In today’s increasingly borderless world, countries are working more closely together to prevent abuses of the global financial system in a wide range of areas, including taxation. Globalization presents significant challenges to tax administrations around the world and the strengthening of mutual assistance as a mechanism for administrative cooperation between States remains one of the outstanding issues in international taxation law. Mutual assistance has developed alongside International Fiscal Law, through conventions to avoid double taxation and tax avoidance and evasion, a process in which international organizations have gone to considerable effort to encourage collaboration among domestic tax administrations through different agreements.

The issue to which tax information exchange is addressed is by no means or unfamiliar but the issue has emerged at the heart of recent controversial and high-profile initiatives especially by both the OECD (I B) and the European Union. In the EU context, the legal instruments on mutual assistance within the European Union have been recently reinforced for cooperation on both direct and indirect tax matters. In few years, the international context has also changed enormously, starting from the need to update the mutual assistance rules; we have arrived at the present situation, where we have to face the risks of normative inflation (I A).

Effective information exchange is essential for countries to maintain sovereignty over the application and enforcement of their tax laws and to ensure the correct application of tax conventions. Given that an increasing number of taxpayers are engaging in cross border activity, tax authorities need an effective legal mechanism for obtaining information from their treaty partners to ensure compliance with the tax laws. While taxpayers can operate in a global world relatively unconstrained by national borders, tax authorities must respect these borders in carrying out their functions. Nowadays, the challenge of effective Exchange of information and tax collection provisions is to offer a legal framework for co-operating across borders without violating the rights of taxpayers (II A) or the sovereignty of other countries (II B).

As 2008 will be the 50th anniversary of the publication of the first draft of the OECD Model Tax Convention and conjointly the 20th Anniversary of the OECD and the Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, this article focus on the legal and administrative framework for transparency in international tax cooperation.

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I/ An encouraging assessment

A- Established Frameworks for Information Exchange

Cooperation in information exchange is mostly intended to facilitate and ensure correct application of the tax rule concerned by the administration responsible for controlling it. Assistance in tax collection aims to ensure correct enforcement of the tax rule. The exchange of information among national tax authorities or the assistance in tax collection could be affected through a number of different frameworks, in addition to bilateral tax treaties, there are also various multilateral agreements, as well as dedicated bilateral agreements outside of tax treaties, under which such exchange could be carried out.

1- The traditional hegemony of Bilateral Instruments

The two main instruments under the bilateral approach are double tax treaties and bilateral information exchange treaties. They are currently based on the model of OECD which has completed in 2004 a comprehensive review of the article on exchange of information and a new article 27 on assistance in tax collection was added to the Model Tax Convention.

1-1 – Assistance on exchange information

Most bilateral tax treaties contain at least one article that sets out the nature and scope of information on relevant tax matters to be exchanged between treaty parties. While the precise language of this article may vary from treaty to treaty, it is generally adapted from Art. 26 of the model tax convention of either the United Nations or the OECD. In both the UN Convention and the OECD Conventions, it is stated explicitly that the exchange of information is not restricted to information exchange on non-residents also falls under the applicable scope of the provisions if and when their activities give rise to tax implications in the contracting parties. Information on direct taxes may be exchanged on request, automatically or spontaneously.

Article 26 of the OECD Model Tax Convention provides the most widely accepted legal basis for bilateral exchange of information for tax purposes. More than 2,000 bilateral treaties are based on the Model Convention which creates an obligation to exchange information that is relevant to the correct application of a tax convention as well as for purposes of the administration and enforcement of domestic tax laws. Article consists of five paragraphs: Paragraph 1 clarifies that the Article applies to taxes of every kind and description including both direct and indirect taxes and sets out the main rule concerning the exchange of information. Paragraph 2 contains rules that ensure the confidentiality of information exchanged. It limits the persons to whom such information can be disclosed and specifies the purposes for which such persons may use the information. Paragraph 3 contains certain exceptions to the obligation to provide information. Paragraphs 4 and 5 provide that, notwithstanding the exceptions in paragraph 3, a domestic tax interest requirement or domestic bank secrecy rules do not limit the obligation to exchange information.

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5 UN Model Double Taxation Convention between Developed and Developing Countries (New York, 1980).
1-2- Assistance in the collection of taxes

There are major obstacles to lending assistance in tax collection. Obstacles include both substantive and procedural tax problems, compounded by the perception that lending assistance in tax collection is a form of extraterritorial intrusion. Globalization not only makes it harder for tax authorities to accurately determine the correct tax liabilities of their taxpayers: it also makes the collection of tax more difficult. Taxpayers may have assets throughout the world but tax authorities generally cannot go beyond their borders to take action to collect taxes. For this reason a new Article 27 on assistance in the collection of taxes was added to the OECD Model Tax Convention in 2003. It deals with assistance in the collection of taxes and goes against a long tradition of not assisting other countries’ tax enforcement. This article is optional and may be included in a bilateral convention where each state concludes that, based on a number of factors; they can agree to provide assistance in the collection of taxes levied by the other state. The factors considered include the importance of their cross-border investment, reciprocity, the ability of their respective administrations to provide such assistance and the similarity of the level of their legal standards.

Bilateral agreements make it possible to adapt to the requirements and peculiarities of each nation’s fiscal arrangements, and establish more precisely the guarantees and prerogatives that contracting States wish to safeguard. Accordingly, bilateral agreements are the best means of strengthening administrative cooperation to ensure recovery of the taxes concerned but the bilateral nature of the exchange under tax treaties limits its effectiveness in dealing with Multinational Enterprises and individuals that are organized on a global basis. To fight tax avoidance and tax evasion countries have decided to develop Multilateral Instruments.

2- The new stress on Multilateral Instruments

2-1- Multilateral Instruments outside the scope of the EU

The Benelux Convention: A first experience of Multilateralized Assistance. One of the earliest examples of multilateral cooperation is the Benelux Convention signed in Brussels by Belgium, The Netherlands and Luxembourg on 5 September 1952. This convention provides for assistance in the recovery of all direct and indirect taxes, including those levied by local authorities in the three States.

The Nordic Convention: A Benchmark for the Future. Since 1972 when the first Nordic Convention on Mutual Assistance in Tax Matters came into force, the Nordic countries have been co-operating on an extensive scale to counteract international tax avoidance and evasion. This multilateral instrument was updated in 1989 and has a very wide scope. It covers a wide range of taxes and concerns all forms of assistance (exchange of information, assistance in the recovery of tax claims including measures of conservancy, service of documents).

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9 In 2007, in order to assist in the implementation of this form of assistance, the Committee on Fiscal Affairs developed and declassified a Manual on the Implementation of Assistance in Tax Collection based.
The Convention on Mutual Administrative Assistance in Tax Matters reflects the growing interest in multilateral administrative co-operation. The success of the Nordic Convention led the Council of Europe and the OECD to use it as a basis to draft the 1988 Convention on Mutual Assistance in Tax Matters. This Convention is not the usual tax treaty. While it has some vague references in the protocol, the Convention does not refer to the elimination of double taxation. Instead, it provides a mutual assistance treaty to prevent evasion and avoidance of all taxes other than customs duties. It provides for a wide range of administrative assistance between any two countries that are parties to the Convention. Administrative assistance would include the exchange of information, simultaneous tax examinations, assistance in collection, and service of documents. This contains 32 articles and covers both administrative cooperation in the exchange of information, including well developed cooperation arrangements such as simultaneous inspections, as well as assistance in tax collection involving measures for enforcing recovery in another State, the notification of tax assessments issued by the other State, or the adoption of interim or conservancy measures.

The Convention is open for signature to the Council of Europe member states and OECD member countries and very clearly the added value of the Convention results from the relationship it regulates with non-EU member countries. The Parties are Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, the Netherlands, Norway, Poland, Sweden, the United Kingdom and the United States. Canada, Ukraine and Germany have signed the Convention and are still in the process of ratification. The Convention provides one of the most comprehensive and efficient instruments to counteract international non-compliance in today’s open and more integrated economy.

2-2- Slow Progress in the EU

Mutual assistance and Exchange of Information. Under the Directive of 19 December 1977 and its amendments, Member States’ competent authorities are required to exchange any information which appears relevant for the correct assessment of taxes on income and on capital and the assessment of direct taxation and taxation of insurance premiums. Besides its more extensive coverage of taxes, it also provides for a broader framework of information exchange than do the OECD and UN Conventions in that it also allows for tax examinations abroad, meaning that representatives of on member country are allowed to be present and gather information during a tax inspection in the territory of another state.

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12 For the text and a brief discussion of the Convention, see 28 I.L.M. 1160 (1988); 3 Rhoades & Langer, Income Taxation of Foreign related Transaction, COUN §8.00[2].
The Saving Directive: only a half success. In January 2003, after more than a decade of discussion\textsuperscript{15}, the EU Council of Economic and Finance ministers (ECOFIN) reached political agreement on the draft saving tax directive, which was formally adopted in June 2003. The agreement envisages that all 25-member states will ultimately exchange tax information automatically to all other member states on the interest paid on savings to residents of those other member states. The directive, which extends to a number of “third countries” such as Switzerland\textsuperscript{16}, the Channel Islands and Caribbean offshore territories, facilitates the exchanges of information between EU tax authorities on certain type of savings and investments held by EU residents in their territory, so that interest earned can be taxed in the resident investor’s home state\textsuperscript{17}. Compared with existing legislation, the saving tax directive presents a more comprehensive system of information sharing in the savings taxations area than established agreements. It includes rules concerning the details of the information to be reported, the frequency of information exchanges and mechanism of information exchange.

However, while the EU was effectively able to bully smaller territories such as those in the Caribbean with colonial links to member states like the UK and the Netherlands, the Asian territories have such ties binding them to Europe. Unsurprisingly, EU officials have already received frosty responses from Hong Kong and Singapore regarding the issue, and little is expected to have changed\textsuperscript{18}. The EU directive has also other weakness. Many types of investment that are not covered by the directive include dividends, capital gains and payments from life insurance policies and pension schemes and private citizens are exploiting numerous loopholes in the European Union’s rules on savings taxation so as not to pay tax on interest income by using trusts, foundations and other investment vehicles to circumvent a landmark savings taxation directive. Because the directive applies to individuals but not to legal entities, it is possible for people to set up investment vehicles or otherwise define themselves in a way that excludes them from the EU’s rules. Obviously, it is necessary to find ways to improve the savings taxation directive\textsuperscript{19}.

Assistance for the Recovery of Tax claims. The European Union has played an important role in setting up tax collection cooperation and assistance mechanisms between community bodies and the administrative agencies of member States. Council Directive 76/308/EEC of 15 March 1976 and its various amendments\textsuperscript{20}, provides for mutual assistance in the recovery of claims. Approval of this directive has resulted in the development of specific regulations establishing tax collection assistance mechanisms in member States, along with important administrative, jurisprudence and doctrinal practice. However the lack of harmonization of countries’ domestic regulations on recovery of tax claims posited the need for a gradual process of study and collaboration.

\textsuperscript{15} The EU savings taxation debate has a long history, dating back to the late 1980s. The 2003 directive (European Commission 2003) modified the 2001 draft savings tax directive (European Commission, 2001), also known as the Feira agreement of June 2000, which replaced the 1998 draft directive.


\textsuperscript{17} During a transitional period Austria, Belgium and Luxembourg will levy a withholding tax; at a rate of 15 percent during the first three years, 20 percent in January 2008 and 35 percent from January 2011 onwards.

\textsuperscript{18} D. Berlin, \textit{La fiscalité de l'épargne dans l'Union européenne : histoire d'une harmonisation en voie de disparition}, Journal des tribunaux de droit européen 2003, P.162 et s.

\textsuperscript{19} T. Barber, \textit{Loopholes exposed in savings directive}, Financial Times, 14 May 2008.

2-3- Difficulties arise and prospective analysis

Which instrument to use and which way to go? The advantages of a multilateral treaty over a bilateral network long have been recognized. In contrast to the existing network of bilateral treaties, which has become ossified, a multilateral treaty provide a vehicle for continual renewal as problems arise with the functioning of the international tax system, allowing amendment or interpretation of its terms to affect all countries at the same time. To date, there has not been a lot of enthusiasm for multilateralism in the area of tax administration and it is striking that the European Community should have failed to develop into a major forum of multilateral cooperation in the 20 years and more since the Directives on mutual assistance were adopted. Up until now the procedures provided have only been systematically or regularly applied by the Member States to a very limited extent. This is probably because by adapting to the general circumstances envisaged in the convention, the signing of multilateral agreements to strengthen administrative cooperation in tax collection requires a similar level of administrative development and compatible administrative structures between the countries, together with a similar level of cooperation. This makes the multilateral mechanism unsuitable for countries with scant experience in international taxation matters. Given the uncertainty of all countries signing the Multilateral Convention, the Community initiative was obviously the best option. In future, however, mutual assistance between national tax administrations will progressively become one of the key elements of control.

Do we have a problem of interaction between cooperation instruments? As we have seen, many norms deal with Mutual Administrative assistance in Tax Matters and many others may affect the power to request Assistance in direct or indirect ways. For instance, the International judicial assistance agreements, such as the European Convention on Mutual Assistance in Criminal Matters, the 1957 European Convention on Extradition or the 1978 European Convention on the Obtaining Abroad of Evidence in Administrative Matters. If we consider the importance of different rules, we could easily talk about a “(r) evolution”. Does this overproduction could lead to inefficiency? Probably, a comparison of the provisions of bilateral tax conventions and Community Law for instance, reveals certain divergence. However this is understandable given that the logic of bilateral conventions, based on reciprocity, is different from that of a Community system founded on a single central system. There is a fairly widespread view that Community States which have conventions may request assistance under either the Convention or the Directives, albeit the latter is more advisable in that its term are broader, conventional provisions are limited by their own internal definitions, and that the latter is an instrument specially for assistance.

26 As extended to tax matters by the Additional Protocol of 17th March 1978.
29 In fact this is the line normally taken by tax administrations, Ph. Malherbe, Le contrôle de l’impôt dans le contexte européen, Journal de Droit Fiscal, 1991, p. 321.
The role of the OECD to promote Effective Exchange of Information and Assistance in the Recovery of Tax Claims

A sustained Effort to promote transparency. Lack of transparency and a failure to co-operate internationally create conditions that can be exploited by dishonest taxpayers to evade their tax obligations. Revenue losses due to tax evasion prevent governments from lowering tax burdens for honest taxpayers. International fiscal issues have long been the subject of debate in the OECD and information exchange has emerged has a central concern of the OECD’s harmful tax practices project.

The Harmful Tax Competition initiatives. In 1998, the OECD published Harmful Tax Competition: An Emerging Global Issue, which proposed the establishment of an international framework—the Forum on Harmful Tax Practices (Forum)—to prevent harmful tax competition. Its goal was to secure the integrity of tax systems by addressing issues, such as the erosion of the tax bases of other countries and the distortion of capital and service allocations, caused by mobile financial activities. The 1998 Report recommended guidelines and timetables for OECD Members to identify, report, and eliminate the harmful features of their tax systems. It also provided non-member countries assistance in the implementation of the guidelines. The Report distinguished between tax havens and harmful preferential tax regimes. On June 26, 2000, the OECD published another report, Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices, a progress report on the implementation of the 1998 Report that aimed at preventing the spread of harmful tax competition. The 2000 Report identified potentially harmful preferential regimes in Member countries, identified jurisdictions that qualified as tax havens under the factors of the 1998 Report, and updated the work with non-member countries.

The issue of Bank information. With the growth of cross-border capital flows, the potential for abuse created by the lack of access to bank information for tax purposes and the resulting adverse consequences have increased exponentially. Thus, a decision by one country to prevent or restrict access to bank information for tax purposes is now more likely than ever before to adversely affect tax administrations of other countries. Considering the problem, the Committee on Fiscal Affairs published a report in April 2000, Improving Access to Bank Information for Tax Purpose, which state very clearly that denying tax authorities access to banking information can have adverse consequences domestically and internationally. Access to bank information for tax purposes has been since greatly improved.

The quest of the Level Playing Field. In short there was consensus that the Level Playing Field is conceptually and fundamentally about fairness. The OECD released a seminal report on tax information collection and exchange practices on May 29, 2006. The study, entitled Tax-Cooperation: Towards a Level Playing Field, took nearly two years to prepare and is a definitive comparison of the disclosure standards applied in the 82 countries surveyed.


Rapport p.9

Such as Belgium, which in November signed its first tax treaty providing for exchange of bank information for all tax purposes.

The Report is formally the output of the Global Forum, a grouping of OECD countries and non-member financial centres assembled by OECD to conduct its tax information exchange programme.
The Report opens with an acknowledgement of the need for implementation of higher standards in a manner that is "fair, equitable and permits fair competition between all countries, large and small, OECD and non-OECD". The Report goes on to say: "The convergence of existing practices of information exchange towards these [high] standards thus should be coupled with a process that ensures equity and fair competition which aims to ensure that financial centres that are engaged in meeting the standards of transparency and effective exchange of information are not disadvantaged by countries that are not part of the process, and that the latter are not permitted to profit from the promotion of their position of being outside the process". Confirming an earlier commitment to provide "mutual benefits through bilateral implementation", the Report provides an assurance that matters will reach a stage where "financial centres that meet such high standards are and remain fully integrated into the international financial system and the global community". This "mutual benefits" point addresses a primary hesitation for non-OECD member countries in supporting the OECD plans for tax information exchange. Even if there were to be a "level playing field" (so that competitive disadvantages were addressed) the non-OECD Member States would still lack any incentive to shoulder onerous and expensive burdens in the interests of conferring benefit exclusively on the high (direct) tax countries. The Report acknowledges this issue, but this theme is otherwise entirely ignored in the Report. The absence of any effort to develop this point is a key shortcoming in the Report.

A close work with offshore territories for better results. The 35 committed jurisdictions and OECD countries (collectively referred to as Participating Partners) work together under the auspices of the OECD’s Global Forum on Taxation to develop the international standards for transparency and effective exchange of information in tax matters. For instance, Tax Information Exchange Agreements was developed by the OECD Global Forum Working Group on Effective Exchange of Information ("the Working Group"). The Working Group consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino. This group was charged with the development of a model agreement establishing the standard of effective exchange of information for purposes of the OECD project. The result of their effort was the 2002 Agreement on Exchange of Information on Tax Matters. The agreement sets out two version of the model, a bilateral version and a multilateral version that provides the basis for an integrated bundle of bilateral treaties. Today nearly 100 more exchange of information arrangements are now in place, compared with one year ago and the scope of some existing arrangements has been extended. A number of bilateral agreements have been based on this Agreement.
What are the next steps? The weak point of the OECD is that as an executive organization with no parliamentary representation, it is ill equipped for the essential task of schooling public opinion in the need to pull together. Nonetheless, it has consistently sought to promote mutual assistance. Many financial centres, both onshore and offshore, are making progress in improving transparency and international co-operation to counter offshore tax evasion, but some still fall short of international standards that have been developed over the last years. Unfortunately significant restrictions on access to bank information for tax purposes remain in three OECD countries (Austria, Luxembourg and Switzerland) and in a number of offshore financial centres (e.g. Cyprus, Liechtenstein, Panama and Singapore). Moreover, a number of offshore financial centres that committed to implement standards on transparency and the effective exchange of information standards developed by the OECD’s Global Forum on Taxation have failed to do so. Maybe the ultimate success of the OECD initiative depends on imposition of sanctions on OFCs that refuse to comply. Sanctions could be restrictions on access to onshore banking and securities markets. Such denial of access will hurt the country imposing the sanctions through a loss of business when the doors are closed to particular jurisdictions. If all countries do not agree to impose sanctions in a co-ordinate fashion, the OECD initiative could unravel.

II/ Challenge ahead: the conciliation of divergent interests

A- In search of a balance between the respect of the taxpayers' procedural rights and the allocation to the fiscal authorities an effective power

Globalization in the private sector has not been accompanied changes in the reach and enforcement powers of national tax authorities. As a general rule, national tax authorities continue to be constrained by national borders; this has created a major problem for national tax authorities who need more efficiency in their international procedure, however this necessity to improve international cooperation should be done in respect of tax payers’ right.

I- From the Tax authorities point of view

As stated above, in the global economy, tax administrations need to be organized globally if they are to deal effectively with Multinational Enterprises, paradoxally "taxpayer morale" is probably declining everywhere and without the cooperation of foreign tax authorities, more and more transactions will escape the tax net. The problem emerges in practice because international fiscal cooperation is subject to so many rules that these rules can at times become constrains upon the principle of cooperation.

Limit to international tax cooperation. The legal obligation to supply information is in fact lifted in a limited number of situations. These exceptions are contained in paragraphs 3 through 5 of Article 26 of the Model Convention and in Article 7 of the Model Agreement 2006. In cases where the exceptions apply, the contracting parties are not obligated to

40 D. Spencer, Exchange of Tax Information, Accountancy business and the Public Interest Vol. 5, No. 1.
41 Relating to Multinational Companies transparency see R. Murphy, How to make Multinational companies more transparent, Tax Justice focus, Second Quarter 2007, vol. 3 issue 2.
42 G. C. Hufbauer, Peterson Institute, Tax Policy in a Global Economy, Paper for the American Institute of Contemporary German Studies, Revised February 2000
43 In the Council of Europe/OECD Convention the exceptions are contained in Article 19 and Article 21, paragraph 2.
provide information. The decision to provide or not to provide the information is then left to
the discretion of the requested contracting party.

Treaty states are not obliged to provide information if administrative measures must be taken
that are in contravention with the legislation or the administrative practices of the states, the
request should also be done in conformity with the terms of the instrument pursuant to which
it is made. States are not obliged to provide information, also, if the information cannot be
obtained under legislation or though normal administrative procedures of the states or if the
information would reveal a trade, business or industry recipe or process, or would violate
professional secrecy\(^{44}\), or if providing the information would be in conflict with public
order\(^{45}\). A competent authority may refuse to supply information in cases involving
discrimination of a national of the requested Party\(^{46}\), and a contracting party is only obliged to
provide information that the requesting party could itself obtain under its own laws in similar
circumstances.

The limit of double incrimination requirement is probably more problematic in practice. The
extent to which exchange takes place under the provisions of the Model Convention and the
OECD/Council of Europe Convention generally depends on the domestic laws of the
countries involved. Thus, if the laws of the countries provide minimal or cumbersome access
to information for tax purposes, the exchange of information provisions will not be effective.
Exchange of Information can be constrained by the application of the dual criminality
principle or by a domestic tax interest requirement. The principle of dual criminality provides
that assistance can only be provided if the conduct being investigated requested country if it
had occurred in the requested country. Where the definitions of Tax crimes are very similar
the principle of dual criminality will not generally be an impediment to information exchange
for criminal tax purposes. However, where the definitions are markedly different, it may be
impossible in many cases for the requesting country to obtain information vital to a criminal
tax investigation\(^{47}\). For this reason, countries should re-evaluate any internal legal barriers to
obtaining information which, due to the reciprocity provisions of tax treaties, might also
prevent them from receiving information from elsewhere\(^{48}\).

Modernising tax cooperation. In the EU many efforts have been made to improve cooperation
between States. The Fiscalis program for instance was a great experience. The Decision n.
Community programme to improve the operation of taxation systems in the internal market\(^{49}\).
The objectives of this programme was to achieve among officials a high common standard of

\(^{44}\) Both Article 26 of the Model Convention and Article 7 of the Model Agreement make clear that there is no
obligation to supply information which would disclose any trade, business, industrial, commercial or
professional secret or trade process, see also Council of Europe/OECD Convention see Article 21, paragraph 2,
sub-paragraph (d).

\(^{45}\) See Article 26, paragraph 3, sub-paragraphs c) of the Model Convention, Article 7, paragraph 4 of the Model
Agreement and Article 21, paragraph 2, sub-paragraph (d) of the Council of Europe/OECD Convention.

\(^{46}\) This rule is contained in Article 7, paragraph 6 of the Model Agreement. In the context of the Model
Convention the rule flows from the first sentence of Article 26 paragraph 1 (“… insofar as the taxation
thereunder is not contrary to the Convention.”) read in conjunction with Article 24, paragraph 1.

\(^{47}\) OECD, Tax cooperation towards a level playing field, p. 10.

\(^{48}\) G. L. Perez-Navarro, Overcoming fiscal borders in the global economy, OECD Observer, n. 215, January
1999. To address this issue, in connection with its work on access to bank information for tax purpose, the
OECD developed a common understanding of tax fraud which was agreed by all OECD countries except
Luxembourg and Switzerland.

\(^{49}\) The Fiscalis programme replaces the Matthaeus-Tax programme.
understanding of Community law, particularly in the indirect tax sphere, and of its implementation in the Member States and to secure efficient, effective and extensive cooperation among the Member States and between them and the Commission. A lot has been made but it is not enough, some basic problems still exist like language differences which make it difficult to utilize available information from the source country. Also, it seems clear that, in the past, much of the information that tax authorities have received automatically from others has gone essentially unused. The key challenge would seem to be to develop audit selection methods that have the appropriate discipline effects on taxpayers whilst still meeting the “no fishing trip” requirement.

2-From the Taxpayers point of view

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

Procedural Rights and Safeguards: does Tax payers need more protection in tax cooperation procedure? Several OECD member countries must notify the taxpayer subject to the enquiry and/or the person that provided the information in certain circumstances. This may result for the person notified in a mere right to be informed about the exchange, a right to be consulted or even a right to challenge the exchange. Given the possible implications of such rights and safeguards for information exchange, contracting parties should inform each other of their legislation or administrative practice concerning notification (and any other procedural rights and safeguards that may be of relevance) when a tax information exchange agreement or an income tax convention is concluded and thereafter whenever the relevant rules are modified.

While the OECD has endorsed a clear statement of taxpayers’ rights and accompanying protection will be positive in terms of improving taxpayers’ collective levels of compliance and providing a mechanism for limiting even more powerful tax administration, it has not yet set forth an international statement of taxpayers’ collective rights. Some authors considers the need to be a separate statement of taxpayers’ right in addition to statements of basic human rights, especially insofar as they relate to international tax cooperation, it can be a solution.

However we should keep in mind that bilateral conventions on double taxation and exchange of information contain some protections of taxpayers. In particular, Article 26 of the OECD Model providing for the exchange of information between the revenue authorities of the two states concerned, has the following taxpayer protections. This article does not provide for unlimited exchange of information, only information that falls within the scope of the article can be exchanged. An exchange of information outside the scope of the article is likely to breach domestic secrecy laws in the transmitting country.

52 See paragraph 14.1 of the Commentary on Article 26 of the Model Convention. Modifications au modèle de Convention fiscale, approuvées par le Comité des affaires fiscales le 1er juin 2004.
Also, any information received should be treated as confidential. The Manual on the implementation of Exchange of Information provisions for tax purposes 2006 specifies that information received may be disclosed only to persons or authorities concerned with the assessment, collection and enforcement of the taxes covered by the Agreement and the information may be used only for such purposes. Information may not be disclosed to any other person or third jurisdiction without the express written consent of the competent authority of the requested party.

B- In search of a balance between the respect of the sovereignty of offshore territories and the necessity of establishing an effective exchange of information

Governments have sometimes conflicting interests with regard to exchange of information, some governments in particular international financial centers, usually want to attract investments from foreigners and adopt a permissive regulatory environment. For many of the smaller nations this is really an issue of sovereignty but an unwillingness of countries to cooperate to counter tax abuse undermine the national fiscal sovereignty of other countries. In a global environment, individual governments can maintain sovereignty over the design of their respective tax systems only insofar as they can count on the cooperation of other governments to share information needed to enforce their tax policy choices.

The issue of Offshore Confidentiality. Offshore jurisdictions view confidentiality as a vital ingredient in the success of the offshore industry and Court in offshore jurisdictions perceive the protection of confidentiality as part of their wider duty in the public interest. Offshore countries are aware that less confidentiality could trigger an exodus from their offshore industry to more secretive, and consequently more attractive, jurisdictions. But secrecy poses some important problem to tax administrators. A common practice in international tax evasion schemes is to incorporate multiple layers of entities in jurisdictions with strict commercial secrecy provisions. Tax administrators have to peel away at the layers in a bid to uncover the true originators of the transaction.

A softening attitude through Mutual legal Assistance Treaties. The mechanisms with the greatest potential for “whittling away” offshore confidentiality are mutual legal assistance treaties. These often work in conjunction with money laundering statutes, some of which have now encompassed tax fraud as part of money laundering. Here too a softening of attitudes as a direct result of international lobbying, especially from the OECD, is discernible. This is being reflected in the most recent treaties. Yet the lines of demarcation are clearly drawn with respect to disclosure of information. Only information related to criminal tax offences is
currently contemplated, in keeping with the subject matter of such treaties, which was confined to criminal matters\textsuperscript{59}.

\textit{Distinction between Criminal Tax and Civil Tax Cooperation.} By and large, most countries provide for some form of exchange of information in criminal tax matters, either through MLATs, or other legislative instrument such as an all crimes money laundering law, or as part of a DTT or a TIEA. Some offshore countries which do not regard certain activities like tax evasion as criminal, or which are of the view that these activities are of domestic interest only, are reluctant to enter into a mutual legal assistance agreements to aid law enforcement on such matters. It is clear that even in the negotiation of such treaties a balance between conflicting priorities in relation to confidentiality must also be struck. The treaties often reflect a compromise.

\textsuperscript{59} R-M Antoine, \textit{Confidentiality in Offshore Financial Law}, p. 73.
Conclusion

For a long time the international exchange of information was exclusively based upon the traditional concept of bilateral cooperation. Gradually, more and more multilateral forms of cooperation emerge besides this bilateral assistance but many problems still exist.

One set of problems is essentially political: ensuring that countries put into place effective mechanisms for collecting and exchanging information sought by others. As we have seen, sharing information is not necessarily in a country’s own best interests. In many aspects, the OECD initiatives have been successful in achieving quite widespread commitments to effective information sharing. Nevertheless, it is clear that a number of countries, especially Switzerland and Luxembourg, are reluctant to commit themselves to information sharing of the kind that others seek. There is, however, a fundamental difficulty to be faced in encouraging countries to adopt effective information exchange: while it is clear enough that for by providing information to the home tax authorities that enables them to levy further tax, low-tax countries make themselves less attractive to foreign investors. From an EU perspectives we can easily consider that the Community have not yet furnished Member States with the tools they need to counteract international tax evasion and avoidance, so it is hardly surprising that they should resort to bilateral conventions among themselves. The Community regulations are obsolete as regards assistance for the recovery of own resources and of indirect taxes, and they are non-existent as regards direct taxes. Despite initial progress in the Directives of 1976 and 1977, the possibilities of multilateralization that they offered were ignored in the first 10 years of their existence because the States preferred to deal bilaterally on the basis on conventions.

The second set of difficulties is essentially practical: that of how to make effective use of information that is or could be received. The first and foremost obstacle is probably the identity issue. Increasingly, legislation requires financial and other service providers to have available details of the beneficial as well as the legal owners of corporate vehicles. Often when financial institutions or tax administration are legally able to exchange information, they may not have enough information to associate the details of a particular account or other asset with a particular individual or company. A lot of effort has been done and as a result of all these efforts, there appears to be more transparency than ever before but the ironic effect of the decline of secrecy is a rapid rise in the number of offshore entities. More transparency in corporate ownership would make life more difficult for tax evaders and make things a little easier for the authorities.

Considerable progress has been made in extending the scope of international sharing of tax information, and more is in prospect.

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63 This issue arises particularly in connection with trusts, offshore companies and bearer shares.
64 Not only from a tax point of view but also with different organization like the FATF.
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