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Automatic exchange of information - the arrival of a new international norm of taxation

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Legislation: Model Tax Convention (OECD) art.26

[Directive 2011/16 on administrative cooperation in the field of taxation \[2011\] OJ L064/1](#)

It is not often that a new norm in international taxation develops. However, with respect to exchange of information for tax purposes, the international standard shifted from exchange on request to automatic exchange during the summer of 2013. In the light of developments over the last few years, this shift of norm is not particularly surprising. However, the speed at which changes have been made in this field over the last couple of years has been astonishing. The new norm of automatic exchange of information would have been unthinkable 10 years ago. This short note explains the background and traces the developments that led to the adoption of the new norm.¹

The starting point is the principle that governments will not use their powers to assist the collection of tax due to other governments. For a tax official of one government to supply information to a foreign government would, in the absence of specific authorisation, constitute in the vast majority of countries a breach of the duty of confidentiality owed by that tax official. However, this principle has come to be respected more in its exceptions. Multiple instruments now provide a basis for exchange of information between governments.

The most common form of provisions for exchange of information are found in bilateral double taxation conventions, and are usually modelled on Article 26 of the OECD or UN Models. The difficulty with including information exchange provisions in bilateral tax conventions, however, is that there would be no basis for exchange with those countries—primarily tax havens—with which governments were unwilling to conclude a tax treaty. In 2002 the OECD adopted a model for a Tax Information Exchange Agreement (TIEA) which would provide a legal basis for exchange of information with governments with which a comprehensive double taxation convention did not exist.² More broadly, in 1988 the OECD and Council of Europe opened for signature a Multilateral Administrative Assistance Convention which provides, inter alia, for extensive exchange of information.³ Finally, within the EU, a Directive on Administrative Assistance has existed since 1977,⁴ and was revised in 2012⁵ to provide for a broad range of provisions for administrative assistance, including exchange of information. Also within the EU, the Savings Income Directive⁶ provides for an alternative of either a withholding tax on savings income paid cross-border, or exchange of information with regard to savings income.

It might be noted in passing that the multiplicity of instruments for exchange of information creates a series of problems of its own. The information to be exchanged under the different instruments is not always identical, and the modality of exchange—electronic forms, for example—that have been developed are not identical. A task over the next few years will be for revenue authorities to develop common standards and common modalities for information exchange in the most effective form.

Most of the instruments that provide for exchange of information cover three types of exchange: exchange on request (in response to a specific request for information from the requesting authority); spontaneous exchange (where one authority discovers information which may be of interest to another authority); and automatic exchange (where certain categories of information are exchanged on a regular and automatic basis). Until the summer of 2013, the international standard recognised that all states should be willing to exchange information on request: the major shift in norm this summer was the adoption of a new standard by which states should agree to exchange information automatically. In principle, this provides a very powerful tool to revenue authorities in combating tax evasion; it should result in large amounts of information flowing between different revenue authorities.

Charting the history of this development really starts in the late 1990s with the commencement of the OECD work on harmful tax competition. While that work originally intended to identify and remove harmful tax practices, after 2001 (and particularly after the arrival of the Bush Administration in the US), the focus shifted in part to transparency and exchange of information. The underlying theory was that a state could combat the use of harmful tax practices by its residents if that state had sufficient access to information. This led in turn to

the establishment by the OECD of the Global Forum on Transparency and Exchange of Information, which has carried out peer reviews of a large number of jurisdictions to determine whether they are both gathering information and exchanging it on a transparent and effective basis.

A major step in the historical development was the adoption in 2004 by the OECD Committee on Fiscal Affairs of amendments to Article 26 of the OECD Model. These amendments introduced the "foreseeable relevance" standard for exchange of information on request; provided that bank secrecy and similar rules relating to confidentiality could not be used to block exchange of information; and provided that a state should be willing to use its information-gathering powers to secure information solely for the purposes of exchange, even if that state had no domestic interest in the information for its own purposes. These changes to Article 26 were also adopted in the UN Model.

In the wake of the global economic crisis in 2008, the G20 leaders meeting in London emphasised the need for exchange of information for tax purposes, and threatened unspecified sanctions against any state that did not co-operate in this process. This had an astonishing effect: whereas a handful of TIEAs had been concluded before that time, the number of such agreements shot up into the hundreds in the months following the London declaration. It was also then possible for the OECD leadership to announce that, with the adoption of the principles enshrined in Article 26 by the OECD, the UN and the G20, exchange of information in accordance with the principles in Article 26 had become a new international standard. At the time, however, exchange of information under this standard was only required if it was exchange on request.

It has taken only four years for that international standard to move from exchange on request to automatic exchange. In that period, the European Union Administrative Assistance Directive has been revised so that Directive 2011/16⁷ provides for automatic exchange of information between EU Member States with regard to certain categories of income with effect from January 1, 2014. Many countries, like the UK, already undertake significant amounts of exchange of information of various categories on an automatic basis.

Finally, one comes to the summer of 2013 and the shift in international norms to automatic exchange. First, the G8 Summit at Lough Erne issued its Declaration, the first point of which stated that "1. Tax authorities across the world should automatically share information to fight the scourge of tax evasion."⁸ Secondly, a month later, the G20 Finance Ministers meeting in Moscow reaffirmed the international commitment to move to exchange of information on an automatic basis.⁹

Thus, within the space of less than a decade the international norm has moved first to exchange of information on request and, from there, to automatic exchange of information. The speed of this development has no doubt been accelerated by the economic crisis, but is nonetheless extraordinary.

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1. There is an excellent examination of the development of practice with regard to cross-border exchange of information in the International Fiscal Association's papers for the second seminar of the Copenhagen Conference 2013, published at (2013) *Cahiers de droit fiscal international*, particularly the general report by Xavier Oberson.

2. See OECD, *Agreement on Exchange of Information on Tax Matters*, available at: <http://www.oecd.org/tax/exchange-of-tax-information/2082215.pdf> [Accessed September 3, 2013].

3. OECD/Council of Europe, *Convention on Mutual Administrative Assistance in Tax Matters*, available at: <http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm> [Accessed September 3, 2013].

4. Council Directive 77/799/EEC.

5. Council Directive 2011/16/EU.

6. Council Directive 2003/48/EC of June 3, 2003, on taxation of savings income in the form of interest payments.

7. Above fn.5.

8. *Prime Minister's Office, 10 Downing Street, G8 Lough Erne Declaration (June 18, 2013)*, available at: <https://www.gov.uk/government/publications/g8-lough-erne-declaration> [Accessed September 3, 2013].

9. *Department of Finance, Canada, Communique, Meeting of Finance Ministers and Central Bank Governors, Moscow (July 20, 2013)*, available at: <http://www.fin.gc.ca/n13/13-096-eng.asp> [Accessed September 3, 2013].

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