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Exchange of information and cross-border cooperation between tax authorities

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General Report

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Summary

Since the last IFA Congress in 1990, the world's economic platform has witnessed an unprecedented development in the field of international mutual assistance through exchange of information. The 2008 economic crisis, the 2009 London G20 summit and the combined efforts of the OECD and Global Forum on Transparency and Exchange of Information for Tax Purposes gave rise to a greater determination to efficiently exchange information beyond national borders. By reinforcing international cooperation on tax matters, states not only expect to be able to increase the efficiency of the fight against tax evasion and abusive or aggressive tax schemes but also to optimize tax assessments, which should, in turn, reduce budget deficits by increasing tax receipts.

The evolution of the global exchange of information as of 2008 can be compared to the "big bang". As with the creation of the universe, before the concrete results of this initial expansion are seen a "cooling-off" time is necessary. However, as described in the 39 branch reports, the general trends on most of the issues are slowly evolving. Based on these reports, the general report aims to shed some light to the "uncertainty" resulting from the many developments that have taken place in a short period of time.

In this respect, the general report first describes the international and domestic legal frameworks for the exchange of information and cross-border cooperation between tax authorities (sources, attitudes of the authorities, etc.). It then analyses the current extent and forms of the exchange and addresses the issue of the limits that can be put on the exchange of tax information. It can be concluded that general trends, mostly conforming to the OECD's guidelines, are emerging on each of these specific issues.

In addition, the general report intends to cover new methods of cooperation both on an international level, such as joint audits and simultaneous tax examinations, and on a domestic level, such as the "Rubik agreements" of Switzerland and the Foreign Accounts Tax Compliance Act (FATCA) of the USA. On these two points it can be concluded that the new international methods are prioritized by states. Even though they are not being widely applied at the moment, these forms of cooperation are generally accepted and are currently being implemented in most states. The level of acquiescence is slightly lower with regard to recent domestic practice. While some states have already adopted or are considering adopting similar mechanisms, a general trend has not yet emerged on this matter.

It should also be underlined that, as shown by the various reports, states are currently focusing on broadening their double tax treaty (DTT) and tax information exchange agreement (TIEA) networks, in order to participate in the global exchange of information system. However, less attention seems to be given to the person involved in the process: the taxpayer. On this point, it can be considered that there are two schools of thought. A first group of states seems to consider the exchange of information process as mere "fact gathering" and not as a proper administrative procedure. From this perspective, procedural rights are only granted at the level of the requesting state, for instance during the court process. A second group of states, by contrast, do regard the exchange of information as an administrative

procedure *per se* and therefore respect the procedural rights of the taxpayer, such as the right to be heard, the right to be notified and the right to appeal.

As a result of the detailed analysis on several aspects, fundamentally, it seems that there are three main challenges: (a) to coordinate all the different legal rules; (b) to ensure that effective exchange of information takes place, namely that states can effectively obtain the relevant information domestically through different methods such as know-your-client (KYC) questionnaires and determination of beneficial ownership; and (c) to guarantee the legal protection of the taxpayer.

1. General introduction

1.1. Context

Since the last IFA Congress in 1990, the world's economic platform has witnessed an unprecedented development in the field of international mutual assistance through exchange of information. Indeed, after quite a significant emergence of commercial and financial transactions, the economic crisis of 2008 deeply affected public finances and thereby put considerable pressure on political authorities to reduce their budget deficits. In parallel, a series of scandals, notably the so-called Liechtenstein CD affair, with stolen bank information, and the *UBS* case involving the non-reported income of US taxpayers, gave a further impetus to preventing tax evasion. These developments increased not only the efforts of the OECD, the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) and the G20 to facilitate the effective exchange of information, but also the pressure on states to fight more efficiently against tax crime and abusive tax schemes.

These significant factors gave rise to a greater determination to efficiently exchange information beyond national borders. By reinforcing international co-operation on tax matters, states not only expect to be able to increase the efficiency of the fight against tax evasion and abusive or aggressive tax schemes but also to optimize tax assessments, which should, in turn, reduce budget deficits by increasing tax receipts. Consequently, the international tax arena has participated in the substantial extension of the exchange of information and creation of new types of collaboration between tax authorities.

Following a meeting of 17 OECD member states which took place in Paris on 21 October 2008, it was agreed that the OECD standard for effective and transparent exchange of information should be implemented worldwide and that defensive measures should be adopted against states and jurisdictions refusing to apply the standard. The London G20 summit of 2 April 2009 took place under these circumstances. In their official communiqué the G20 declared: "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."

These efforts were combined with the elaboration of lists of jurisdictions that had not implemented the international standard in terms of exchange of information (so-called "black", "grey" and "white" lists) by the OECD within the framework of the Global Forum. In order to appear on the white list, a state must have signed at least 12 DTTs with the standard of article 26 OECD Model Tax Convention (OECD MTC) or 12 TIEAs. Once a state undertakes (re)negotiations in order to comply with this international standard, it generally concludes a large number of treaties in quite a short period of time.

Therefore, as of 2009, which can be regarded as the turning point, the evolution of the global exchange of information can be compared to the "big bang". Like the universe, which began expanding rapidly in a flash, international developments on this matter created a density that reached a tipping point and exploded with a tremendous expansion of the treaty network.

At the very core of this explosion there is one category of person who forms the main object of the recent developments: the taxpayer. Therefore, the development of the exchange of information rules should inevitably raise the question of the taxpayer's position and create a need to clearly define the scope of the taxpayer's rights.

The general report and the branch reports aim to shed some light on the "thick fog" of uncertainty in several matters. The reports offer a broad description and analysis of the recent trends in exchange of information and cross-border cooperation between tax authorities. They encompass not only the new multilateral or bilateral rules currently applied and developed in this field but also specific issues that the various states might encounter *vis-à-vis* recent developments in the exchange of information.

1.2. Focus and organization of the report

After a description of the current legal framework (see below section 1.3), the report will discuss specific issues pertaining to the current situation in the international exchange of information. Section 2 considers the general international and domestic legal frameworks for the exchange of information and cross-border cooperation between tax authorities (sources, attitudes of the authorities, etc.). It is intended to cover recent developments in the framework of international treaties and domestic legislation on exchange of information and cooperation.

Section 3 discusses the current extent and forms of exchange of information. In this section both the traditional and the alternative forms of exchange of information, as well as the most recent methods put forward against tax evasion, are discussed. Section 4 addresses the current issue of the limits that can be placed on the exchange of tax information. This includes in particular the question of the taxpayer's rights and of the application of the general principles of administrative law. It aims to evaluate the concrete impact that these have in each specific jurisdiction.

The excellent reports rendered by 39 branches show the significant and constant developments in this field.

1.3. Legal framework

Many bilateral DTTs have been renegotiated around the world during the past decade. Most of the time, these DTTs include the standard provision of the OECD MTC on the exchange of information. Article 26 paragraph 1, in its current version,

provides that the competent authorities of contracting states shall exchange such information as is foreseeably relevant for carrying out the provisions of the Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind.

The Global Forum, created in 2000, has been the multilateral framework within which both OECD and non-OECD economies have carried out their works in the area of transparency and exchange of information. Many measures have been put forward as a result of these efforts. Meanwhile, the OECD has been continuing to develop instruments that provide a legal framework for exchange of information such as the model agreement on exchange of information on tax matters (OECD TIEA model) developed jointly with a number of non-member economies, which was published in April 2002. The model represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. It is not a binding instrument but contains a model for both bilateral and multilateral agreements. A large number of bilateral agreements have been based on it since 2002. In the beginning, the development of the TIEA network was noticeably slow. Up to 2008, only 44 TIEAS had been signed. After the "big bang" the number of TIEAs increased to 700.[1]

Following the work of the Global Forum, article 26 OECD MTC was updated in July 2005, at which time paragraphs 4 and 5 were added. These paragraphs make it clear that a state cannot refuse a request for information solely because it has no domestic tax interest in the information (paragraph 4) or solely because it is held by a bank or other financial institution (paragraph 5). The United Nations Model Tax Convention (UN MTC) has also been amended to include a provision on the exchange of information which is similar to article 26 OECD MTC. As of March 2009, most countries, including Switzerland, Luxembourg, Austria and Belgium, have agreed to adopt the international standard of exchange of information as provided for by article 26 OECD MTC.

In addition, the Global Forum currently assesses the administrative assistance standard by means of peer reviews. The review occurs in two phases. During the first phase, an examination is conducted to check whether the legal foundations for the exchange of information in accordance with the international standard are in place. The second phase focuses on checking the effectiveness and efficiency of the exchange of information. Up to now, over 60 countries have been examined in the first phase and 22 countries have been examined in both phases.[2]

Moreover, the Council of Europe and the OECD have put forward the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD Mutual Assistance Convention), currently signed by 43 states.[3] The OECD Mutual Assistance Convention opened for signature by the member states of both organizations on 25 January 1988. The object of the convention is to promote international cooperation for a better operation of domestic tax laws, while respecting the

1 For more information on this point, see Miranda Stewart, "Transnational Tax Information Exchange Networks: Step towards a Globalized, Legitimate Tax Administration", *World Tax Journal*, June 2012, p. 161.

2 For a complete list of reviews, see http://www.eoi-tax.org/keydocs/schedule-of-reviews#y2013 (accessed on 14 March 2013).

3 The complete list can be found at http://www.oecd.org/ctp/exchangeofinformation/Status_of_convention.pdf (accessed on 13 February 2013).

fundamental rights of taxpayers. It has been amended by a protocol that entered into force on 1 June 2011. The effect of the protocol is to align the convention with the international standard on information exchange for tax purposes and in particular by requiring the exchange of bank information on request. It also provides for the opening of the convention to all countries, i.e. non-OECD member states.

With regard to the European Union, in order to ensure that cross-border savings income is taxed effectively, the Savings Directive (Council Directive 2003/48/EC) was adopted in June 2003. As per article 17(2) of the directive, for its provisions to become effective, Switzerland, Liechtenstein, San Marino, Monaco and Andorra must implement equivalent measures based on bilateral agreements. The directive became effective in July 2005. In November 2008, the European Commission adopted an amending proposal to the directive to close the existing loopholes and prevent tax evasion better. Furthermore a new directive on administrative cooperation in the field of taxation (the Administrative Cooperation Directive) (Council Directive 2011/16/EU) was adopted on 15 February 2011 to provide for a "more straightforward" mechanism for the collection of tax information. As per this new directive, the OECD's standard for the exchange of tax information on request is applicable within the EU: no Member State is allowed to refuse a request for information from another Member State solely on the grounds of banking secrecy. This will pave the way for the introduction of the automatic exchange of information, regarding the taxable period as from 1 January 2014, on the following specific categories of income and capital: income from employment, directors' fees, life insurance products not covered by other EU legal instruments on exchange of information, pensions, ownership and income from immovable property (article 8 of the directive). As from 1 July 2017, the automatic exchange of information could be extended to include dividends, capital gains and royalties. The directive applies to all taxes except VAT and excise duties, which are already covered by other EU legislation (Council Regulation (EC) No. 1798/2003 on administrative cooperation in the field of VAT and No. 2073/2004 on administrative cooperation in the field of excise duties). It is also important to underline that with the entry into force of this new legislation, Directive 77/799/EEC was repealed as of 1 January 2013.

Besides, since the paradigm change of March 2009, Switzerland, while adopting the standard of article 26 OECD MTC, has also developed bilateral agreements pertaining to the cooperation in the tax area (so-called withholding tax agreements more commonly known as "Rubik agreements").[4] These agreements aim to find a "solution for the past" and a "solution for the future". The basic idea is to require the Swiss paying agent to levy the taxes due, in the form of a final withholding tax, in accordance with the rules of the contracting state, while preserving the confidentiality of the relevant resident taxpayer. Such agreements are in force, as of 1 January 2013, with the UK and Austria. Germany signed such an agreement on 21 September 2011 but in the end Parliament voted against its ratification.

Finally an important trend is to use domestic legislation to enforce the exchange of information. A significant example of this approach is FATCA enacted by the

4 More details on the subject and practical information can be found at http://www.sif.admin.ch/themen/00502/00758/index.html?lang=en (accessed on 13 March 2013).

USA. This entered into force on 1 January 2013 and is currently being implemented internationally.

2. Sources[5]

International cooperation on exchange of information is not only regulated by the large network of bilateral and/or multilateral tax treaties or TIEAs but also by mostly multilateral "informal" cooperation methods. As detailed below, even though currently the bilateral approach remains the preferred method of exchange, the use of the multilateral approach is constantly increasing. In this section, the different domestic practices of the reporting countries will be briefly analysed.

Moreover, the fact that a given country has a large network of tax treaties does not necessarily indicate the presence of an effective exchange of information. In order to be fully operative, the treaties should be properly implemented in domestic law. For this reason, relevant aspects of the countries' domestic laws will also be discussed in this section.

2.1. Bilateral approach

The past decade's tendency was to increase the number of DTTs including the standard clause of the OECD MTC. In addition, as mentioned above, the OECD TIEA model, containing one bilateral and one multilateral agreement model, was released in 2002. A large number of *bilateral* agreements have been based on this since its publication.

For the time being, most states have a clear preference for the bilateral approach. This tendency may evolve in the future, with the entry into force of the OECD Mutual Assistance Convention. It is also important to underline that, as will be further discussed below, there are several examples of groups of countries exchanging information very efficiently by following a multilateral approach.

2.1.1. OECD MTC

The OECD model is generally closely followed not only by the OECD member states but also by non-member states even though the treaties concluded by the latter may diverge to some extent and may also be influenced by the UN MTC.

2.1.1.1. Excursus: implementation of article 27

Article 27 entitled "Assistance in the collection of taxes" was incorporated in the OECD model in 2003. Except for a few countries such as Mauritius, Uruguay and

5 General disclaimer: the main purpose of this report is to establish the general tendencies of states on the proposed matters in the light of the branch reports. In this respect, it is important to underline that the information contained in this report on the domestic laws and practices of the mentioned countries is retrieved in its entirety from the branch reports except where another source is specifically mentioned.

Colombia, which include this article in most of their DTTs, the general tendency of states is either not to include article 27 at all or to include it very rarely in their bilateral treaties. Moreover, even if a similar provision is inserted, it does not normally follow the model of article 27 OECD MTC. There are two main reasons for this trend.

First, assistance in the collection of taxes is mostly implemented in a multilateral manner, thereby allowing the necessary coordination between the most frequently cooperating countries and eliminating the need to further regulate this issue. For the sake of simplicity, out of a significant number of multilateral means, only a few will be mentioned here. The OECD Mutual Assistance Convention is the most commonly used source. Most states that have become party to this convention do not consider article 27 to be necessary in their bilateral treaties. It should be underlined that some signatory states, such as Canada and Argentina, chose not to include the "Assistance in recovery" section of the convention. Other multilateral sources are more limited in their territorial scope of application. EU countries are bound by Directive 2010/24/EU, which obliges them to assist all other EU states in the recovery of tax claims. The Nordic countries (namely Denmark, Finland, Iceland, Norway and Sweden) have concluded the Nordic Convention on Mutual Assistance in Tax Matters which diverges from the OECD standards in some respects. The Benelux Mutual Assistance Treaty provides for extensive cooperation in the collection of tax claims between Belgium, the Netherlands and Luxembourg. Finally, the South African Development Community (SADC) Multilateral Agreement on Assistance inTax Matters contains an equivalent of article 27 OECD MTC.

Second, article 27 requires a high level of cooperation between tax administrations and causes problems of implementation for some countries. For example, Serbia's tax administration is not sufficiently developed to be able to collaborate with other tax administrations in this respect. For the same reason Portugal, which concluded three DTTs containing a similar provision *before* 2003, has included an equivalent of article 27 only in its DTT with Norway. On this point, as illustrated by Germany's practice, the similarity of legal systems is also deemed to be important. Germany has concluded a few bilateral agreements to various extents on assistance in the collection of taxes as provided by article 27 with countries that have a comparable legal system.

It should be underlined that some states seem to choose simply not to incorporate a similar provision. For example, as noted in the US report, according to the "revenue rule", which is a general rule of customary international law, embodied in the common judicial law recognized in the USA, a country will generally not enforce the collection of another country's tax, or permit collection activity of the other sovereign upon its territory, unless otherwise agreed by the two sovereign states. This rule was called into question in a recent decision rendered by the US Supreme Court,[6] where the Court upheld the conviction of two men under a US criminal statute for attempting to defraud Canada of alcohol taxes.

To sum up, article 27 is rarely included in DTTs. This phenomenon can be explained by the preference for multilateral cooperation in this area and the difficulties of implementation of the necessary rules. Finally, as mentioned above,

6 *Pasquantino* v. *US* 544 US 349 (2005).

some states simply choose not to include a similar provision in their bilateral or multilateral treaties.

2.1.1.2. Model agreement on exchange of information on tax matters

As mentioned above, conclusion of TIEAs has become more and more frequent over the years, intensifying mostly after 2008. This type of agreement is considered by most countries to be very efficient and to produce significantly positive results. Consequently, the majority of states have already concluded or are considering entering into such agreements, with the notable exception of Luxembourg which has no intention of doing so. Generally, OECD member states follow the model agreement while non-member countries' treaties either diverge to a certain extent from the OECD TIEA model, as is the case for Peru, or are simply not based on the model, as with Russia.

As it is widely known, while DTTs are mostly concluded with trading partners maintaining a traditional tax system, TIEAs are chiefly signed with "tax havens". Accordingly, unlike DTTs, TIEAs are mainly focused on exchange of information matters and do not offer further tax privileges. For this reason, as illustrated by concerns expressed in Uruguay, some countries considered as tax havens by certain other countries may not be willing to conclude TIEAs. This has impelled some states to grant additional benefits to their TIEA partners in order to encourage other states to conclude this type of agreement. In this respect, Australia has signed a number of "additional benefits agreements" (ABAs) with its TIEA partners. Simply put, ABAs provide for the allocation of taxing rights with respect to certain income of certain types of individuals and establish a mechanism to assist in the resolution of disputes arising from transfer pricing adjustments. In the same vein, two amendments were made to the Canadian Income Tax Act in 2007. Moreover, as will be further discussed below, by signing a TIEA with a state, jurisdictions which would otherwise have been qualified as tax havens will be treated as "normal" countries, thereby escaping the anti-avoidance rules put in place in order to fight harmful tax practices.

It is important to emphasize that, even though the OECD TIEA model contains provisions for a bilateral and a multilateral treaty, countries prefer to conclude bilateral treaties. Hence, the dominance of the bilateral approach is also confirmed by this tendency. A noteworthy approach is followed by the Nordic countries. These countries' cooperation extends to negotiation of agreements based on the OECD TIEA model as a result of a project set up by the Nordic Council of Ministers. Accordingly, the Nordic countries negotiate TIEAs together with third states but sign bilateral agreements. They have experienced a positive result, as even though they are relatively small countries on an individual basis, they have managed to attract a significant number of TIEA contracting partners by offering a treaty package deal.

2.1.2. Tax haven policy

Countries' tax haven policies diverge to a great extent. There is a large palette of different treatments varying from Austria, which considers that establishing a list of uncooperative countries is counterproductive from the perspective of foreign economic policy, to Estonia, which maintains a black and a white list. However, the most common practice is not to establish any domestic criteria or blacklist and to follow the OECD's guidelines on this matter.

States that have adopted a statutory definition of tax havens most commonly use some or all of the following criteria: (a) no income tax or a significantly low effective rate of income tax compared to the rate applicable to income of the same nature in other states; (b) the existence of special tax regimes; (c) the lack of effective exchange of information; (d) a lack of transparency at the legal, regulatory or administrative performance levels; (e) no requirement for substantial economic activity/less than 50 per cent of the entity's income consists of real business activities. Some states, like Russia, have not adopted express criteria for defining tax havens, but nonetheless have charged an authority with preparing a blacklist. In Russia's case this lack of clarity has resulted in two lists slightly different from each other: the list established by the Ministry of Finance and the list of the Bank of Russia. Most states do not consider that a domestic law regulation or a list is necessary as they have efficient CFC and/or anti-abuse rules permitting the prevention of harmful tax practices.

Several measures are put in place for the tax treatment of income linked to countries fulfilling at least one of the tax haven criteria or CFC/anti-abuse rules. Usually states provide for a more detailed transfer pricing regulation, higher rates of withholding and income tax, either the impossibility of deducting losses or their stricter treatment and specific notification procedures combined with the enclosure of several documents.

Countries considered as tax havens in the light of the domestic legislation or international guidelines may avoid the above-mentioned consequences by signing a TIEA or a DTT with an extensive exchange of information provision, i.e. including paragraph 5.

It is important to emphasize that, while determining the potential classification as tax havens, despite the objective criteria available at both domestic or international levels, or both, countries also take into consideration their foreign policy and relations with the given countries. Most probably this is the main reason lying behind the increasing use of "white lists" replacing the traditional lists of uncooperative countries. Changes made in Italian domestic law in 2007 illustrate this new tendency. As per this amendment, not yet in force, the blacklist will be replaced by a new white list of countries providing a sufficient level of fiscal cooperation and having a comparable tax rate to Italy's. States that are not listed will be considered as tax havens.

2.2. Multilateral approach

Despite the fact that the bilateral approach remains the preferred method of exchange of information, the OECD Mutual Assistance Convention, currently signed by 43 states, constitutes an important multilateral source most likely to influence the practice on the matter. The convention covers a wider range of taxes than bilateral treaties, such as VAT/GST and social security contributions, and provides for all possible forms of administrative cooperation between states in the assessment and collection of taxes. Consequently, the Mutual Assistance

Convention has the merit of allowing signatory states to extend their treaty networks related to exchange of information not only to new contracting partners but also to other taxes, in accordance with the latest criteria established by the OECD, in a rather effortless way. It is important to underline that some signatory states have made a reservation to section II of the convention entitled "Assistance in recovery".

Besides this international effort, there are several other multilateral cooperation groups, either international or regional.[7] The first and the most developed multilateral cooperation is assistance within the EU, which is efficiently taking place within the framework designated by the directives. In this respect, it is also important to mention EUROFISC, a mechanism provided for EU Member States in order to enhance their administrative cooperation in combating organized VAT fraud and especially the so-called "carousel fraud". The second significant effort is the Nordic countries' alliance, which also served a base for the work carried out by the OECD and the Council of Europe on the Mutual Assistance Convention. The Nordic countries have concluded a multilateral treaty for the avoidance of double taxation and another on mutual assistance, and they also cooperate in the negotiation of TIEAs with third states. On this point, it is important to underline that European Member States can also benefit from the Nordic conventions in some cases.[8] Another noteworthy example of multilateral cooperation is the Joint International Tax Shelter Information Centre (JITSIC), which currently has seven formal members, namely Australia, Canada, Japan, the UK, the USA, the Republic of Korea (South Korea) and China, as well as two observer members, France and Germany. JITSIC countries' collaboration diverges from that of the Nordic countries as they do not have multilateral treaties on exchange of information but are linked by bilateral agreements. JITSIC was established in 2004 with the aim of tackling abusive tax schemes. The main aim is to improve members' capacity to deal with risks posed by tax havens, to share research and information on schemes encountered and strategies adopted, and to conduct joint training sessions. The working group has had a great success, as demonstrated by the fact that the US foreign tax credit generator schemes were first discovered by HMRC and provided to the IRS by the UK authority. A number of other groups exist, such as the Study Group on Asian Tax Administration and Research (SGATAR), which has 16 members. These regional and international multilateral cooperation schemes seem to be highly beneficial to their member states.

2.3. Exchange of information in practice

2.3.1. Number of requests

The number of requests has increased remarkably in the last years. The number of incoming requests varies widely from Colombia, which has not received any so far, to Russia, which received more than 5,000 requests from foreign tax authorities in 2003. Generally, countries receive a larger number of requests than they send abroad.

7 For the sake of simplicity only some of them will be mentioned here.
8 See Portugal's branch report for further details.

For countries practising spontaneous and automatic exchange of information, a greater part of the communication takes place by these two methods.

It is also important to underline that exchange of information for VAT purposes is generally more significant than exchange on direct taxes.

2.3.2. Necessary amount of time to provide the requested information

The necessary amount of time to provide the information requested depends mostly on the availability of that particular information. If the data are already available the exchange is relatively swift, i.e. varying from two to six months. If the information has to be obtained by other institutions or from the taxpayer itself, depending on the complexity of the request, the required amount of time fluctuates between six to twelve months. In some rare cases, due to the particularities of the request, the preparation of the solicited data may take more than a year. It is possible to conclude that states are generally compliant with the OECD's recommendations on this point.

2.3.3. Reasons for more intensive cooperation

Countries most commonly exchange information with their major trading partners, neighbouring countries and members of the same organizations such as the EU, Nordic countries and JITSIC. Other main reasons for a frequent exchange of information with a third state are political connections, as indicated by New Zealand, large numbers of migrated citizens, as expressed by Serbia, a large amount of investment, as underlined by South Korea, a large amount of cross-border activity, as emphasized by Denmark, and high number of citizens living in that particular country, as indicated by Poland and the UK.

The significance of the language was only invoked by two countries, Italy and Russia. According to Italy's report, the necessity to translate requests slows down the exchange of information procedure. In the Russian branch reporter's view one of the reasons for the exchange of information being more active and rapid between Russia and the former Soviet Union countries is the common language. Even though not frequently mentioned in the branch reports, language seems to be an important factor. In fact most countries exchange information more frequently with other countries using the same language. Of the various examples available, we can enumerate the regular exchange of information between New Zealand and its treaty partners Australia, the UK and the USA, the frequent cooperation between France, Belgium and Luxembourg and the intense collaboration between Canada, the UK and the USA.

2.4. Domestic law

Pursuant to the branch reports, domestic laws support the exchange of information procedures. Even though from time to time there are some shortcomings, states are quickly making the necessary amendments in order to comply with international standards. For instance, Italy and South Korea have made modifications to the existing law in order to render the treaty ratification procedure easier, the Netherlands

amended its domestic regulations in order to reply to exchange of information requests even more swiftly and India has developed several institutions as well as new tax return forms.

Undoubtedly, domestic laws may sometimes prevent compliance with all of the internationally provided forms of exchange and assistance. This is the case for several countries such as Poland and Serbia, which state that some forms of tax cooperation practised at the international level, e.g. assistance in collection of taxes, cannot be domestically implemented for the time being. Nonetheless, countries do not have an obligation to provide for each and every internationally recommended form of collaboration in tax matters. Therefore, these small divergences are not particularly significant.

Finally, it is important to mention some unilateral measures taken by states. Voluntary disclosure procedures are quite frequent, as is the case in Denmark and Israel. A unique as well as interesting unilateral measure is Serbia's exchange of information procedure. Where a DTT is lacking legal assistance may still be provided by this country if the following five conditions, largely based on the OECD criteria, are cumulatively met: (a) reciprocity; (b) confidentiality of the information provided; (c) avoidance of double taxation; (d) protection of public policy and other important public interests; and (e) protection of professional secrets.

3. Extent and forms of the exchange of information

3.1. Extent

3.1.1. Taxes covered

Since 29 April 2000, the text of article 26 paragraph 1 has made it clear that the exchange of information is not restricted by article 2 (taxes covered). Accordingly, "taxes of every kind", i.e. direct and indirect taxes, fall within the scope of the exchange of information.

However, as per the branch reports, in most DTTs exchange of information is still limited to taxes covered by the treaty, partly because the amendment was made in 2000 and the older treaties have not yet been modified. In this vein, some countries, such as Finland, incorporate a broad clause in all recent treaties and actively update their older treaties.

Nevertheless, a great number of countries do not follow this trend. As mentioned in the Swiss report, some newly concluded/updated treaties continue to contain a narrow clause. This lack of systematic inclusion results in the absence of a broad clause in most cases. In fact, a clause covering "taxes of every kind" is generally found in less than one-third of the treaties concluded by a given country. For example, only 20 Canadian, 7 Danish, 8 Estonian and 10 Polish DTTs allow exchange of information on "taxes of every kind".

In contrast, some other states, such as Germany, the UK, India and the USA, adopt an extensive approach on the matter and include a broad clause in as many treaties as possible, depending on the practice of their contracting partner.

It is interesting to note that, generally, countries more readily accept not limiting exchange of information provisions to *persons* covered by treaties.

3.1.2. Interaction between information obtained for indirect and direct tax purposes

In most countries the information obtained under a tax treaty can only be used for the purposes of the taxes covered by that treaty. Some countries consider that, if the treaty covers "taxes of every kind", the information obtained can be used with regard to all taxes. In all other cases, information obtained for indirect taxes cannot be used for direct tax purposes and vice versa. In some cases, as illustrated by the DTTs concluded by Belgium with Chile and the Netherlands, even if the scope of the treaty is limited to certain taxes, the use of the information obtained is permitted for all kinds of taxes.

Generally, domestic laws contain neither restrictions nor specific rules on this matter. Only some countries' domestic law, such as in Australia, Canada and Chinese Taipei, explicitly provides for the use of the information obtained on direct taxes for indirect tax purposes and vice versa. However, regardless of the domestic law provisions, if an international treaty excludes this possibility, it is not possible to use the information. Moreover, as mentioned by Austria, in order to use the information received for indirect tax purposes efficiently, it might be indispensable to raise an additional request for information relevant for direct tax purposes.

Several regulations and directives of the EU permit the use of the information obtained for direct and indirect tax purposes (see for example article 16 of the Administrative Cooperation Directive). Most European countries make use of these provisions as demonstrated by the Polish Administrative Court's decision, which recognized information obtained by means of VIES, a system used to exchange information on value added tax between EU Member States, as eligible evidence in a corporate income tax case.[9] Nevertheless, some Member States show reluctance on this point. For example, the Czech Republic permits the use of the information for the purposes of all taxes to a limited extent only, as some states have attempted to obtain information concerning direct taxes by the means designated for indirect taxes, because of the quicker response. If not avoided, such conduct may result in an overload of the standardized indirect taxes information exchange system.

3.1.3. Definition of the concept of "fishing expeditions"

According to article 26 paragraph 1, the competent authorities of the contracting states exchange information that is "foreseeably relevant". This term was added in 2005 and replaced the word "necessary". As per the OECD commentary:

> "[t]he standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in 'fishing

9 Judgment of the Administrative Court in Wroclaw of 13 July 2012, case file no. I SA/Wr 584/12.

> expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given tax payer" (§5 ad article 26).

Consequently, the term foreseeably relevant already excludes "fishing expeditions". However, this latter concept is difficult to define.

This concept is commonly used, but rarely defined at an international level. As per the branch reports, it is also very uncommon to find a statutory definition of the term "fishing expedition". Before analysing the concept, it is important to underline that some countries' domestic tax rules, such as those of New Zealand and Russia, do not prohibit "fishing expeditions".

This lack of definition does not mean a total absence of established criteria on the matter. First of all, in some countries, a definition is given either by case law or by documents such as circular letters and manuals. For example, Mauritius follows the principle laid down in a court case rendered in the UK,[10] which defines a fishing expedition as

> " [...] where what is sought is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence. It is the search for material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence to support allegations of fact, which have been raised bona fide with adequate particularization."

As another example, the Netherlands Parliament defined this concept as

> "a request with regard to one or more taxpayers without a concrete reason. It concerns situations in which the link between the requested information and the taxpayer(s) mentioned is insufficiently substantiated, as a result of which it cannot be concluded that the information requested is expected to be of relevance for the provisions of the treaty or domestic law."

Moreover, even if no statutory definition or public policy is available on the matter, some precision can be made by other Acts in a given country. This is the case for South Africa, where there is no specific definition of the term "fishing expedition" but section 45 of the Promotion of Access to Information Act 2 of 2000 (PAIA) provides that:

> "[t]he information officer of a public body may refuse a request for access to a record of the body if (i) the request is manifestly frivolous or vexatious; or (ii) the work involved in processing the request would substantially and unreasonably divert the resources of the public body."

Besides, most countries, as exemplified by Sweden, Estonia and Israel, follow the OECD guidance. Furthermore, some international agreements, like the DTT concluded between Argentina and Uruguay, define the concept to a certain extent.

[10] *First American Corp and Anor* v. *Sheik Zayed Al-Nayan*: State of Norway's Application (No. 1) (1989) 1All ER 661.

In Switzerland, the "fishing expedition" concept has been analysed in detail in the judgment rendered by the Federal Administrative Court on 5 March 2009.[11] The Court had to examine the request made by the IRS to the Swiss Federal Tax Authority concerning the beneficial owners of the offshore companies created for the purpose of circumventing the qualified intermediary (QI) system. The IRS request did not mention names of taxpayers but described concretely and precisely the "pattern of facts" used by these persons. The Court ruled that a request containing elements precise enough to permit the presumption that a "tax fraud or the like" could have been committed did not constitute a "fishing expedition". The US request was therefore considered as being valid, even though the taxpayers concerned were not identified by their names.

As a result, it can be concluded that, even though the concept of "fishing expeditions" is rarely defined at either domestic or international level, there is a common understanding as to its meaning. As stated by the UK report, the ordinary everyday definition of the English language seems to fulfil the purpose.

In our opinion, most states should have a consensus on the following definition: speculative requests for discovery of interesting information and random collection of pieces of evidence that have no apparent nexus to an open inquiry or investigation.

3.1.4. Analysis of the implementation of article 26 paragraph 5 OECD MTC

Article 26 paragraph 5 OECD MTC provides that no requested state shall 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.

3.1.4.1. Incorporation by the various states

Paragraph 5 of article 26 was added to the OECD model on 15 July 2005 by the 2005 update to the model tax convention. Several countries such as Austria, Belgium and Switzerland have made a reservation to this rule. Some other countries, like Serbia, did not make a reservation but preferred to follow a conservative approach. Given the significance of the OECD's work in the area and the effect of the financial crisis, combined with the 2009 London G20 Summit, the reservations made to this article were withdrawn and states were not able to persist with their conservative approach. At the present time, none of the OECD member states categorically refuses to incorporate this paragraph in their treaties and most non-OECD members follow the OECD approach.

Despite these important developments, paragraph 5 has not been incorporated in all DTTs. In most cases, the exchange of information clause contained in a DTT is consistent with article 26 of the OECD MTC at the time of the negotiation, which means that paragraph 5 is most commonly found in treaties concluded after 2005. Besides, as demonstrated by the example of Chile, for some states whose domestic law provided for banking secrecy, the inclusion of the paragraph in treaties was

[11] Judgment of Federal Administrative Court of 5 March 2009, A-7342/2008 and A-7426/2008.

significantly delayed. In Chile's case, the modification of the domestic legislation was completed in January 2010 and paragraph 5 was only included after that date, in merely two treaties for the time being, namely those with the USA and Australia, neither yet in force.

In summary, it appears that most states are currently updating and renegotiating their DTTs to include paragraph 5. In any event, according to the branch reports, as most states do not provide for domestic secrecy on these matters, the non-existence of paragraph 5 does not prevent an effective exchange of information.

3.1.4.2. Definition of the terms contained in paragraph 5

Although the three terms contained in this provision, namely ownership interest, other financial institution and person acting in an agency or a fiduciary capacity, are defined by the OECD commentaries,[12] the interpretation given by domestic laws and different national practices is of the utmost importance. However, as it will be detailed below, most countries do not have a specific definition of these terms; either they follow the OECD guidelines or they interpret them in the light of Acts/circulars/manuals referring to other aspects of law.

The tendency is indeed to cover all legal and natural persons, taking into account the ever increasing range of legal arrangements including not only traditional arrangements such as trusts, foundations and investment funds, but also any new instrument which may be set up by taxpayers.

3.1.4.2.1. Scope of the "ownership interest" concept

The scope of this concept is described in detail in the OECD Commentary of the Agreement on Exchange of Information on Tax Matters (§50 ff. ad article 5). To summarize briefly, the term comprises not only the legal but also the beneficial owner. The requested state must be able to provide information about the persons in an ownership chain, if it is possible to do so without disproportionate difficulty, unless the information is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

The "ownership interest" concept is generally not defined by domestic law and there seem to be no clearly indicated domestic policies on this point. One of the main reasons for this absence of definition, as expressly mentioned by Austria, is that countries follow the rules established by the OECD and prefer not to define terms already described in the OECD commentary in order to prevent "mismatches of interpretation". The other reason, as put forward by several countries such as the Czech Republic, Estonia and Israel, is that the interpretation of this term does not represent any particular difficulties as "trusts" and/ or "partnerships" are not recognized in these jurisdictions. Finally, as mentioned by Colombia, the case law may already provide for an obligation to disclose tax information and the requirements of the internationally established standards for the exchange of information can thus be fulfilled without any obstacles.

In some countries "ownership" is defined in domestic law but not for tax purposes. Nonetheless, these definitions shed some light on the interpretation of the

[12] Commentary on the OECD MTC and Commentary on the Agreement on Exchange of Information on Tax Matters.

concept. For example, in Malta, the Civil Code defines "ownership" as the right to enjoy and dispose of things in the most absolute manner, provided no use thereof is made which is prohibited by law.

3.1.4.2.2. Definition of "other financial institution"

Like the concept "ownership interest", the term "other financial institution" is usually not defined by domestic law. However, the term "financial institution" is frequently defined in statutory law, even if not for tax purposes. In fact, the concept is mostly found in the banking or similar Acts of domestic law. This is the case for Australia, Austria, Estonia, Germany, India, Luxembourg, Malta, New Zealand, Poland and Serbia. In Uruguay, the definition is given in a government decree. Finally, Italy describes the term in a circular and similarly Japan defines it in its manual of the National Tax Agency.

Instead of giving a general definition, most countries prefer to list the institutions that are to be considered as "financial institutions". As per the lists contained in the branch reports, the term is primarily understood to encompass banks and credit institutions. Other most commonly listed institutions are foreign bank branches, insurance companies, undertakings active in leasing, factoring and consumer credit operations, risk capital payment services and management companies.

A general definition is found in New Zealand's law and a general exception for some institutions has been made by Japanese law. By the combination of these two countries' regulations, the following definition can be obtained:

> "the term financial institution is given a broad meaning and would generally encompass any body of persons (incorporated or otherwise) that carries on the business of borrowing and lending money or providing financial services; institutions and securities companies dealing with the usual deposits and savings are reserved."

Another general definition is given by India in its Reserve Bank of India Act. This definition has to be noted as it has the merit of being much more detailed and clear both on the general definition and the exceptions. It states as follows:

> "[t]he term financial institution means any non-banking institution which carries on as its business or part of its business any of the following activities, namely: (a) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own; (b) the acquisition of shares, stock, bonds, debentures or securities issued by a government or local authority or other marketable securities of a like nature; (c) letting or delivering of any goods to a hirer under a hire-purchase agreement as defined in clause (c) of section 2 of the Hire-Purchase Act, 1972; (d) the carrying on of any class of insurance business; (e) managing, conducting or supervising, as foreman, agent or in any other capacity, of chits or kuries as defined in any law which is for the time being in force in any State, or any business, which is similar thereto; (f) collecting, for any purpose or under any scheme or arrangement by whatever name called monies in lump sum or otherwise, by way of subscriptions or by sale of units, or other instruments or in any other manner and awarding prizes or gifts, whether in cash or kind, or disbursing monies in any other way, to persons from whom monies

are collected or to any other person. But does not include any institution, which carries on as its principal business, (a) agricultural operations; or industrial activity; or; (b) the purchase or sale of any goods (other than securities) or the providing of any services; or (c) the purchase, construction or sale of immovable property, so however, that no portion of the income of the institution is derived from the financing of purchases, constructions or sales of immovable property by other persons."

3.1.4.2.3. Interpretation of a "person acting in an agency or a fiduciary capacity"

The interpretation of this term seems not to cause any specific problems, as the branch reports merely contain information on this matter. States follow the OECD commentary (§19.12 ad article 26) on this point or refer to the definitions made by court decisions or even dictionaries (see the Australian report in this respect). "Fiduciary" and/or "agent" is usually defined in Civil Codes or similar Acts as mentioned by some countries such as Malta, India, Luxembourg, Serbia and Uruguay. However, these definitions fall outside the scope of this report.

From an international tax law perspective, a "person acting in an agency or a fiduciary capacity" can be defined as follows: "a person who has been entrusted with the authority or capacity to create or affect legal relations regarding the management of assets on behalf of another person (principal) and who acts solely within the limits of this entrustment".

3.2. Forms

3.2.1. Traditional

Exchange of information between tax authorities may take several forms:

- on request, concerning a specific case;
- automatically;
- spontaneously (for example in the case of a state having acquired through certain investigations information which it assumes to be of interest to another state).

Even though there are states that are still reluctant, the idea of an automatic, or even a spontaneous, exchange of information is more and more accepted throughout the world. These three forms of exchange of information tend to be combined (see the new European Council Directive 2011/16/EU). Moreover, other techniques for obtaining tax information are being developed (see the OECD Model Agreement for Simultaneous Tax Examinations; use of tax identification numbers in an international context; use of the OECD standard magnetic format for automatic exchange; the OECD Model Memorandum of Understanding for Automatic Exchange of Information).

3.2.1.1. Exchange on request, spontaneous and automatic exchange

As per the branch reports, for the time being, exchange on request remains the most commonly used method. For example, in Austria bank information can only be exchanged on request. Another example is Switzerland where the traditional and the exclusive way of exchange is on request. The most restrictive approach is taken by Liechtenstein. The domestic law of the country expressly states that administrative assistance only includes the exchange of information on request.

For the time being, the use of spontaneous and automatic methods does not seem to be changing this tendency. For instance, in Canada, where automatic exchange is possible and highly valued, the current priority is to develop the "on-request" network. As summarized in the Luxembourg report, there are several reasons for this preference. First, exchange on request is the most proven and balanced technique, particularly in terms of privacy rights and data protection. Second, it is the method most compatible with domestic laws and therefore can easily be implemented. Finally, as expressed in the Serbian report, enforcement of spontaneous and automatic exchange of information requires larger human and technical resources.

Even though exchange on request remains the most frequently used method, as stated by the Estonian report, the amount of the information exchanged via automatic exchange can be larger. Moreover, the focus on this type of exchange has been constantly increasing at the OECD level, within the EU and finally in the USA, as demonstrated by FATCA and by some of the US TIEAs which includes automatic exchange (see below section 3.2.3). In some countries, such as Denmark and Norway, automatic exchange of information is already the preferred method of data communication. In order to provide automatic exchange, countries generally conclude a memorandum of understanding or apply the principle of reciprocity. On this point, Australia adopted a remarkably extensive approach. The country sends bulk data to 41 countries and follows a non-discriminatory approach, i.e. data are sent automatically even if similar data cannot be received from a DTT partner. It is important to note that the Luxembourg report puts forward an interesting point of view on automatic exchange of information. As per this report, the system of automatic exchange is discriminatory in the sense that domestic clients, whose information is not automatically sent to their tax authorities at the domestic level, would enjoy a higher degree of privacy and data protection than cross-border clients.

To sum up, the two preferred forms are on request and automatic. While exchange on request remains the most frequently used method, the emerging tendency is for automatic exchange.

3.2.1.2. Use of electronic support

Although not expressly addressed in many branch reports, use of electronic support is frequent and most likely to amplify in the near future.

Electronic transfer of data is mandatory between the European Member States as per articles 20 and 21 of the Administrative Cooperation Directive. Consequently, when the directive is fully implemented all Member States will have to use electronic support to exchange information. Most European countries have already adopted electronic support and are transmitting the relevant data by CCN

mail (Common Communication Network), a secure mail system. Some Member States, like Spain, are in the process of making the necessary adjustments in order to permit efficient electronic data communication. Interestingly, in Italy, information is mostly exchanged on paper, and only exceptionally by using electronic support. The Italian report gives the example of the "stolen lists", in particular the so-called Falciani list in this respect (see below section 4.3 for the use of stolen data).

Other groups of countries also have specific electronic databases for exchange of information purposes. For example, the Nordic countries use the TLS mail system between themselves and Russia, Belarus and Kazakhstan exchange information on indirect taxes on a monthly basis in electronic form.

Electronic communication is also used between countries that are not party to the same organization/group. In these cases a specific secure mailing system does not exist, but encrypted CDs and track and trace mails are used. In this respect the most important challenge is the protection of the information transmitted. As mentioned in the Canadian report, generally, the requested country will only engage in these forms of exchange with countries that have sufficiently secure, and compatible, data encryption technology. On this point, it is important to mention that the adoption of uniform encryption software and procedures at the OECD level will have the merit of facilitating the safe and efficient exchange of information through electronic means. Another significant problem, as expressed in the Belgian report, is the disparity between the computer systems used by different countries, which sometimes slows down the transfer of information, because files must be converted into a format that can be used by the recipient.

Electronic transmission of data is indubitably gaining importance; however, this system is not used by all countries. In these cases the relevant information is transferred by post, as indicated in the South African report.

3.2.1.3. Group requests

The possibility of contracting states to exchange information on the basis of group requests was concretized in the 2012 update of the OECD's commentary to article 26[13] with the following words:

> "The Commentary was expanded to develop the interpretation of the standard of 'foreseeable relevance' and the term 'fishing expeditions' through the addition of: general clarifications (see paragraph 5), language in respect of the identification of the taxpayer under examination or investigation (see paragraph 5.1), language in respect of requests in relation to a group of taxpayers (see paragraph 5.2)..."

Paragraph 5.2 states that:

> "The standard of 'foreseeable relevance' can be met both in cases dealing with one taxpayer (whether identified by name or otherwise) or several taxpayers (whether identified by name or otherwise). Where a Contracting State undertakes an investigation into a particular group of taxpayers in accordance with its laws, any request related to the investigation will typically serve 'the administration of enforcement' of its domestic tax laws and thus comply with the requirements of paragraph 1, provided it meets the standard of 'foreseeable relevance'. However, where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition, as the requesting State cannot point to an ongoing investigation into the affairs of a particular taxpayer which in most cases would by itself dispel the notion of the request being random or speculative."

[13] The update of the commentary to art. 26 of the OECD MTC was approved by the OECD Council on 17 July 2012 (§5.2 ff.).

It should be noted that the modifications concerning group requests were only made to the OECD commentary and not in the text of the OECD MTC.

As expressed in the branch report of Luxembourg, the availability of this type of request may depend on the approach adopted by a given country on the interpretation of treaties, i.e. the static or dynamic approach. However, most countries seem to have applied the dynamic approach on this point, as group requests are considered to be possible even though not practised very often up to now.

A group request implies a request that not only covers a specific person but a group of taxpayers not individually identified that are in a similar situation or that share at least one characteristic provoking a similar outcome. The information requested within this procedure must be "foreseeably relevant" and must not constitute a "fishing expedition" (see above section 3.1.3). Accordingly, the requested states will conduct a case-by-case basis analysis. The requesting states must provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for which information is requested have been non-compliant with that law supported by a clear factual basis. Moreover, the requesting states have to show that there is an on-going investigation in their country and the request must include the facts and circumstances found in the course of their investigation. Finally, it has to be substantiated that the information requested will contribute to clarifying the matter.

As rightly invoked in the Netherlands' report, group requests could be problematic from the point of view of secrecy and privacy (see below section 4). If the received documents are used in fiscal proceedings, there is a risk that the names of persons other than the taxpayer will be revealed. Consequently, some countries are more reticent about using of this type of request. For example, in Portugal and Serbia, for the time being, group requests are not possible.

It is important to note that some countries that are reluctant to accede to group requests have concluded specific agreements with the USA providing for that possibility. As an example it is possible to mention Liechtenstein and Japan. While Liechtenstein agreement policy only provides for an international exchange of information on request, the US Administrative Assistance Act also permits the submission of so-called group requests for a limited period of 12 months. In Japan according to Special Enforcement Law article 9 clause 1, if the authority to inquire and inspect to provide information based on a tax treaty is used, the target person is limited to the "those who are identified in the request concerned", and it is necessary to satisfy this requirement. However, Japan has agreed to allow group

requests coming from the USA by signing the FATCA agreement (see also below section 3.2.3).

Finally, another noteworthy example related to the USA is given by Switzerland. The Swiss government announced in summer 2012 that it would adopt the new OECD standard in terms of group requests based on a pattern of fact. However, it is interesting to note that, as mentioned above (see above section 3.1.3), the Federal Administrative Court already considered in 2009, regarding the USA–Switzerland tax treaty (which provides for an exchange of information for the purpose of applying the US domestic tax law only in the event of a tax fraud or the like), that an exchange of information would be possible even if the request did not mention the names of the persons concerned, if there were enough "search criteria" to allow the identification of the persons involved in the tax fraud (pattern of facts).[14] This request made by the IRS concerning 300 taxpayers can be regarded as the first group request, as far as is known.

3.2.1.4. System provided by "Rubik"

Another approach to the exchange of information, developed by Switzerland, consists of providing, in international agreements, for a withholding tax mechanism as a waiver of the exchange of information. The mechanism is as follows. Switzerland agrees with a third country to have the relevant paying agent register the assets belonging to clients from this third country and the final withholding tax is levied at the agreed rate. First the existing assets are registered and regularized. Once this procedure is carried out, the tax arising from future assets of the taxpayer is collected by Switzerland's paying agents. The paying agent passes the tax amount on to the Federal Tax Administration (FTA). Details of the client's country of domicile are provided as part of this process. However, the client's name is not disclosed. The total tax revenues received are then passed on to the relevant country of domicile by the FTA. The tax privacy of the bank's client is therefore safeguarded. As expressed in the Swiss report, the Rubik system remains very attractive for foreign countries since Switzerland is in charge of tax collection "on behalf of" the contracting state.

Switzerland has concluded two Rubik agreements so far, with the UK and Austria, which entered into force on 1 January 2013. An agreement was also signed with Germany; however, it did not enter into force as it was rejected by the German Parliament. In addition, Switzerland has entered into a dialogue with Italy and held discussions with Greece about the conclusion of similar agreements.

As can be deduced from the branch reports, for the time being there is no general tendency "for" or "against" the system. Some countries, like Chile, have simply not followed this approach up to now; and other states, such as Malta, have not considered it as there is no withholding tax on outbound payments and consequently the implementation of a similar system seems difficult. Finally some countries, like Spain, are following developments on the matter.

Several countries, such as the Netherlands, Denmark and Sweden, have expressed concern about the withholding tax mechanism. According to the Netherlands report, this type of arrangement can be considered as continuing to give the

[14] Judgment of Federal Administrative Court of 5 March 2009, A-7342/2008 and A-7426/2008.

taxpayer the possibility of hiding the income and assets necessary for the tax authorities to examine the taxpayer's overall compliance with tax law. Sweden's report implies that countries should move forward with the exchange of information rather than finding new solutions. Countries holding a similar opinion consider that the system put in place in Switzerland is not sustainable in the long run.

However, there are also several countries that are supportive of the idea. For example, the Belgian authorities have not excluded the conclusion of a similar agreement. Moreover, Liechtenstein and Luxembourg also consider that the system provided by Rubik can be followed and can be perfectly sustainable in the long term. In accordance with the Luxembourg report, this approach has the merit of solving the problem of how to safeguard client privacy while at the same time making sure that clients pay the taxes they owe. As per the Liechtenstein report, the fact that withholding tax is an equivalent measure to the automatic exchange of information has already been demonstrated by the EU Savings Tax Agreement. On this point, it is important to underline that Liechtenstein and the UK entered into a bespoke agreement, which runs from 2009 to 2015, that provides for a taxpayer assistance programme via a special disclosure facility for individuals with unpaid UK taxes. Moreover, Austria, which has already concluded a Rubik agreement with Switzerland, considers that the Swiss approach offers a pragmatic solution to collecting taxes for the state of residence in cases that normally would not have led to any tax revenue for that state. As per the Austrian report, refusing that type of cooperation would lead to considerable budgetary losses.

As can be deduced, the Swiss approach is more likely to be followed by countries attaching particular importance to bank secrecy and client privacy, just like Switzerland itself. Other countries seem much more reluctant about the idea, even though the conclusion of similar agreements is not entirely excluded. It should be borne in mind that the Rubik system has the merit of respecting the taxpayer's private sphere while collecting the taxes due and permitting thereby a better respect for the "limits" that are detailed in section 4. In addition, with this system, Switzerland is in charge of tax collection "on behalf of" the contracting state, which could be regarded as a significant advantage for contracting states.

3.2.1.5. Simultaneous tax examinations

The OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations, published in 1992,[15] defines this concept as follows:

> "an arrangement between two or more Parties to examine *simultaneously and independently*, each on its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain."[16]

As per the OECD MTC, simultaneous tax examinations can be conducted under the exchange of information article of an income and capital tax treaty concluded

[15] Available online, http://www.oecd.org/ctp/exchange-of-tax-information/2666483.pdf (accessed on 15 March 2013).

[16] Emphasis added by the reporter.

between two states, like article 26 OECD MTC or article 8 of the OECD Mutual Assistance Convention, or article 12 of the Nordic Convention on Mutual Assistance inTax Matters. Consequently, the disclosure of the information obtained under the simultaneous tax examinations is also subject to these provisions.

An interesting example illustrating the importance of the limits that may be imposed by the above-mentioned exchange of information provisions on simultaneous tax examinations is *Avowal Administrative Attorneys Ltd* v. *District Court at North Shore*[17] litigated in New Zealand. In this simultaneous tax audit conducted with Australia, some concerns were raised about the possibility of exchanging the obtained information under the scope of the version of article 26 at that date of the DTT concluded between the two countries. One of the arguments for refusing to communicate the relevant information was that, unless the information obtained by the New Zealand Inland Revenue Department in New Zealand could have been obtained by the Australian Taxation Office in Australia by adopting exactly the same information-gathering procedures, then the New Zealand Inland Revenue Department had no obligation to exchange the information with the Australian Taxation Office under article 26. This argument was rejected by the New Zealand Court of Appeal.

Some countries, such as Canada and the Netherlands, have concluded memoranda of understanding with third countries based on the OECD model on simultaneous examinations in order to intensify this type of cooperation. The USA followed a similar approach by developing a simultaneous examination programme authorized by IRS procedures and concluding working arrangements with several countries. However, simultaneous examinations can also be conducted without any specific agreement. First, article 26 OECD MTC forms a legal basis for this type of procedure. This point of view is confirmed in the Austrian report, which indicates that the provisions of a tax treaty permit simultaneous examinations even if this type of cooperation is not explicitly mentioned in the treaty. Another basis on the OECD level is article 8 of the Mutual Assistance Convention, which expressly states the possibility of conducting such procedures. There also exist sources with a more limited geographical scope. For example, within the EU, since 2004, Regulation (EC) 1798/2003 regulates the possibility of carrying out a "simultaneous control" in its article 12.[18] The possibility of simultaneous audits is also expressly provided for in the Nordic Convention on Mutual Administrative Assistance in Tax Matters. Other examples are the information exchange model agreement of the Inter-American Center of Tax Administrations (CIAT) and Decision 578 of the Andean Community.

While most countries recognize the possibility of this type of cooperation, the number of procedures conducted seems to remain particularly low for the time being. One of the countries that is using simultaneous tax examinations very efficiently is the Netherlands. As per its branch report, between 2007 and 2011, the Netherlands took part in 64 simultaneous examinations, most of them

[17] *Avowal Administrative Attorneys Ltd* v. *District Court at North Shore* (2007) 23 NZTC 21,610 (HC); (2009) 24 NZTC 23,252 (HC), and (2010) 24 NZTC 24,252 (CA). See the New Zealand report for more details.

[18] Council Regulation (EC) No. 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No. 218/92 (PB 264 of 15 October 2003), chapter II, section 4, Simultaneous controls.

with other countries of Europe, within the Fiscalis programme. According to an example given in the report, the Netherlands and France organized a simultaneous examination with the participation of several other European countries, namely Belgium, Denmark, Germany, Ireland, Italy, Luxembourg, Malta, Spain, the UK and Portugal.

Finally, it is important to underline that simultaneous tax examinations are not only used for direct taxes but also for indirect taxes, VAT and excise duties, especially among European countries.

3.2.2. Joint audits and multinational audits

A "joint audit" is a new form of coordinated action between tax administrations. It is defined in the OECD's Joint Audit Report as follows:

> "two or more countries joining together to form *a single audit team* to examine an issue(s)/transaction(s) of one or more related taxable persons (both legal entities and individuals) with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organized in the participating countries, and in which the countries have a common or complementary interest; where the taxpayer jointly makes presentations and shares information with the countries, and the team includes Competent Authority representatives from each country."[19]

As can be inferred, even though they have some similarities, joint audit and simultaneous tax examination are two different procedures. During a joint audit procedure, two or more countries would join to form a single "international" audit team to conduct a taxpayer examination. Therefore, the cooperation does not take place "simultaneously and independently" but in an "overlapping" manner within the same team.

As rightly put in the OECD report, the term "joint audit" as such is not a *legal* term. In tax matters the term "joint audit" has been used *in practice* to express the idea that two or more tax administrations are working together. If countries want to carry out a joint audit (according to OECD principles), it is necessary to determine the legal framework according to which they can cooperate before they start. The current provisions constituting a legal framework for the joint audits are mentioned in detail in the OECD Joint Audit Report.[20] Briefly, article 26 MTC, articles 5 and 6 OECD TIEA model, articles 5, 8 and 9 of the Mutual Assistance Convention, several EU regulations and article 12 of the Nordic Mutual Assistance Convention form the legal basis for this type of procedure.

In accordance with the branch reports, most countries accept the possibility of joint audits. However, in practice, there have been only a few procedures or pilot projects with the notable exception of Finland, which is conducting five to ten joint audits a year. For example, Australia and the USA are involved in a pilot project concerning two joint audits. The project is being coordinated through JITSIC. The

[19] Joint Audit Report, Sixth Meeting of the OECD's Forum on Tax Administration, Istanbul (15–16 September 2010), p. 7, emphasis added by the reporter.

[20] Annex 1, Overview of Terminology in International Legal Frameworks.

Australian report expresses that JITSIC has played an important role in the development and establishment of the joint audit programme and is also likely to form the basis for future joint audits. As can be understood from this statement and other branch reports, the future development of joint audits is keenly anticipated.

According to the branch reports, the cases most suitable for joint audit procedures are those dealing with transfer pricing, a taxpayer's residence determination, analysis of complex tax structures, examination of entities operating in tax havens where it is possible to follow money flows and identification of aggressive tax planning schemes. Notwithstanding the types of case mentioned in the branch reports as being suitable for the joint audit procedures, in practice, states involved in the process will make their decisions on a case-by-case basis.

There are several obstacles to an efficient joint audit procedure. The most important one is the impossibility of allowing a foreign state's tax officers to perform their own tax examinations or exercise any kind of authority functions in the territory of the state concerned, and vice versa, according to its domestic law. This is the reason invoked for not participating in joint audit procedures in the Swedish report. This absence of authority constitutes a significantly frequent problem for most joint audits apart from those conducted under the EU Mutual Assistance Directive. Another main difficulty, as invoked by the Czech Republic and Italy, is the different languages used by the authorities of the different countries. Joint audit procedures are also considered to be financially more burdensome by Denmark and the Czech Republic. In addition, as mentioned in the Italian report, different procedures and rules followed by the various tax inspectors involved in the examination may create conflict situations. Furthermore, different domestic rules concerning the collection of information and the taxpayer's involvement can make the proofs and information recovered not usable for one of the participating countries. Finally, all these discrepancies may result in excessive time consumption. Despite these obstacles, the interest in joint audits and similar forms of international cooperation, such as tax examinations abroad, seems to be growing. The methods of exchange of information proposed by the OECD are generally willingly adopted by a majority of countries. Moreover, some countries are also creating other highly developed forms of international cooperation. The simultaneous examination programme (SEP) and the simultaneous criminal investigation programme (SCIP) of the USA illustrate this tendency perfectly.

3.2.3. The use of intermediaries (especially in the financial sector)

There has been a recent trend to use intermediaries as a sort of auxiliary for the exchange of information procedures. Italy, the Netherlands and Finland are some of the many countries that are efficiently using intermediaries for tax purposes. In particular, in Italy according to the Article 11 of Law Decree n.201/2011, all the financial intermediaries are requested to communicate periodically to the *Anagrafe Tributaria* (an electronic tax register) *all* the financial transactions concerning *all* the taxpayers.

The use of intermediaries may also take a more organized and large-scale form. The first notable example is the European Savings Directive, which has as its main effect to cause Member States to exchange information automatically on savings interest payments made to residents of other Member States. All European member

countries, with the notable exception of Austria and Luxembourg, have implemented the directive and therefore are using the intermediaries effectively for exchange of information purposes.

The second significant and more recent example is the US FATCA. Under FATCA, US taxpayers with specified foreign financial assets that exceed certain thresholds must report those assets to the IRS. In addition, foreign financial institutions (FFIs) must provide information to the IRS identifying US persons investing in non-US bank and securities accounts. Otherwise, a withholding tax of 30 per cent is due on US withholdable payments.

In order to be able to efficiently implement this domestic system in an international level, the USA has been concluding intergovernmental agreements (IGAs). There are two models of IGAs: IGA model 1 (intergovernmental system) and IGA model 2 (facilitating system). Both models require a prior conclusion of a DTT or a TIEA with the USA. Model 1 provides for a reciprocal automatic information exchange between the USA and the signing jurisdictions. On the other hand, model 2 provides for an automatic unilateral reporting of US accounts between FFIs and the IRS.

To date,[21] not many IGAs have been concluded. Joint statements were signed between the USA and the interested countries in June 2012. So far, as per the joint statements, model 1 has been adopted by the UK, France, Germany, Italy and Spain. Switzerland and Japan are the only two countries agreeing to model 2. This small number of IGAs is partially due to the burdensome implementation of the system, both legally and financially. Another reason is put forward in the Canadian report, which states: "[t]hese requirements would, they say, impose a significant burden on financial institutions operating in a country (Canada) that is not a tax haven and that is at low risk of harbouring US tax evaders."[22]

Despite these considerations, it should not be deduced that there is a lack of interest in other countries in entering into IGAs. The rather small number of IGAs is also due to the considerable amount of time necessary to complete the negotiation procedures.[23] The US Treasury believes that the process will accelerate and that initial agreements will be reached with most of the interested jurisdictions by January 2014.[24]

With regard to the enforcement of the FATCA system, an agreement is expected soon on a universal electronic format. In the same vein, the USA also plans to discuss with its partners the possibilities of correcting insufficient information.[25]

It is important to mention that some countries, like Spain and Germany, are of the opinion that a standard regarding the exchange of information in tax matters will gradually evolve on the basis of FATCA, not least because the OECD is also taking the opportunity provided by this development to work towards a generally applicable standard for the automatic exchange of information. This development

21 March 2013.

22 See the Canadian report which gives the following reference: Canadian Banker's Association Remakes on FATCA Proposed Regulations 1.1471–1.1474, available at http://www.cba.ca/contents/files/presentations/pre_20120515_irsfatca_en.pdf.

23 See on this point Jaime Arora, "FATCA Progress Expected to Accelerate IGA Process", *Tax Notes International*, February 2013, p. 636.

24 *Ibid.*

25 *Ibid.*

is also protected by the OECD's treaty relief and compliance enhancement (TRACE) project which, ultimately, also deals with the automatic exchange of tax information. This development will lead to states making much more use of the automatic exchange of information in future and thus to it being possible to contain tax evasion and tax avoidance even more effectively.

Moreover, it is also interesting to note that South Korea has a similar system to FATCA in its domestic law. Accordingly, since 2011, a South Korean resident must directly report information on any accounts that exceed KRW 1 billion within six months from the beginning of the following year. This reporting requirement applies even if the account holds the requisite amount for only one day. Non-reporting or under-reporting of such information may result in a penalty of up to 10 per cent. As can be seen, the Korean system does not require a worldwide implementation of its domestic law but only imposes an obligation on South Korean residents.

Even though the FATCA system is seen to be beneficial by some countries, there are three main issues that must be carefully considered. First, the implementation of the system is quite burdensome not only financially but also both legally and administratively. If each country tried to implement a similar system, it would simply not be possible for financial intermediaries to deal with all information requests. Second, model 2 provides for a unilateral automatic exchange of information between FFIs and IRS, which may not be really beneficial to the contracting partner. Moreover, on this point, the US point of view consists of staying as close as possible to the prepared models and not entering into detailed negotiations with interested countries.[26] Third, the generalization of the automatic exchange of information may cause several problems concerning the limits of exchange (see below section 4 for more details).

3.3. Collaboration between authorities (including transmission of documents to third parties)

3.3.1. Authorities that can access the information received

According to a majority of tax treaties the information provided is to be kept secret and may not be disclosed by the receiving state to any persons other than those concerned with the assessment and collection of the taxes which are the subject of the treaty. In accordance with the branch reports, the information received is mostly shared with authorities responsible for assessment and collection of the taxes as well as the courts and administrative bodies as indicated in article 26 paragraph 2 OECD MTC. Generally, the obtained information can also be communicated to the following: social security and insurance authorities, some other governmental authorities, police and anti-money-laundering authorities. All domestic practices seem to be in conformity with article 26 paragraph 2 OECD MTC. In this regard, Colombia has a rather extensive approach. As per the branch report, public agencies must keep databases and make the information that they produce and manage available to other public agencies, and must allow them free and permanent access to that information. On the other hand, New Zealand follows a restrictive approach. Information obtained through a DTT remains exclusively with the Inland Revenue

[26] *Ibid.*

Department. Another interesting practice on the matter is developed by Chile. Each and every DTT concluded by Chile specifically mentions the persons to whom the information can be disclosed. This approach has the merit of guaranteeing legal certainty for both contracting states as well as the taxpayer. In the same vein, some countries' domestic laws, like Poland, contain specific provisions providing for an exhaustive list of authorities that can have access to the information. However, this practice remains very rare.

3.3.2. Measures taken by the requested state to protect the confidentiality of the information in the requesting state

Notwithstanding the provisions of international agreements, some other precautions are taken by some countries in order to protect the confidentiality of the transferred information in the requesting state. In this respect, some states, such as Australia, Belgium and Canada, use secured computer networks or data encryption technologies. Other countries, like Mexico, remind the requesting state that the information is subject to the rules of confidentiality of the specific agreements concerned. However, as mentioned by Italy, generally there is no follow-up mechanism to guarantee that this requirement is respected in the requesting state. For this reason, in order to protect the data in an efficient manner, some countries go one step further and refuse to disclose any information to another country's tax authority if it is found that that country does not meet the standards of confidentiality. Finally, some states, such as Russia, New Zealand and Switzerland, do not take any precautions in this regard.

It is important to underline that the obligation of the tax authorities to keep secret the information obtained from the taxpayer (tax secrecy) may not be invoked in order to deny information under an applicable tax treaty.

3.3.3. Use of the information in the requested state for its own domestic purposes

The general tendency of countries is to use the information obtained during the exchange of information procedure for their own domestic purposes. Only a few branch reports indicated the impossibility of such use, namely Argentina, Australia, Malta, Mauritius, New Zealand and Uruguay.

3.3.4. Possibility of passing the information to a third state

The EU Mutual Assistance Directive and the OECD Multilateral Mutual Assistance Convention allow for the information to be passed on to a third state, provided that the requested authority has had an opportunity to object or give its permission. Accordingly, some countries, such as Denmark, Finland, France and Germany, accept communicating the information to a third state if the approval of the requested state can be obtained. On this point, it is interesting to note that the Italian report seems to indicate that no consent of the requested state is necessary in order to pass the information to a third state.

Nonetheless, in accordance with the branch reports, the general tendency is to refuse to transfer the data to a third state.

3.4. Identification of the taxpayer and the holder of the information[27]

Identifying the taxpayer and the holder of the information is usually an indispensable prerequisite for the granting of administrative assistance. In most cases, this occurs by indicating the name and address.

Nonetheless, it has appeared within the framework of the Global Forum that other means of identification should also be admissible. The provisions concerning a DTT with an administrative assistance clause are to be amended in such a way that the requirements for an administrative assistance request should not hinder an effective exchange of information. In this respect, rules regarding the identification of the taxpayer and the information holder should not be too rigid. Accordingly, (a) identifying the taxpayer should also be possible through means other than his name; and (b) the name and address of the information holder must be provided "to the extent known" (see article 5 OECD TIEA model).

4. Limits

4.1. Right to privacy

All OECD instruments include strict confidentiality rules that protect against unauthorized disclosure of the exchanged information.

4.1.1. Bank secrecy

Bank secrecy is widely recognized as playing a legitimate role in protecting the confidentiality of the financial affairs of individuals and legal entities. It derives from the concept that the relationship between a banker and his customer obliges the bank to treat all the customer's affairs as confidential. Most countries provide, to a greater or lesser extent, the authority and obligation for banks to refuse to disclose customer information to ordinary third parties. Nevertheless, it is more and more acknowledged that bank secrecy towards governmental authorities, including tax authorities, may enable taxpayers to hide illegal activities and to avoid tax. The effective administration and enforcement of many laws and regulations, including those on taxation, require access to, and analysis of, records of financial transactions.

To date,[28] bank secrecy does not constitute an obstacle for international exchange of information purposes. Countries' practices diverge but the result remains the same. At one extreme there is the Netherlands, whose domestic law does not contain bank secrecy at all, either in the Civil Code or in the tax laws. In Germany, bank secrecy does not exist in a traditional sense but there is a special responsibility for public officials handling the bank information. In a large number of countries, such as India, bank secrecy is contained in Bank Acts or similar but is

[27] See also above sections 3.1.3 and 3.2.1.3.
[28] March 2013.

overridden by the relevant Tax Acts. Many states, such as Finland and Norway, go one step further and impose on the banks and financial institutions a general obligation to report income information to tax administrations once a year without prompting.

At the other extreme there are jurisdictions attaching great importance to bank secrecy such as Austria, Belgium, Switzerland and Luxembourg. However, all these countries have had to adapt their domestic law in order to comply with the OECD standards. In Austria and Switzerland bank secrecy is only lifted for international exchange of information purposes. The application of bank secrecy remains maintained under their domestic laws with regard to their residents. In accordance with the principle of reciprocity as specified in article 26 §3(a) and (b) *in fine* of the OECD MTC, this means that these countries must communicate the relevant banking information to foreign authorities but they cannot obtain the same information from these authorities as this would exceed the limits of their domestic law. In other words, the amendments made to the law result in an export of banking secrecy. Belgium has avoided this consequence by following a different path and lifting banking secrecy for both domestic and international purposes.

It can be concluded that banking secrecy does not create any problems for the international exchange of information. An interesting observation is made on this point in the Luxembourg report. The report indicates that the sole aim of banking secrecy is to safeguard the individual's right to privacy. An indiscriminate, automatic exchange of private information would indeed be prone to abuse with negative impacts on the free movement of capital and the individual's right to privacy, the latter principle being enshrined by article 8 of the European Convention on Human Rights (ECHR).

4.1.2. Lawyers' legal professional privilege

The confidentiality of written communications between lawyers and clients is usually protected. However, that protection is often subject to two cumulative conditions. First, the exchange with the lawyer must be connected to "the client's rights of defence". Second, the exchange must emanate from "independent lawyers", that is to say "lawyers who are not bound to the client by a relationship of employment". This privilege is based on the conception of the lawyer's role as collaborating in the administration of justice and a lawyer being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs.

The branch reports demonstrate that the practice of the countries on this matter is similar to a great extent. Generally, the protection of confidentiality includes only advocates and law firm employees, who provide or assist advocates in providing legal services, and does not include lawyers who provide their services independently not being members of the Bar. On this point, it is important to note two important practices mentioned respectively in the Netherlands and Swiss reports on the one hand and in the US branch report on the other hand. First, the Dutch Supreme Court has acknowledged a quasi-legal professional privilege for tax advisers not admitted to the Bar.[29] On this point the Netherlands report states that:

[29] HR 23 September 2005, BNB 2006/21.

"[t]he principle of fair play forbids the tax inspector to request the taxpayer for reports and other documents, as far as these were written to underexpose the fiscal position of the taxpayer or to advise him in that regard".[30] A similar approach is adopted in Switzerland. In a recent judgment, the Supreme Court ruled that a tax lawyer who was asked to reply on behalf of his client (taxpayer) to a request for information of the tax administration was performing a typical advisory activity which was covered by the lawyers' legal professional privilege.[31] As most tax advisers are not lawyers admitted to the Bar, this extension of legal professional privilege is of great importance for the international exchange of information.

Second, in the USA, a statutorily created privilege protects communications between a taxpayer and a "federally authorized tax practitioner" to the same extent as the attorney–client privilege except in "tax shelter" items or criminal tax issues. Generally, the protection of the lawyer's professional privilege extends only to so-called "traditional activities". This is undoubtedly true for criminal proceedings. However, as indicated in the US report, it is often waived or restricted in tax matters.

Where a lawyer acts as a financial intermediary or a financial adviser or agent or a board member or a director of an entity, confidentiality is usually not protected.

The OECD guidance is thereby strictly followed by countries.

4.2. Domestic law and administrative practice

Article 26 paragraph 3(a) and (b) of the OECD MTC provide that in order to comply with exchange of information requirements, a state is not obliged to: (a) carry out administrative measures at variance with its laws and administrative practice or those of the other contracting state; (b) supply information which is not obtainable under its laws or in the normal course of administration or those of the other contracting state.

The branch reports indicate that these two dispositions have an extremely limited scope. As rightly put by Austria, "[e]ven in the absence of that provision Austria could not go beyond its domestic law in putting information at the disposal of the requesting State". Moreover, countries seem not to pay great attention to the principle of reciprocity for the same type of information or to the possibility of obtaining the same sort of data under the domestic law of the other contracting state, except a few countries like Italy and the USA.

4.3. Commercial and industrial business secrets

As per article 26 paragraph 3(c) of the OECD MTC, a state is not required to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. As can be inferred from the wording of this provision, the determination of the exact scope of the term "secret" is left to the discretion of the requested state.

30 The Netherlands report.

31 Supreme Court, 20 August 2012, 1B_380/2012; Federal Criminal Court, 22 May 2012, BE.2011.5. See also the Swiss report for more details.

The OECD commentary provides some guidance on the interpretation of this term. Accordingly, a trade or business secret means: "facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage" (§19.2 ad article 26). Branch reports seem to indicate that "commercial and industrial business secrets" are not defined in domestic tax law. Countries prefer to follow the interpretation given in the OECD commentary on this point.

So far, as per the branch reports, no significant problems have been encountered on this matter. With the development of the exchange of information all over the world, this may change in the future. Indeed, the requesting state could define the relevant information needed in a broad way and it might be difficult in practice to distinguish between commercial or trade secrets on the one hand and relevant information on the other hand. For example, a request for balance sheet and profit and loss accounts seems to be clearly regarded as relevant information for the taxation of a multilateral group, although these documents might reveal important trade secrets.

Most of the branch reports seem to indicate that in the normal course of exchange of information procedure, this type of information will not be transferred for tax purposes. As per the reports, if the information is transferred, under exceptional circumstances, the availability of any remedies depends mostly on the notification of the taxpayer concerned. On this point, countries' practices diverge to a great extent. Most countries, such as Israel, either do not seem to inform the person concerned at all or only notify the taxpayer after the information has been communicated. However, a few countries prefer to inform the taxpayer before transmitting the information. For example, German taxpayers whose legally protected secrets are at risk of being disclosed have the possibility of taking preventative action for injunction or, where necessary, applying for an interim order.[32] A similar possibility also exists in the Netherlands. However, in order to be able to prevent the transfer of the information, the taxpayer should be able to prove that there is such a secret and that damage is to be expected if the information is used in the other state.[33]

Several countries recognize the possibility of a damages claim on the basis of misconduct as indicated in a few reports, such as Finland, Denmark and Japan. Nonetheless, the extent of this claim seems to be rather limited. For instance, in Luxembourg the payment of damages would be limited to actual damages suffered and which were demonstrably a direct consequence of the violation of the secret, in other words no punitive damages. Consequently, it would be very difficult for the taxpayer to obtain any substantial payments on this basis.[34]

32 For more information see Klaus-Dieter Drüen and Isabel Gabert, Germany, national report, in *Mutual Assistance and Information Exchange*, 2009 EATLP Congress, EATLP International Tax Series, vol. 8, 249 ff.

33 For more information see Jan J.P. Goede, Sigrid Hemels and Tonny C.M. Schenk, The Netherlands, national report, in *Mutual Assistance and Information Exchange*, 2009 EATLP Congress, EATLP International Tax Series, vol. 8, 409 ff.

34 For more information see Jean-Pierre Winandy, Luxembourg, national report, in *Mutual Assistance and Information Exchange*, 2009 EATLP Congress, EATLP International Tax Series, vol. 8, 389 ff.

An interesting decision demonstrating the importance of the confidentiality of trade secrets was rendered by the Court of Brussels in Belgium.[35] A Belgian company had made secret but legal payments to its foreign clients. The Belgian tax authorities obtained the list of the beneficiaries' names and transferred it to the Italian tax administration. After this communication, the Italian clients reduced to a considerable extent their business relations with the Belgian company, which thereby suffered a significant loss. The Court of Brussels ordered the Belgian state to pay indemnities to the company for being careless in the exchange of information procedure. In this decision, it was emphasized that tax authorities should pay attention to the economic consequences of the exchange of information procedure.

4.4. Public policy (*ordre public*)

As per article 26 paragraph 3(c) of the OECD MTC, contracting states may refuse to provide the information if its disclosure would be contrary to public policy. Vaguely defined, the term "public policy" consists of the "vital interests of the State itself". This concept not only includes matters of security or the requested state's political survival, but also the constitutional content of the tax laws in the requesting state which are considered important enough to be mutually assessed by states. For example, a confiscatory character of the legislation in the requesting state or a disproportionate sentence may violate public policy.[36] Moreover, based on the Vienna Convention, it can also be argued that exchange of information will not be possible in cases of violation of good faith.

Surprisingly, illegally obtained data can be used in a great number of countries such as Australia, Israel, Denmark and the USA. For example, in the *Payner* case rendered by the US Supreme Court,[37] it was held that the use of documents illegally obtained by the federal government from a third party did not violate the defendant's Fourth Amendment right against unreasonable search and seizure and would not have to be excluded from evidence.

Only a few countries such as Switzerland, the Czech Republic, Norway and Portugal expressly refuse to use such data. The Portugal report contains an interesting reflection on this point. According to this report, if the use of stolen data was admitted, this would represent a sort of "information laundering", which could obviously never be accepted.

In a significant number of countries, the question is not clear. A recent and a significant example of a stolen list is the so-called Falciani list. As it is widely known, Hervé Falciani, a former Swiss bank employer, stole the bank details of 24,000 account holders and communicated them to French prosecutors investigating tax evasion. In its turn, the French authority transferred the list to tax authorities of other countries, notably Italy. At the moment, the position of Italian jurisprudence is quite uncertain. While some courts have declared that tax assessments based on documents *ab origine* illegally acquired[38] must be void, others have stated that what is relevant is that the documents used by the Italian Revenue Agency have been received through the ordinary channels from the competent authority of another Member State, irrespective of how those documents were acquired in the first place.[39] In its recent decision, the Italian Supreme Court seems to agree with the first approach.[40] The Court has stated that the data obtained can be used unless proof of the illegality of their *ab origine* acquisition is provided: in this latter case, an assessment based only on this information should be declared void.

4.5. Procedural guarantees and administrative principles

Regrettably, in most countries such as France and the Netherlands, the taxpayer is neither informed nor allowed to be involved in the process. Some countries, such as South Korea and Luxembourg, permit the taxpayer to object but only after the information has been supplied. Another country that informs the taxpayer is Sweden; however, the scope remains limited as the authority merely provides the concerned person with the same information communicated to the foreign authority. A similar approach is followed by the UK, where the taxpayer is informed but cannot appeal.

The respect of the right of fair hearing has only been invoked in the Mauritius report.

Switzerland attaches a great importance to procedural rights. As per the branch report, these rights include the right to be heard and the right to appeal against the final decision to pass the information to the requesting state. The appeal against the final decision has a suspensive effect. It has been criticized by the peer review, since these rights may constitute a hindrance to the actual and efficient implementation of the OECD principle, in particular the fact that the person concerned must still be notified before the information can be exchanged.

In addition to this lack of procedural rights, the extent of application of the ECHR is not clear either. Beyond doubt, the convention applies to criminal charges and civil rights and/or obligations. However *a priori*, as invoked by the Netherlands, taxation constitutes neither a criminal charge nor a civil right. For this reason, the applicability of the convention remains controversial and depends on the domestic interpretation. The branch reports did not develop this matter in detail. The Netherlands report indicates that only tax fines would fall within the scope of the convention. As per the Swiss report, during the *UBS* case the Federal Administrative Court ruled that article 6 ECHR was not applicable to the international exchange of information.[41] This opinion is controversial within Switzerland.

It can be concluded that, although the extent of procedural rights is not very clear, the protection of the taxpayer is often ignored. As these rights constitute a

[35] Brussels Court Decision of 6 October 1980; for more information see Ilse De Troyer and Michel Maus, Belgium, national report, in *Mutual Assistance and Information Exchange*, 2009 EATLP Congress, EATLP International Tax Series, vol. 8, 193 ff.

[36] For more information see Tonny Schenk-Geers, "International Exchange of Information and the Protection of Taxpayers", *Eucotax*, Wolters Kluwer Law & Business, 2009, pp. 193–194.

[37] *US* v. *Payner*, 447 US 727 (1980).

[38] Tax Court of First Instance (*Commissione Tributaria Provinciale*) of Como, Decision No. 188/01711 of 15 November 2011 and Tax Court of First Instance of Milan, Decision No. 236/05/12 of 4 October 2012.

[39] Tax Court of First Instance of Genoa, Decision No. 193 of 5 June 2012.

[40] *Corte di cassazione*, Third Criminal Section, Decision 4 October 2012, No. 38753.

[41] Federal Administrative Court judgment, 15 July 2010, A-4013/2010.

cornerstone of the legal system, it would be interesting to analyse why they are not taken into consideration more carefully in the international exchange of information procedures. This may be partially due to the fact that many states like Italy and the USA, seem to consider the exchange of information process as a mere "fact gathering" and not a proper administrative procedure. From this perspective, procedural rights are only granted at the level of the requesting state, for instance in the court process. For example, in France it was ruled that the requests for administrative assistance itself were merely preparatory documents that did not have to be provided to taxpayers.[42] However, according to the so-called *principe du contradictoire*, for the French tax administration to be able to use the information obtained from the exchange of information in court, the relevant files should have been communicated to the taxpayer. Other states, by contrast, do regard exchange of information as an administrative procedure *per se*. Therefore, the procedural rights of the taxpayer exist in these few states, such as Switzerland and Germany. The distinction between these two schools of thought undoubtedly constitutes a very interesting analysis, which, however, is outside the scope of this general report.

5. Conclusion

5.1. Current trends

As a result of the analysis of the various branch reports some general comments can be made.

As a general trend we see that the legal basis for international exchanges of information remains by far provided through bilateral conventions, and namely DTTs. The trend is to either modify existing DTTs or to adopt new ones based on article 26 OECD MTC or the UN MTC. In addition, since 2002, a TIEA model has been developed by the OECD. After rather a slow start the development of TIEAs around the world, particularly between developed countries and tax havens, has grown rapidly after the G20 summit of 2009. It appears that there are more than 700 TIEAs signed as of today. For example, to date the USA has signed 30 TIEAs, Australia 35 and India 14. It should be noted that there is a crucial difference between a DTT and a TIEA as far as legitimacy is concerned. While a DTT usually requires a formal ratification process, which typically (but not always) includes acceptance by Parliament and, in the case of Switzerland, a facultative referendum, TIEAs are negotiated at the level of the administration and do not provide, in most cases, for formal parliamentary acceptance.

While the preference seems, according to most country reports, to be to base international exchange under bilateral agreements, there also appears to be a shift toward the use of multilateral conventions, such as the OECD Multilateral Mutual Assistance Convention of 1988, especially after its new protocol of 2010. This is of course also true within some groups of countries, notably EU Member States, based on either the Savings Directives, or the Exchange of Information Directives and the various legal materials in the field of indirect taxes.

Another trend is the development, sometimes on an informal basis, of new political fora such as the G20, on the one hand, and the Global Forum on Transparency and Tax Information Exchange, on the other hand. Both fora have played a key role in fostering the development of DTTs based on article 26 OECD MTC. They have also provoked an unprecedented development of TIEAs, especially after the G20 summit of 2009. Indeed, at the London Summit of 2 April 2009, the G20 proclaimed that "the era of bank secrecy is over". It is also interesting to note that, at the G20 meeting of 4 November 2011, all countries agreed to sign the OECD/ Council of Europe multilateral Mutual Assistance Convention. In the same vein, we see the more frequent use of transnational networks such as the JITSIC and SGATAR.

The forms and types of exchange of information are also in constant development. The most common form remains as of today information upon request (as provided for in article 26 of the OECD MTC and most TIEAs). However, the use of automatic exchange is growing. This is particularly the case within the EU in the framework of the saving directives, for interest on savings, with the exception of Austria and Luxembourg, which levy a withholding tax as an equivalent measure. The recent directive on exchange of information also provides for automatic exchange of information, as of 1 January 2014, for five specific categories of income and capital (salaries, directors' fees, life insurance products, pensions, income and wealth from landed property). Some states also use spontaneous exchange. With the modification of the OECD commentary in 2012, the already existing possibility of "group requests" gained a more specific basis and more accrued importance. Although this type of request is not unanimously agreed upon and is infrequently used at the moment, it seems that this type of cooperation will develop to a great extent in the near future. Moreover, the emergence of specific types of exchange of information procedures, such as multilateral and joint audits, can be seen. These several new types of cooperation require much more extensive cooperation between the authorities. Even though their practice is not frequent at the moment, most states are taking the necessary measures to be able to implement and use these new forms efficiently. It is interesting to note that, as these methods are highly similar, there seems to be confusion in relation to terms. In branch reports, the concepts "simultaneous tax audits", "tax examinations abroad" and "joint audits" were generally used as synonyms, which is not the case. However, this "lost in qualification" situation does not have any practical impact.

Switzerland, since its acceptance of article 26 of the OECD MTC in its entirety on 13 March 2009, has also tried to develop an alternative model to automatic exchange of information in the form of a bilateral agreement on cooperation in the tax field. These so-called Rubik agreements, currently in force with the UK and Austria (signed with Germany, whose Parliament rejected its ratification), provide for a mechanism of a final withholding tax – corresponding to the rate of tax in the country of residence of the taxpayer, while still protecting the confidentiality of the taxpayer. Many branch reporters have shown an interest in this system, while others have clearly rejected it.

Another approach is represented by the US FATCA, system, as a follow-up to the QI system, which represents a unilateral solution to monitoring and receiving

[42] *Conseil d'Etat*, 26 January 2011, No. 311808, *Weissenburger*.

information about income from US foreign taxpayers. This system, as of 1 January 2013, requires FFIs to report income received by US taxpayers. As mentioned above (see section 3.2.3), in order to be able to efficiently implement this domestic system on an international level, the USA has been concluding IGAs. There are two models of such agreements: IGA model 1 (intergovernmental system) and IGA model 2 (facilitating system). Both of the models require a prior conclusion of a DTT or a TIEA with the USA. Model 1 provides for a reciprocal automatic information exchange between the USA and the signing jurisdictions. On the other hand, model 2 provides for an automatic unilateral reporting of US accounts between FFIs and the IRS.

If we compare the Saving Directive, the Rubik agreements and FATCA, we can see that the key implementing person in these three systems is the financial intermediary (or paying agent). In other words, the tax administration tends to "outsource" its auditing and reporting obligations to the financial intermediary, which has the direct contact with the relevant taxpayer. The use of financial intermediaries in the framework of global tax exchange of information will most probably expand. Indeed, the Savings Directive is currently under revision, and should broaden its scope, while the FATCA system already has been implemented into various models, such as the IGA model 1 (agreement with the UK, France, Germany, Italy and Spain) and the IGA model 2 (agreement with Switzerland, potentially with Japan).

5.2. Remaining issues and challenges

As a consequence of the extraordinary development of treaties, legal basis and forms of exchange some specific new problems are emerging. Although this issue goes much beyond the scope of this general report we will try to outline some of these problems.

First of all, the complexity of the existing system requires a coordination of the rules. The exchange of information in tax matters occurs not only within international agreements, but also according to domestic rules, such as FATCA for instance. In addition, other areas of the law, such as banking supervision, stock exchange rules, or criminal investigation (in particular in the field of money laundering) also provide for a whole set of international assistance, which also includes tax matters. The legal basis of exchange is therefore not limited to a combination of legal rules in the area of tax, but includes a multitude of rules in other fields as well, which clearly affects the exchange of information on taxation.

In addition, a state can only exchange information that it already has or can easily obtain. Effective exchange of information will therefore become a key issue in the future. Now that a monumental network of treaties, organizations and fora are in place, it remains to be seen whether relevant information can be: (a) effectively obtained at the level of the requested state; and (b) provided in an efficient manner. Here a clear distinction should be made between information which is at the level of the tax administration and information that the tax administration has to obtain from third party providers (financial intermediaries, agencies, etc.). In the latter case, the effective exchange could remain theoretical if the use of intermediaries, offshore entities, trusts, foundations or the like could prevent the requested state from obtaining information on the beneficial owner. The various

branch reports have sometimes shown rather different approaches in this respect. It seems that in this area the development of rules in the money laundering, as it was done by the FATF, could serve as an appropriate mechanism to define and report the beneficial owner.

It has already been pointed out in the general report of 1990 that the rights of taxpayers should also be taken into account within the framework of exchange of information. This is even more true after the "big bang" of 2009, which can be seen as the starting point for an unprecedented development of DTTs with article 26 of the OECD MTC and TIEAs, including also signatories to the OECD Multilateral Mutual Assistance Convention. There have been some developments on the acceptance of taxpayers' rights (such as the right of notification, right to be heard and to participate in the exchange of information process and the right to appeal) but the issues, according to the reports, remain rather controversial. The OECD TIEA Model itself provides for a client–attorney privilege. Some countries, like Switzerland, tend to include in the protocol of DTTs specific procedural rights for taxpayers involved in the process. Other countries, notably, tend to view the exchange of information process more as a "fact gathering" tool and prefer to grant taxpayers' rights at the level of the requesting state (for instance in court proceeding), and therefore do not grant significant taxpayers' rights at the level of the exchange of information process. It can be argued that the granting of taxpayers' rights should be favoured already during the exchange of information process because it will often be too late to invoke some procedural right before the court of the requesting state at the end of the process.

The question of guarantee of a fair procedure not only arises on the side of the requested state but also of the requesting state. Based on a public policy provision, a requested state could be tempted to refuse to grant the information under the argument that the requesting state did not provide sufficient protection for the taxpayer. Therefore, a clear definition of the minimum standard in this respect would be welcome.

In the same vein, the question of the protection of human rights in the framework of the exchange of information process remains an open question. It is possible to argue that, provided the exchange of information process occurs in an issue of tax fraud – defined as a criminal offence according to the ECHR – article 6 ECHR should be applicable. Another quite controversial issue is the application of article 8 ECHR (right of privacy).

In conclusion, the so-called "big bang" of 2009 has led to an unprecedented network of DTTs, TIEAs, multilateral treaties, directives and informal agreements on exchange of information. Fundamentally, it seems that there are three main challenges: (a) to coordinate all these legal rules; (b) to ensure that an effective exchange of information takes place, namely that states can effectively obtain the relevant information domestically through different manners such as KYC questionnaires and determination of beneficial ownership; and (c) protection of the taxpayer. On this third point, what about an international standard of protection rules for the taxpayer? After all, the universe is expanding at all points ...