

Università Carlo Cattaneo – LIUC

International Tax Law a.a.2018/2019

*Exchange of information on request,
Automatic exchange of information,
Assistance in the collection of taxes*

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Introduction

- States are not obliged to cooperate under International law
- Exchange of information can be an effective instrument to fight international tax avoidance

Main sources of exchange of information in tax matters

- Article 26 OECD MC
- Strasbourg Convention (OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters)
- OECD Model Agreement on Exchange of Information on Tax Matters
- EU Directive on administrative cooperation in the field of taxation (Directive 2011/16/EU)

Exchange of information on request - Article 26 OECD MC

Introduction

- Article 26 OECD MC provides for an obligation to exchange information between the two contracting States
- In addition to exchange of information on request, Article 26 OECD MC provides legal basis for the other two types of exchange of information:
 1. Automatic: when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State;
 2. Spontaneous: in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State

Introduction

- Similar provisions are included in:
 - Chapter II of the Directive 2011/16/EU of 15 February 2011
 - Section I of Chapter III of the Strasbourg Convention (OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters)

The structure of Article 26 OECD MC

1. Obligation to exchange information
2. Principle of confidentiality
3. Limitation on the obligation to exchange information
4. Obligation of the requested State to gather the information requested
5. Derogation to bank secrecy

The scope of Article 26

- Taxes covered
 - All taxes levied in both Contracting States
- Objective of the exchange
 - Application of the double tax treaty
 - Application of domestic tax law of any of the Contracting States
- Persons who are concerned by the information
 - Individuals and legal entities
 - Resident and non-resident persons of both Contracting States
 - No limitation due to nationality

The scope of Article 26

- Objective of the exchange (examples)

- Application of the convention

“When applying Article 12, State A where the beneficiary is resident asks State B where the payer is resident, for information concerning the amount of royalty transmitted.”
(Commentary para. 7(a))

- Application of the domestic law

“State A, for the purpose of verifying VAT input tax credits claimed by a company situated in its territory for services performed by a company resident in State B, requests confirmation that the cost of services was properly entered into the books and records of the company in State B”
(Commentary para. 8(c))

The concept of “foreseeable relevance” (Article 26(1) OECD MC)

- The request of information is valid if related to information that is “foreseeably relevant”:
 - “The 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 expeditions”” (Commentary para. 5)
- The standard of foreseeable relevance requires that “at the time a request is made there is a reasonable possibility that the requested information will be relevant” (Commentary para. 5). Therefore:
 - “whether the information, once provided, actually proves to be relevant is immaterial”
 - A request may “not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information”

The concept of “foreseeable relevance” (Article 26(1) OECD MC)

- The request should
 - Be based on certain concrete facts
 - Precisely design the scope
 - Identify the relevant persons
 - Be relevant to a precise objective
 - Allow the requested State to assess the “foreseeable relevance” of the information requested

The concept of “foreseeable relevance” (Article 26(1) OECD MC)

- Identity of the taxpayer:
 - “a request for information does not constitute a fishing expedition solely because it does not provide the name or address (or both) of the taxpayer under examination or investigation” (Commentary, par. 5.1)
- The standard of “foreseeable relevance” is met in both cases dealing with:
 - one specific taxpayer:
 - groups of taxpayers (possibility of group requests):
 - “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” (Commentary para. 5.2)

The concept of “foreseeable relevance” (Article 26(1) OECD MC)

- Conditions relevant to the identification of the taxpayer (example):
 - “The tax authorities of State A conduct a tax investigation into the affairs of Mr. X. Based on this investigation the tax authorities have indications that Mr. X holds one or several undeclared bank accounts with Bank B in State B. However, State A has experienced that, in order to avoid detection, it is not unlikely that the bank accounts may be held in the name of relatives of the beneficial owner. State A therefore requests information on all accounts with Bank B of which Mr. X is the beneficial owner and all accounts held in the names of his spouse E and his children K and L.” (Commentary, par. 8, lett. e))

The concept of “foreseeable relevance” (Article 26(1) OECD MC)

- Example of «foreseeable relevance» for groups of taxpayers (OECD Comm. Para. 8, lett. h)):
 - Financial service provider B is established in State B;
 - B is marketing a financial product to State A residents using misleading information suggesting that the product eliminates the State A income tax liability on the income accumulated within the product. The product requires that an account be opened with B through which the investment is made.
 - State A’s tax authorities have issued a taxpayer alert, warning all taxpayers about the product and clarifying that it does not achieve the suggested tax effect and that income generated by the product must be reported.
 - Nevertheless, B continues to market the product on its website, and State A has evidence that it also markets the product through a network of advisors.

The concept of “foreseeable relevance” (Article 26(1) OECD MC)

- Example of «foreseeable relevance» for groups of taxpayers (OECD Comm. Para. 8, lett. h)):
 - State A has already discovered several resident taxpayers that have invested in the product, all of whom had failed to report the income generated by their investments.
 - State A requests information from the competent authority of State B on all State A residents that (i) have an account with B and (ii) have invested in the financial product. In the request, State A provides the above information, including details of the financial product and the status of its investigation”

The concept of “foreseeable relevance” (Article 26(1) OECD MC)

- Example of lack of «foreseeable relevance» for groups of taxpayers (OECD Comm. Para. 8.1):
 - Bank B is a bank established in State B. State A taxes its residents on the basis of their worldwide income. The competent authority of State A requests that the competent authority of State B provide the names, date and place of birth, and account balances (including information on any financial assets held in such accounts) of residents of State A that have an account with, hold signatory authority over, or a beneficial interest in an account with Bank B in State B. The request states that Bank B is known to have a large group of foreign account holders but does not contain any additional information”

Confidentiality (Article 26(2) OECD MC)

- Principle of confidentiality:
 - “the information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes”
 - Applies to “both information provided in a request and information transmitted in response to a request” (Commentary, para. 12)
- Derogation
 - Information may be used for purposes other than the assessment and collection of taxes if:
 - Such use is allowed by the legislation of both Contracting States; and
 - The competent authorities of the supplying State approved such use
 - Purpose of the derogation: prevent that the same information is asked multiple time (Comm. Para. 12.3)

Limitation on the obligation to exchange information (Article 26(3) OECD MC)

- Series of limitations in favor of the requested State
 1. No obligation to carry out administrative measures at variance with its laws and administrative practice or at variance with that of the requesting State
 2. No obligation to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State
 - Principle that the requesting State cannot take advantage of the information system of the requested State if it is wider than its own system
 - Principle of reciprocity

Limitation on the obligation to exchange information (Article 26(3) OECD MC)

3. No obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*)

“State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable it to check the prices charged by the company in State A by direct comparison (e.g. prices charged by a company or a group of companies in a dominant position). It should be borne in mind that the exchange of information in this case might be a difficult and delicate matter owing in particular to the provisions of subparagraph c) of paragraph 3 relating to business and other secrets.”

Obligation of the requested State (Article 26(4) OECD MC)

- The requested State is obliged to provide the information even if such information is not needed for its own tax purposes
 - For example, a State cannot refuse to gather and exchange information relevant to a tax period in which respect the statute of limitation required by its domestic law for an assessment expired (Commentary para. 19.7)

Derogation to bank secrecy (Article 26(5) OECD MC)

- A Contracting State cannot decline to provide information solely because the information is held by a bank or other financial institution
 - Article 26(5) provides for a derogation from the limitation provided by paragraph 3
 - Introduced in 2005 but such introduction should not be interpreted as suggesting that the previous version of the Article did not authorise the exchange of such information (Commentary, para. 19.10)

Entry into effect of Article 26

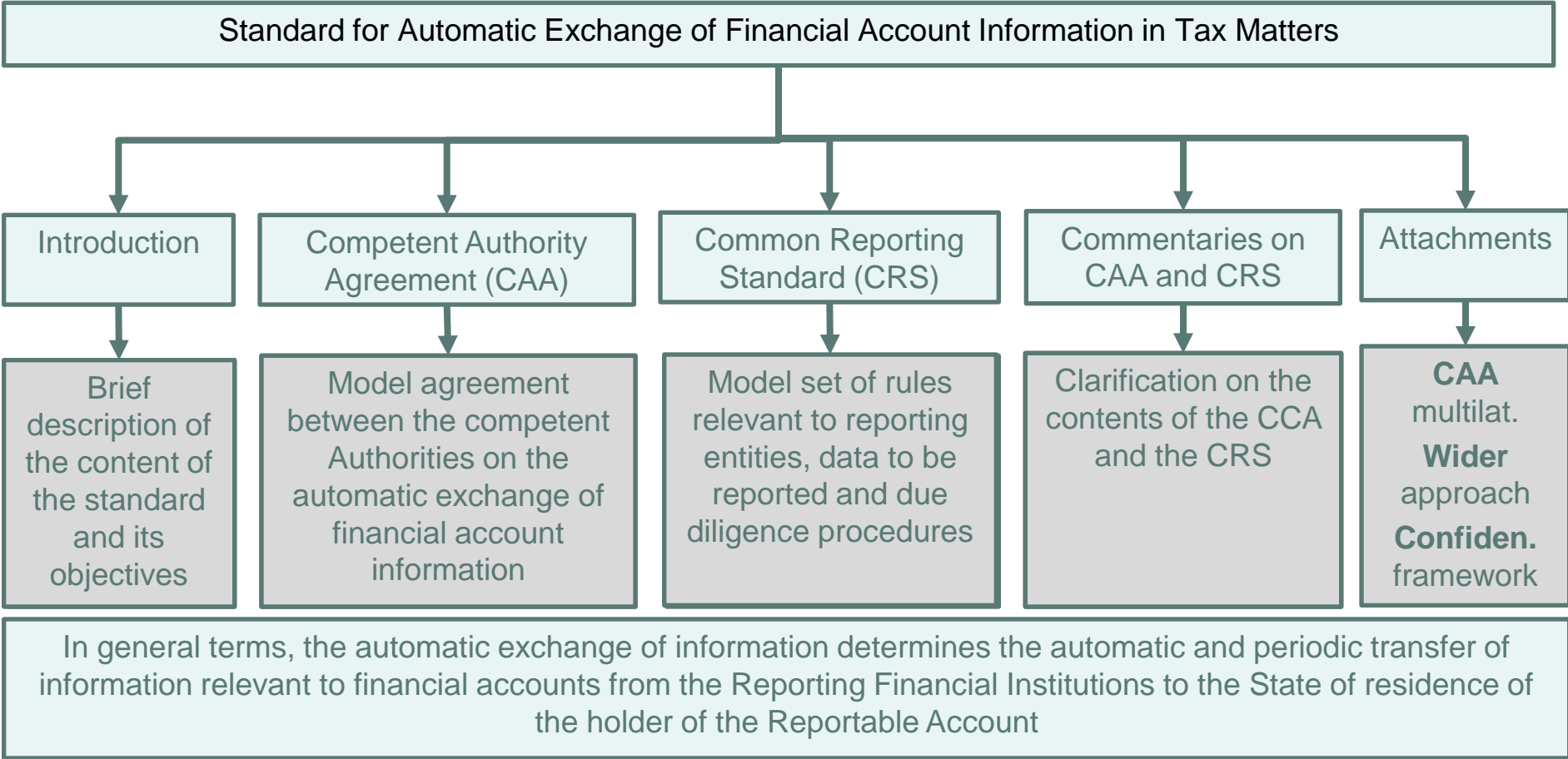
- OECD Commentary (para. 10.3)
 - Application of the Article to obtain information that existed prior to the entry into effect of the convention
 - Possibility for the Contracting States to agree on a different entry into effect

Automatic exchange of information

Introduction

- Sources of automatic exchange of information:
 - Article 26 OECD MC
 - Strasbourg Convention
 - OECD Implementation Handbook
 - Tax Information Exchange Agreement («TIEA»)
 - *Competent authority agreements* («CAA»)
 - 2014 OECD Standard for Automatic Exchange of Financial Information in Tax Matters
- Automatic exchange of information relevant to several different areas

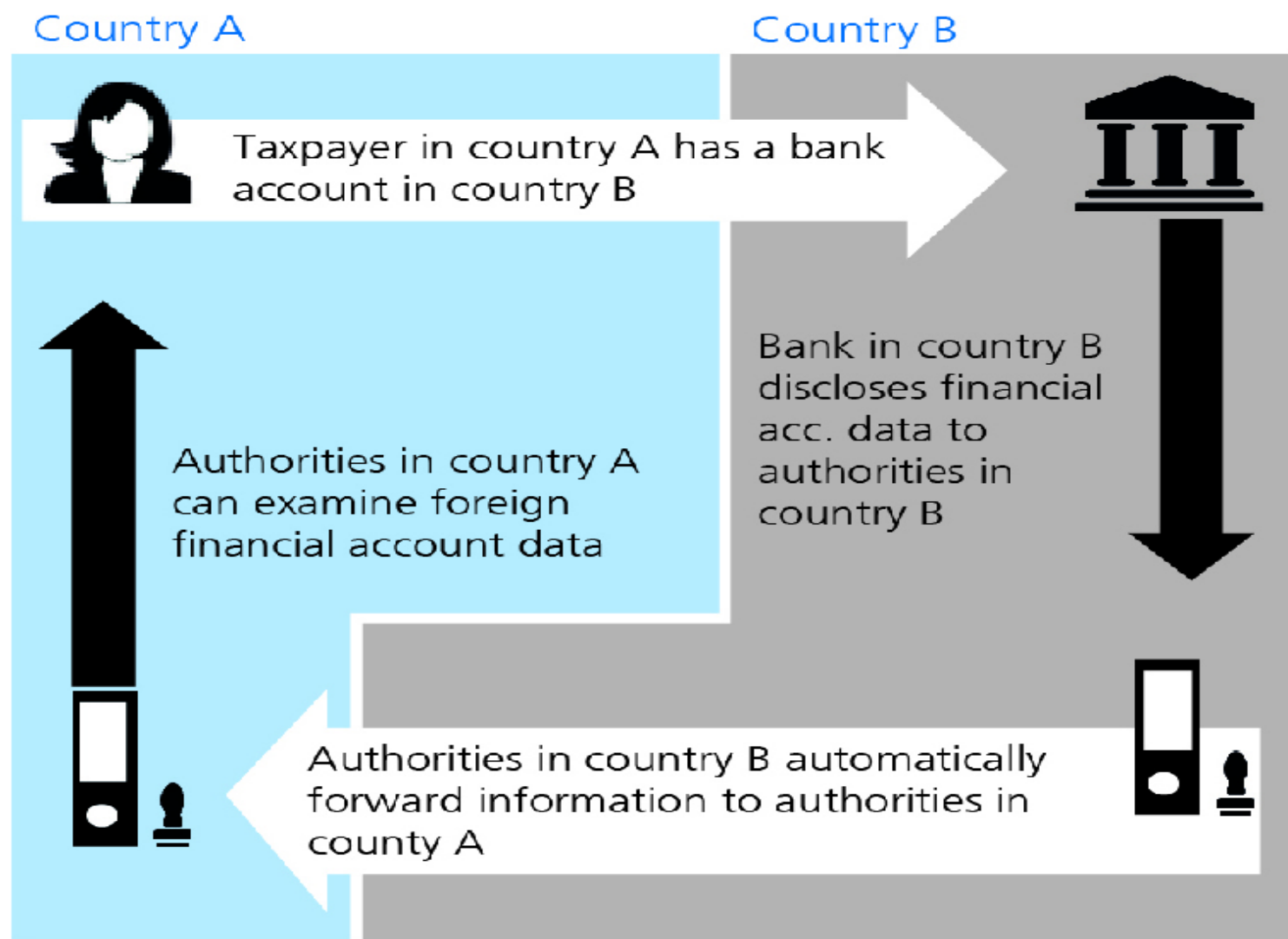
Structure of the 2014 OECD Standard



CAA and CRS - Introduction

- The CAA links the CRS and the legal basis for the exchange allowing the financial information to be exchanged, thus implementing the automatic exchange of information
 - Bilateral CAA (usually based on Article 26 OECD MC);
 - Multilateral CAA (based on Article 6 Strasourg Convention or the EU Directive)
 - Unilateral CAA (usually based on the TIEAs)
- The CRS provides
 - Rules relevant to the determination of the Reporting Financial Institution;
 - Rules relevant to the determination of the Reportable Accounts;
 - Information to be reported by each Reporting Financial Institution;
 - Due diligence procedure relevant to existing and new accounts

CAA and CRS – Simplified flow-chart



From www.efd.admin.ch

CAA and CRS – Scope of the exchange

- Automatic exchange of the following information on an annual basis relevant to Reportable Accounts (CAA, Section 2):
 - Name and other identifying data relevant to the account holder;
 - Account number;
 - Name and identifying number of the Reporting Financial Institution;
 - The account balance or value as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account;
 - The total gross amount of proceeds (such as interest, dividends, proceeds from other financial assets) credited to the account during the relevant calendar year or other appropriate reporting period

Assistance in the collection of taxes

Introduction

- Under general principle of public international law, States cannot collect their taxes in the territories of other States
- In order to override such limitation specific international agreement for the assistance in the collection of taxes have been entered into
- The main instruments are:
 - Article 27 OECD MC
 - Strasbourg Convention
 - Directive 2010/24/EU of 16 March 2010

Obligation to provide assistance (Article 27(1) OECD MC)

- Obligation to provide assistance in the collection of taxes;
 - Assistance cover also the collection of interest, administrative penalties and costs of collection
- Obligation relevant to taxes of any kind and to resident and non resident persons
- Contracting States may by mutual agreement settle the mode of application of the Article

Conditions to request assistance (Article 27(3) OECD MC)

- A request for assistance shall be accepted by the requested State if:
 - The revenue claim is enforceable under the laws of the requesting State
 - The debtor cannot prevent the collection under the laws of the requesting State
- The requested State shall collect the revenue claim of the requesting State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes
- No obligation to provide assistance if the requesting State has not pursued all measures of collection available under its laws or administrative practice (Article 26(8)(c))

Proceedings (Article 27(6) OECD MC)

- Proceedings concerning the existence, validity or amount of a revenue claim shall be brought before the courts of the requesting State

Measures of conservancy (Article 27(4) OECD MC)

- The requested State shall take measures of conservancy in accordance with the provisions of its law
- No obligation if no measure of conservancy is available under the laws of the requesting State