

# **LIUC – Università Carlo Cattaneo**

International Tax Law

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*Exchange of information and  
assistance in the collection of taxes*

Prof. Marco Cerrato

# 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
- EU Directive on administrative cooperation in the field of taxation (Directive 2011/16/EU)
- OECD Model Agreement on Exchange of Information on Tax Matters
- DAC 6 (Directive 2018/822/EU)

**Exchange of information on request -Article 26**  
**OECD MC**

# Introduction

- Art. 26 OECD MC provides for an obligation to exchange information between the two Contracting States.
- In addition to exchange of information on request, Art. 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.

# 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 of information
  - 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.
  - The competent authorities of State B are not obligated to provide the information in response to the request for 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

# **EU Directive on administrative cooperation in the field of taxation**

# Directive 2011/16/EU

- Council Directive 2011/16/EU of 15 February 2011 («**DAC**») which repealed Directive 77/79/EEC.
- The Directive has been amended by:
  - DAC 2: Council Directive 2014/107/EU of 9 December 2014: exchange of financial account information (CRS);
  - DAC 3: Council Directive (EU) 2015/2376 of 8 December 2015: automatic exchange of tax rulings and advance pricing agreements;
  - DAC 4: Council Directive (EU) 2016/881 of 25 May 2016: on automatic exchange of country by country reports;
  - DAC 5: Council Directive (EU) 2016/2258 of 6 December 2016: access to beneficial ownership information collected pursuant to the anti-money laundering legislation;
  - DAC 6 (*infra*)

# Directive 2011/16/EU

Art. 8 DAC: Automatic exchange of information regarding taxable periods as from 1 January 2014 that is available concerning residents in that other Member State, on the following specific categories of income and capital

- employment income
- directors' fees
- life insurance products
- pensions and
- immovable property



# Directive 2011/16/EU

Art. 5 DAC: Exchange on request on all information that

- is foreseeably relevant to the administration and enforcement of the domestic laws of Member States
- concerning all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities
- excluding VAT, customs, excises, compulsory social security contributions

# Directive 2011/16/EU

Art. 9 DAC: Spontaneous exchange of any information of which the competent authorities of one Member State is aware and may be useful to the competent authorities of the other Member States

# Directive 2011/16/EU

EU “Most favoured nation” clause under DAC:

Art. 19: “*Where a Member State provides a wider cooperation to a third country than that provided for under this Directive, that Member State may not refuse to provide such wider cooperation to any other Member State wishing to enter into such mutual wider cooperation with that Member State*”.

# **OECD Model Agreement on Exchange of Information on Tax Matters**

# OECD Model Agreement on Exchange of Information on Tax Matters

- On 18 April 2002 the OECD released a **model agreement** for effective exchange of information in tax matters, developed by the OECD's Global Forum Working Group on Effective Exchange of Information which included representatives from several OECD countries and Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, the Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino.
- The purpose of this Agreement is to promote international co-operation in tax matters through exchange of information.

# OECD Model Agreement on Exchange of Information on Tax Matters

- This Agreement is not a binding instrument but contains two models for bilateral agreements drawn up in the light of the commitments undertaken by the OECD and the committed jurisdictions.
- The model grew out of the work undertaken by the OECD to address harmful tax practices that distort competition in the global market for mobile financial services. One of the key criteria in identifying harmful tax practices is the lack of effective exchange of information.
- The model can be used as a basis for entering into agreements to exchange information.

# OECD Model Agreement on Exchange of Information on Tax Matters

- The Agreement provides two different models:
  - **Multilateral version:**
    - the multilateral version is not a “multilateral” agreement in the traditional sense. Instead, it provides the basis for an integrated bundle of bilateral treaties. A Party to the multilateral Agreement would only be bound by the Agreement vis-à-vis the specific parties with which it agrees to be bound;
    - thus, a party wishing to be bound by the multilateral Agreement must specify in its instrument of ratification, approval or acceptance the party or parties vis-à-vis which it wishes to be so bound;
    - The Agreement then enters into force, and creates rights and obligations, only as between those parties that have mutually identified each other in their instruments of ratification, approval or acceptance that have been deposited with the depositary of the Agreement.

# OECD Model Agreement on Exchange of Information on Tax Matters

- The Agreement provides two different models:
  - **Bilateral version:**
    - the bilateral version is intended to serve as a model for bilateral exchange of information agreements;
    - as such, modifications to the text may be agreed in bilateral agreements to implement the standard set in the model.



# OECD Model Agreement on Exchange of Information on Tax Matters

- **Object and scope of the Agreement (Art. 1):**
  - Competent Authorities shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting States concerning taxes covered;
  - such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters;
  - the information exchanged shall be treated as confidential.

# OECD Model Agreement on Exchange of Information on Tax Matters

- **Jurisdiction (Art. 2):**

*“A Requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction”.*

# OECD Model Agreement on Exchange of Information on Tax Matters

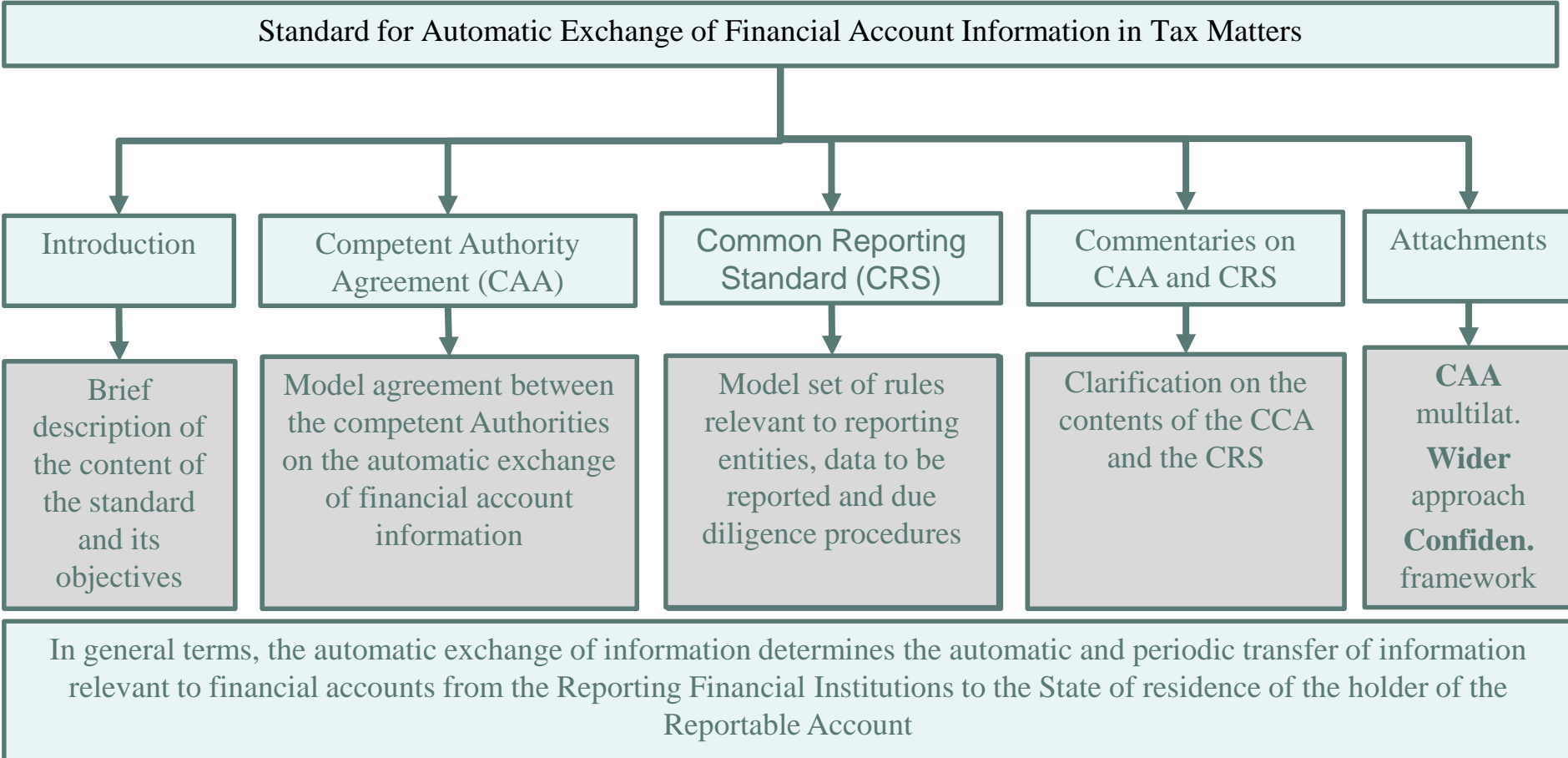
- **Exchange of information upon request (Art. 5):**
  - The competent authority of the requested Party shall provide upon request information for the purposes referred to in Art. 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party;
  - if the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

# **Automatic exchange of information**

# Introduction

- Sources of automatic exchange of information:
  - Article 26 OECD MC
  - 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

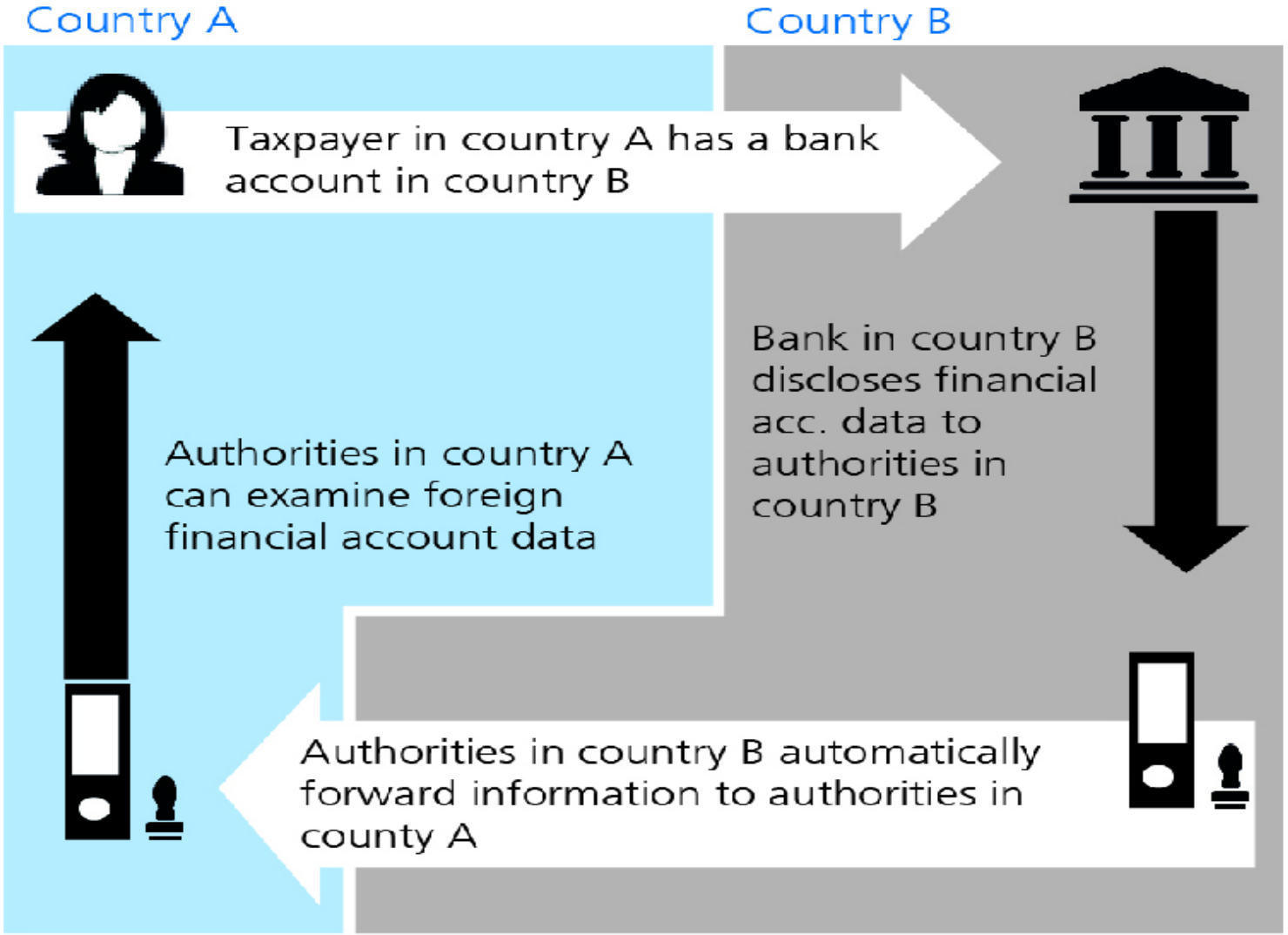
# Structure of the 2014 OECD Standard



# CAA and CRS - Introduction

- The CAA links the CRS («*Common Reporting Standards*») 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](http://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

# **DAC 6 (Directive 2018/822/EU)**

# DAC 6 (Directive 2018/822/EU)

- On 13 March 2018, the ECOFIN Council reached political agreement on the European Commission's proposal from June 2017 of the DAC 6 Directive on new **transparency rules for intermediaries** (firms or persons, such as consulting firms, banks, lawyers, tax advisors, accountants) that design or sell potentially harmful tax schemes.
- On May 25 of 2018 the ECOFIN Council adopted formally the DAC 6 Directive.
- DAC 6 provides for mandatory disclosure of information on cross-border potentially aggressive tax-planning arrangements by intermediaries, or individual or corporate taxpayers, to the tax authorities and mandates automatic exchange of this information among Member States.

# DAC 6 (Directive 2018/822/EU)

- The main purpose of DAC6 is to strengthen tax transparency and fight against aggressive tax planning (Panama papers).
- DAC 6 is in line with Action 12 of the OECD Base Erosion and Profit Shifting (BEPS) Project.
- Member States must transpose the Directive into their national laws and regulations by 31 December 2019.
- The new reporting requirements will apply from 1 July 2020.
- Member states will be obliged to **exchange information every three months, within one month from the end of the quarter in which the information was filed**. The first automatic exchange of information should be communicated among Member States by 31 October 2020.
- Intermediaries and taxpayers are requested to report to the respective national authorities **aggressive cross-border arrangements** whose implementation started in the interim period of adoption of the Directive (i.e. from 25 June 2018, when entered into force the Directive, to 1 July 2020, when the Directive is applicable) by 31 August 2020, with retrospective effect of the new provisions.

# DAC 6 (Directive 2018/822/EU)

- The term **aggressive tax planning** is undefined, for this reason the scope of application of the Directive is limited to the so called “**reportable cross-border arrangements**”.
- 'reportable cross-border arrangement' means any cross-border arrangement that contains at least one of the **hallmarks** set out in the Annex IV of the Directive.
- ‘**Hallmark**’ means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in Annex IV.
- The Directive distinguishes between **generic hallmarks** and **specific hallmarks**: the generic hallmarks and some of the specific hallmarks may only be taken into account where they fulfil the “**main benefit test**”.
- That “main benefit test” will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

# DAC 6 (Directive 2018/822/EU)

- The Directive refers to “*intermediaries*”: **'intermediary'** means any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement. Included are also the persons who knows or could be reasonably expected to know.
- Examples of intermediaries are tax advisors, accountants, banks and lawyers.
- the intermediary must meet at least one of the following conditions:
  - be resident for tax purposes in a Member State;
  - have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;
  - be incorporated in, or governed by the laws of, a Member State;
  - be registered with a professional association related to legal, taxation or consultancy services in a Member State;

# DAC 6 (Directive 2018/822/EU)

- the intermediaries are exempt from the reporting obligation where the reporting obligation would breach the legal professional privilege under the national law of that Member State: in this case the intermediary must notify the taxpayer;
- where there is no intermediary or the intermediary has the right to a waiver, the disclosure obligation shifts to the taxpayer in the absence of any other intermediary.

# **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 practise (Article 27(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.

# Directive 2010/24/EU of 16 March 2010

- Within EU, the assistance for the recovery of tax claims among member States is provided for by the Directive 2010/24/EU of 16 March 2010.
- The Directive provides for the assistance with respect to the collection instruments and precautionary measures to guarantee the recovery of the claim even if the claim is contested.
- The Directive provides the general framework concerning the procedures to be followed in case of a request for assistance from a member State (“the applicant State”) to another member State (“the requested State”).

# Strasbourg Convention

- Outside of the EU, the assistance in the field of taxes is regulated by the Convention on Mutual Administrative Assistance in Tax Matters signed in Strasbourg on 25 January 1988 by the member States of the Council of Europe and the member countries of the OECD.
- The Convention entered into force when five States signed it on 1 April 1995.
- 127 jurisdictions currently participate in the Convention.

# Strasbourg Convention

- Under the Mutual Assistance Convention, signatory States shall provide for assistance in recovery of taxes pursuant to Article 11 (except for reservations made by single States) if:
  1. the request of assistance concerns claims relating to taxes listed in Annex A as well as interest thereon, related administrative fines and costs incidental to recovery;
  2. the tax claims form the subject of an instrument permitting their enforcement in the applicant State (Art. 11, para. 2);
  3. unless otherwise agreed between the States concerned, the tax claims against a resident of the applicant State are not contested. If the claim is against a person who is not a resident of the State requiring for assistance, the assistance can be activated only where the claim may no longer be contested, unless otherwise agreed between the States concerned (Art. 11, para. 2) ;
  4. the applicant State has pursued all means available in its own territory (Art. 19).



# Strasbourg Convention

- If these conditions are met, the requested State shall proceed with the recovery of the tax claim of the applicant State according to its domestic legislation as if it was its own tax claim.
- The Convention applies to all taxes imposed by a contracting State, including VAT.
- Administrative assistance in the field of criminal law falls outside the Convention.