederman L., *The Use of Voluntary Disclosure Initiatives in the Battle Against Off-Shore Tax Evasion*, Indiana University Maurer School of Law Research Paper 200, 2012

Lederman L. *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 Fordham Law Review (2010), at 1733

Lederman L, *Statutory Speed Bumps: The Role Third Parties Play in Tax Compliance*, 2007, 60 Stanford Law Review, at 695

Levi F., *L'attività conoscitiva della Pubblica Amministrazione*, Torino, Giappichelli, 1967

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Liccardi E., *L'accertamento e la riscossione nei rapporti internazionali*, Il diritto tributario nei rapporti internazionali, Rassegna Tributaria, Quaderno n. 2- 86

Lindencrona G., Lodin S.O., Wiman B., *International Studies in Taxation: Law and Economics*, London, 2005

Litman J., *Information Privacy/Information Property*, 52 Stanford Law Review (2000), at 1283

Luchena Mozo G.M., *The Prevention and Resolution of Tax Conflicts within the Framework of International Exchange of Information*, European Taxation 5 (2012), online edition

MakhloufG., *Transparency in Tax Systems: Keeping Pace with the Information Age*, Intertax 2 (2000), at 64

Makris M., *International Tax Competition: There is No Need for Cooperation in Information Sharing*, Review of International Economics (2003), at 555

Manasfi J., *The Global Shadow Bank. Systemic Risks and Tax Policy Objectives: The Uncertain Case of Foreign Edge Funds Lending to US Borrowers and Transacting in US Debt Securities*, forthcoming on Florida Tax Review, available in draft form on the SSRN website.

Mann F.A., *The Doctrine of Jurisdiction in International Law Revisited after Twenty Years*, Recueil des Cours, 1984-III, at 463

Marino G., La cooperazione internazionale in materia tributaria, tra mito e realtà, Rassegna tributaria 2 (2010), at 433

Marino G., *Brevi note sull'onere della prova nel diritto tributario internazionale*, Diritto e pratica tributaria internazionale 1 (2008), at 222

Martino E.,*The Future of International* Tax *Cooperation in a Barrier Free Market: Recent Developments Regarding Italian Tax Treaties*, Bulletin for International Taxation 8 (2010), at 437

Martinez B. G., *The Role of Good Governance in the Tax Systems of the European Union*, *Bulletin for International Taxation*4 (2011), at 270

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Mastellone P., *Brevi note sull'applicabilità delle garanzie CEDU alle procedure di cooperazione fiscale internazionale*, retrievable on the following website: http://www.scigiur.unich.it/?action1=eventi&action2=interventi

Mattsson N., *Is the Multilateral Convention a Solution for the Future?- Comments with Reflection to the Nordic Experience*, Intertax (1985), at 214

McLure Ch.E. Jr., Will the OECD Initiative on Harmful Tax Competition Help Developing and Transition Countries?, *IBFD Bulletin*, No. 3, 2005

McIntyre M.J., *Identifying the New International Standard for Effective Information Exchange*, in LANG M. et al. (Eds), Tax Treaties: Building Bridges between Law and Economics, Amsterdam, IBFD, 2010, at 481

McIntyre M.J., *How to End the Charade of Information Exchange*, Tax Notes International (2009), at 255

Meessen K. (Ed.), *Extraterritorial Jurisdiction In Theory And Practice*, London, Kluwer Law International, 1996

Meinzer M., *Policy Paper on Automatic Tax Information Exchange Between Northern and Southern Countries*, Tax Justice Briefing9 (2010)

Menck Th., *Internationale Amtshilfe in Steuersachen*, Deutsche Steuer Zeitung (1971), at 57

Milner H., *Interests, Institutions, and Information: Domestic Politics and International Relations*, Princeton, Princeton University Press, 1997

Mohamed H., *A Critical Assessment Of The Proposal Directive On The Taxation Of Cross Border Savings*, EC Tax Journal 1 (2002), at 45

Morrow, J., *Modeling the Forms of International Cooperation: Distribution vs. Information*, 48 International Organization 3 (1994), at 387

Morse S., *Ask for Help Uncle Sam: The Future of Global Tax Review*, Villanova Law Review (2012), at 529

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Nehring H., Schui F. (Eds),*Global Debates about Taxation* , Pallgrave Macmillan, Basingstoke, 2005

Nijkeuter E., Exchange of Information and the Free Movement of Capital between Member States and Third Countries, EC Tax Review (2011), at 232

Note N., *How to Kill the Scapegoat: Addressing Offshore Tax Evasion with a Special View to Switzerland*, Vanderbilt Law Review 63 (2010), at 1849

Nussi M., *Lo scambio di informazioni tra amministrazioni finanziarie*, Marino G., I profili internazionali e comunitari della nuova imposta sui redditi e delle società, Milano, Giuffrè, 2004

Nuzzolo A., *L'opponibilità del segreto bancario nell'accertamento transnazionale dei redditi*, Il Fisco (2005) at 4976

Oberson X., *The OECD Model Agreement on Exchange of Information: A Shift to the Applicant State?*, IBFD Bulletin 1 (2003), at 14

OECD, *Access For Tax Authorities to Information Gathered by Anti Money Laundering Authorities*, 2002

OECD, *TaxInformation Exchange between OECD Member Countries. A Survey of Current Practices*, Paris, 1994

OECD, Report of the Informal Consultative Group on the Taxation of Collective Investment Vehicles and Procedures for Tax Relief for Cross-border Investors on Possible Improvements to Procedures for Tax Relief for Cross-Border Investors, OECD (Jan. 12, 2009), available at
http://www.oecd.org/dataoecd/34/19/41974569.pdf (hereinafter "ICG Report").

OECD, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes,* Paris, 2006

OECD, *Harmful Tax Competition: An Emerging Global Issue*, Paris, OECD, 1998

OECD, *Improving Access to Bank Information for Tax Purposes*, Paris, OECD, 2000

OECD, *International Tax Avoidance and Evasion: Four Related Studies*, Paris, OECD, 1987

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

OECD, *Tax Information Exchange between OECD Member Countries: A Survey of Current Practices*, Paris, OECD, 1994

OECD, *Taxation of Cross-Border Portfolio Investment: Mutual Funds and Possible Tax Distortions*, Paris, OECD, 1999

OECD, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*, Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, June 2000 (available on-line at http://0-www.oecd.org.lib.unibocconi.it)

OECD, *Committee on Fiscal Affairs, "Model Draft Convention for Administrative Assistance in the Recovery of Tax Claims*", Paris, 1981

Offermans R., *Exchange of Information*, European Taxation 4 (1999), at 174

Oliver J.D.B., Libin J.B., Van Weeghel S., Du Toit C., *Beneficial Ownership*, Bulletin for International Fiscal Documentation, 7 (2000), 310

Oliver J.D.B., *Exchange of Information and The OECD Model Treaty*, Intertax, (3) 1995

Öner C., *A Different Approach To The Agreement On Exchange Of Information In Tax Matters*, Intertax 8 (2009), at 483

Öner C., *Tax Co-operation: Towards a Level Playing Field*, Intertax 4 (2007), at 326

Osterweil, E., *OECD Report on Harmful Tax Competition and European Union Code of Conduct Compared*, 39 European Taxation 6 (1999), at 198

Owens J., *Moving Towards Better Transparency and Exchange of Information in Tax Matters*, Bulletin for International Taxation 11 (2009), at 557

Pagan J., *Expansion of the scope of Exchange of information and Mutual Assistance in Fiscal Matters*, European Taxation (1991), at 52

Palan R., *A History of Tax Havens, History and Policy*(2009). Retrievable at the following website: http://www.historyandpolicy.org/papers/policy-paper-92.html

Perdelwitz A., *The New Tax Agreement Between Germany and Switzerland – Milestone or Selling of Indulgences?*, European Taxation 12 (2011), at 496

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Persano F., *La cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria*, Torino, Giappichelli, 2006

Persano F., *Sui limiti allo scambiodi informazioni disciplinato da Convenzioni contro le doppie imposizionisul reddito*, *Diritto e pratica tributaria internazionale* (2004), at 358

Piatier A., *L'évasion fiscale et l'assistence administrative entre états*, Paris, 1938

Picciotto S., *International Business Taxation as a Study in the Internationalization of Business Regulation*, London, Weidenfeld and Nicolson, 1992

Pijl H., *State Responsibility in Taxation Matters*, IBFD Bulletin 1 (2006), at 38

Pistone P., *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, forthcoming on Bulletin for International Taxation 4-5 (2013)

Pistone P., *Waiving Bank Secrecy and Exchanging Tax Information in Cross-Border Situations: the Austrian Way to Global Fiscal Transparency*, Salvini L., Melis G. (Eds) *Financial Crisis and the Single Market*, 2011, at 169

Pistone P., *Five Years Of EURYI Research On The Impact Of European Law On Relations With Third Countries In The Field Of Direct Taxes: Selected Remarks For A General Report*, Heidenbauer S., Stürzingler B. (Eds), *The EU's External Dimenstion in Direct Tax Matters*, Vienna, Linde, 2010, at 17

Pita C., *El papel del Centro interamenricano de administraciones tributarias* (CIAT), Uckmar V., Diritto tributario internazionale, Padova, Cedam, 2005

Pitrone F., *Lo scambio di informazioni e la direttiva 2011/16/UE in materia di cooperazione amministrativa: innovazioni e profili critici*, Diritto e pratica tributaria internazionale 2 (2012), at 463.

Porter R.B. et al (Eds), *Efficiency Equity Legitimacy. The Multilateral Trading System at the Millenium*, Washington, Brookings Institution, 2001

Posner R., *Economic Analysis of Law* (VI ed.), New York, Aspen, 2003

Quiñones Cruz N., *La cruzada por la transparencia fiscal y la dudosa apuesta por el intercambio de información*, Derecho Tributario Global 1 (2010), at 4

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Qureshi A., *The Public International Law of Taxation*, London, Springer, 1994

Raskolnikov A., *Crime and Punishment in Taxation: Deceit, Deterrence and the Self-Adjusting Penalty*, 106 Columbia Law Review,

Reich M., *Das Amstshilfeabkommen in Sachen UBS oder die Grenzen der Staatsvertragskompetenz des Bundesrats*, IFF Forum für Steuerrecht (2010), at 116

Reymond H., *The Representation of Nationalities on the Secretariat of the United Nations*, 4 International Review of Administrative Sciences(1983), at 349

Ring D., *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, Florida Tax Review 9 (2009), at 555

Ring D., *International Tax Relations: Theory and Implications*, Tax Law Review (2007), at 83

Rixen T., Schwarz P., *How Effective is the European Union's Savings Tax Directive?: Evidence from four EU Member States*, 50 Journal of Common Market Studies (2011), at 151

Romagnoli S., *Scambio di informazioni: il nuovo art. 26 del Modello OCSE contro le doppie imposizioni*, Il Fisco (2005), at 6238

Rosenau A.N., Czempiel E.O., *Governance without Government: Order and Change in World Politics*, Cambridge, 1992

Rosenbloom H.D., *International Tax Arbitrage and the International Tax System*, David R. Tillinghast Lecture on International Taxation, 53 Tax Law Review (1998), at 137

Ruchelman S., Shapiro S., *Exchange of Information*, Intertax (11) 2002, at 408

Russo R., *Administrative Aspects of the Application of Tax Treaties*, Bulletin for International Fiscal Documentation 10 (2009), at 482

Rust A, Fort E., *Exchange of Information and Bank Secrecy*, Aalphen aan den Rijn, Wolters Kluwer, 2012

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Sacchetto C., *Indagini tributarie e legislazioni straniere sul segreto bancario*, Il Fisco 39 (1996), at 9296

Sacchetto C., *Territorialità (diritto tributario)*, Enciclopedia del diritto, 1992

Sacchetto C., *L'evoluzione della cooperazione internazionale fra le Amministrazioni finanziarie statali in materia di IVA ed imposte dirette: scambio di informazioni e verifiche "incrociate" internazionali*, Bollettino tributario(1990), at 499

Sacchetto C., *L'evoluzione della cooperazione internazionale fra le Amministrazioni finanziarie statali in materia di Iva ed imposte dirette: scambio di informazioni e verifiche "incrociate" internazionali, parte II, la collaborazione fiscale nell'ambito della Comunità economica europea*, Bollettino tributario (1990), at 563

Sacchetto C., *Tutela all'estero dei crediti tributari dello Stato*, Padova, Cedam, 1978

Sawyer A.J., *Tax Havens "Coming from the Cold": A Sign of Changing Times?*, Bulletin for International Taxation 10 (2010), at 546

Sawyer A.J., *Blurring The Distinction Between Avoidance And Evasion: The Abusive Tax Position*, British Tax Review 5 (1996), at 483

Sawyer A.J. , *Developing a World Tax Organisation: The Way Forward*, London, Fiscal Publications, 2009

Schaumburg H., Schlossmacher S., *Article 26 of the OECD Model in the Light of the Right to Informational Self Determination*, IBFD Bulletin 10 (2000), at 527

Schenk T., *International Exchange of Information and the Protection of Taxpayers*, Alphen aan den Rijn, Kluwer Law International, 2009

Schiavolin R., *Poteri istruttori dell'amministrazione finanziaria*, Rivista di diritto tributario, 1994 , I, p. 937

Schlosser P., *Jurisdiction and International Judicial and Administrative Cooperation*, in Recueil des Cours 284, The Hague Academy of International Law, The Hague, 2000

Schneider H., Hubschmid A., *Swiss Banks Say They Will Resist Elements of Proposed Regs (Section 1441—Nonresident Alien Withholding)*, Tax Notes Today (1996), at 161

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Seer R., Gabert I. (Eds), *Mutual Assistance and Information Exchange*, Amsterdam, IBFD, 2010

Seer R., Gabert I., *European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements*, Bulletin for International Taxation 2(2011), at 88

Selicato P., *Scambio di informazioni, contraddittorio e statuto del contribuente*, Rassegna tributaria 2 (2012), at 321

Selicato P., *Il modello di convenzione Ocse in materia di scambio di informazioni: alla ricerca della reciprocità nei trattati in materia di cooperazione fiscale*, Rivista di diritto tributario internazionale 1(2004), at 11

Sengupta D.P., *Tax Treaty Application – Cross Border Administrative Issues*, Lang M. et al (Eds), Tax Treaties: Building Bridges between Law and Economics, Amsterdam, IBFD, 2010,517

Serino M., *Scambio di informazioni e paradisi fiscali – questioni aperte*, Il Fisco (2010), at 2963

Shadwick B., *The* Cayman Islands and United States: Tax Information Exchange Agreement- Is it a Sham or One-Sided?*,* Tax Planning International Review1 (2002), at 3

Slaughter A.M., *The Accountability of Government Networks*, Indiana Journal of Global Legal Studies 2 (2001), at 347

Smiley. S., *Qualified Intermediaries. The EU Savings Directives, Trace – What Does FATCA Really Add?*, Corporate Taxation (2011), at 20

Snidal D., *The Game Theory of International Politics*, World Politics (October 1985), at 25

Soriano A.G., *Toward an Automatic but Asymmetric Exchange of Tax Information: the US Foreign Account Tax Compliance Act (FATCA) as Inflection Point*, 40 Intertax 10 (2012), at 540.

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
di TURINA ALESSANDRO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2013
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Spencer D., *Sharman J.C., International Tax Cooperation*, (3 parts), Journal of International Taxation 12 (2007) – 2 (2008)

Spencer D., *Tax Information Exchange and Bank Secrecy*, Journal of International Taxation (2005), at 23

Spencer D., *Atmosphere is Changing for Exchange of Information*, International Tax Review 5 (2010), at 42

Spies K., *Influence of International Mutual Assistance on EU Tax Law*, 40 Intertax 10 (2012), at 518

Spreutels J., Grijsels C., *Interaction Between Money Laundering and Tax Evasion: Belgian and International Measures in the Fight against Money Laundering*, EC Tax Review 1 (2001), at 3

Stewart M., *Transnational Tax Information Exchange Networks: Steps Towards a Globalised, Legitimate, Tax Administration*, World Tax Journal June (2012), at 152

Succio R., *Illegittimo l'accertamento fondato su scambi di informazioni ove non si rispetti la previsione dell'art. 7 dello Statuto del Contribuente* – Nota a C.T.P. Mantova, 27 maggio 2010, n. 137, Diritto e pratica tributaria internazionale 3 (2010), at 1555

Succio R., *Sharing Bank Deposit Information with Other Countries: Is the US Tax System Becoming the "Aloof" of a Definitive Global Tax Compliance*, Diritto e pratica tributaria internazionale *3* (2009), at 1481

Sunstein C.R., *Problems with Rules*, 83 California Law Review (1995), at 953.

Tanzi V., *Is There a Need for a World Tax Organization?* A. Razin, E. Sadka (Eds), *The Economics of Globalization: Policy Perspectives from Public Economics*, New York, Cambridge University Press,1999

Tanzi V., Zee H.H. , *Can Information Exchange be Effective in Taxing Cross-Border Income Flows?*, K. Andersson, P. Melz and C. Silfverberg (Eds) Modern Issues in the Law of International Taxation, London, Kluwer Law International, 2001

Tanzi V., *Taxation in an Integrating World*, Washington DC, Brookings Institution, 1995

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Teck T.H., *Singapore: Implementing the New OECD Model Standard on Exchange of Information*, Bulletin for International Taxation 12 (2009), at 578

Tello C., Arnold J., *Proposed FATCA Regulations Provide Much Relief though Administrative and Financial Burdens Still Remain*, Bulletin for International Taxation, (4/5) 2012, online version

Thuronyi, V., *In Defense of International Tax Cooperation and a Multilateral Tax Treaty*, Tax Notes International(2001), at 1291

Todd Jones C., *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 Northwestern Journal of (1991-1992), at 454

Tosi L., *La collaborazione con le amministrazioni straniere ai fini della repressione degli illeciti fiscali in materia di imposte dirette*, Il Fisco, 2001, at 11731

Udina M., *Il diritto internazionale tributario*, Padova, Cedam, 1949

Udina M., *L'assistenza internazionale in materia tributaria*, Milano, estratto, 1937

Un Group Of Experts On International Cooperation In Tax Matters, Institutional Framework for International Tax Cooperation, 2003

U.N. Secretariat, Mutual Assistance in Collection of Tax Debts, Report of the United Nations Ad Hoc Group of Experts on International Cooperation in Tax Matters, U.N. Doc. ST/SG/AC.8/2001/L.2 (Aug. 30, 2001)

U.N., Coopération Internationale en matière fiscale. Rapport du Groupe spécial d'experts de la coopération internationale en matière fiscale sur les travaux de sa deuxième réunion, New York, 1984, a13.

Urtz C., *Confidentiality of Taxpayer Information*, *International Transfer Pricing Journal*, 3(2000), a 43

Urtz C., *Admissibility in Austria of Spontaneous Exchange of Information under the EC Mutual Assistance Directive*, *EC Tax Review*(1996) 4, at 171

Valente P., *I Tax Information Exchange Agreements (TIEAs) - Disposizioni Ocse su scambio di informazioni con paradisi fiscali*, Il Fisco XXXV-2009, p. I-5781

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Valente P., *Lo scambio di informazioni automatico nelle fonti internazionali e sovranazionali*, Il Fisco 20 (2010), at I-3160

Valente P., *Lo scambio di informazioni spontaneo nelle fonti internazionali e sovrannazionali*, Il Fisco (32) 2010, at 5170

Valente P., *Lo scambio di informazioni su richiesta nelle fonti comunitarie*, Il Fisco, 31 (2010), at I-4987

Valente P., *Lo scambio di informazioni su richiesta secondo l'OCSE*, Il Fisco 30 (2010), at I-4829

Van Der Bruggen E., Good Faith In The Application And Interpretation Of Double Taxation Conventions, British Tax Review (2003), at 25

Van der Heel Van Dijk L., Pheiffer M., *A Tailor-Made Approach to Fiscal Supervision*, 66 Bulletin for International Taxation 10 (2012), at 578

VAN DER WOUDE M.H., *Liability for Administrative Acts under Article 215(2) EC*, HUEKELS T., McDonnell A., The Action for Damages in Community Law, The Hague, 1996

Van Thiel, S. and M. Vascega (2011), "Assessment of Taxes in Cross Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation", EC Tax Review 20(3), 148

Van Thiel S. (Ed.), *CFE Forum reports: 2010 – 2011: Sharing Information Across Borders in Direct and Indirect Tax*, Brussels, 2010

Vanistendael F., *The European Interest Savings Directive: An Appraisal and Proposals for Reform*, European Taxation 4 (2009), at 152

Vanistendael F., *General Report on the Interest Savings Directive*, EATPL Annual Conference Materials, Budapest, 2006, retrievable on www.eatlp.org

Vanz G., *Indagini fiscali irrituali e caratteri della spontanea collaborazione delcontribuente o di terzi ai fini dell'utilizzabilità del materiale probatorio acquisito*, Rassegna tributaria (1998), at 1394

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Vascega M., van Thiel S., *Assessment of Taxes in Cross- Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation*, EC-Tax Review 3 (2011), at 150

Vervaele J.A., Klip A., European Cooperation between Tax, Customs and Judicial Authorities, Kluwer Law International, The Hague, 2001

Villiger M.E., *Customary International Law and Treaties*, Dordrecht, Martinus Nijhoff, 1985

Vogel K., *On Double Taxation Conventions*, III Edition, London, Kluwer, 1997

Vogel K., *Worldwide vs. Source Taxation of Income*, Intertax 11 (1988), at 224

Vorpe S. (Ed.), *Ilsegreto bancario nello scambio di informazioni fiscali*, Manno,SUPSI, 2011

Waelbroeck D.F., *Liability of Member States*, Heukels T., Mcdonnell A. (Eds), The Action for Damages in Community Law, The Hague, 1996

Waldburger R. , *Entwicklungen in der schweizerischen Amtshilfepolitik in Steuersachen – ein Überblick*, *IFF* Forum (2010), at 80

Webb M.C. , *Defining The Boundaries Of Legitimate State Practices: Norms, Transnational Actors And The OECD's Project On Harmful Tax Competition*11 Review of International Political Economy 4 (2004), at 787

Wenz M. et Al, *Tax Treaty Application: Cross-Border Administrative Issues (Including Exchange of Information, Collection of Taxes, Dispute Settlement and Legal Certainty in Tax Treaty Application)*, Lang M. et al (Ed), Tax Treaties: Building Bridges between Law and Economics, Amsterdam, 2010, at 547

Widmer S., *Exchange of Information*, European Taxation 2 (1981), at 814

Wisselink A., *International Exchange Of Information Between European And Other Countries*, EC Tax Review (1997), at 108

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Wouters J., Meuwissen K., *Global Tax Governance: Work in Progress?* (Leuven Centre for Global Governance Studies, Working Paper No. 59 – February 2011)

Zagaris B., *The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots?*, 35 George Washington International Law Review (2003), at 331

Zielke R., *The Changing Role of Tax Havens – An Empyrical Analysis of the Tax Havens Worldwide*, Bulletin for International Taxation 1 (2011), at 42

Zoller E., *La bonne foi en droit international public*, Paris, Pedone, 1977

Tesi di dottorato "Information Based Administrative Tax Co-operation. Consolidating Standards, Emerging Actors and Evolutionary Perspectives"
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