tax justice network

TAX JUSTICE BRIEFING – FEBRUARY 2012

Analysis of the CoE/OECD Convention on Administrative Assistance in Tax Matters, as amended in 2010 - Prepared by Markus Meinzer, TJN-IS

1. Introduction

1. When a country's citizens shift money or assets to another jurisdiction, the jurisdictions need to exchange information with each other in order to be able to levy appropriate taxes[1]. Various bilateral and multilateral information-sharing mechanisms exist, each with their own strengths and weaknesses. Perhaps the best known multilateral arrangement is the EU Savings Tax Directive[2], under which participating countries automatically share all relevant information with each other. Many bilateral treaties[3] are weaker and involve 'on request' or 'on demand' information exchange, where information is only provided after a specific request.

2. NGOs have long been calling[4] for a multilateral convention requiring automatic information exchange. The Convention on Mutual Administrative Assistance in Tax Matters[5] (a joint initiative by the OECD and the Council of Europe) is currently being promoted in response to this demand. It was first opened for signature in 1988 and came into force in 1995. It was amended in 2010[6], and the amended version ('the Convention') came into force on 1st June 2011.

3. This briefing paper analyses the amended Convention, and tries to paint as complete a picture of it as possible[7], to help inform policy makers, activists and government officials. It compares the convention to other arrangements, such as the OECD's Tax Information Exchange Agreements.

4. The Convention embodies various legal improvements over Tax Information Exchange Agreements[8] (TIEAs). Its multilateral nature is an important improvement over the bilateral processes that dominate the field of cross-border information exchange. It is also much broader than TIEAs: it provides differing mechanisms for exchanging information ('on

[1] This analysis is a team effort and would not have been possible without the valuable contributions by Eurodad, Martin Hearson, Sarah Knott, David McNair, Sol Picciotto and David Spencer. Thanks to all.

[2] http://www.taxjustice.net/cms/upload/pdf/EUSTD-TJN-Briefing_-_JAN-2011.pdf; 6.2.2012.

[3] http://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf; 6.2.2012.

[4] http://www.taxjustice.net/cms/upload/pdf/TJN_0903_Action_Plan_for_G-20.pdf; 7.2.2012.

[5] http://www.oecd.org/dataoecd/63/49/48980598.pdf; 20.12.2011.

[6] The main rationale for this Protocol was to open the Convention for non-OECD and non-Council of Europe countries to sign and ratify the Convention. Another main purpose of the Amending Protocol was to update the provisions on information gathering (Art. 21 (3) and (4)), reflecting recent changes in international tax law.

[7] The paper is based on information available as of 7 February 2012.

[8] http://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf; 2.1.2012.

request', 'spontaneous' and 'automatic' information exchange, see box 1 below) and allows for joint tax audits of multinational corporations. This may be particularly useful for developing countries struggling to untangle complex multi-jurisdictional tax structures.

Box 1: Automatic, spontaneous, and on-request information exchange

Countries can exchange information in different ways. 'On request' information exchange involves one jurisdiction requesting another jurisdiction for a specific piece of information about a specific taxpayer; often it has to jump over high hurdles to obtain the information. 'Spontaneous' information exchange happens when a jurisdiction discovers information that might be relevant to another tax authority and hands it over even though it received no specific request to do so. 'Automatic' information exchange happens when parties routinely collect relevant information on another jurisdictions' taxpayers and hand over this information automatically, without receiving any specific request.

Under the Convention, all three types of information exchange are envisaged.

5. The Convention nonetheless has major weaknesses: secrecy jurisdictions face little or no incentive to adhere to it, and it is unclear whether the Convention will require secrecy jurisdictions to obtain the information that needs to be exchanged.

Current signatories[9] (let alone those that have actually ratified it; see Annex A) exclude secrecy jurisdictions such as Switzerland, Luxembourg and the Cayman Islands. In addition, there are no mechanisms for assessing how well the Convention is performing in practice[10], and consequently no evidence as to how well it performs. These risks are particularly relevant for developing countries deciding whether to commit scarce resources to it. Furthermore, unlike recent guidance issued by the UN, there is no provision to allow wealthier countries to bear more of the costs involved in complying with the Convention. The Convention also fails to refer to the UN as an appropriate forum for advancing international tax cooperation and instead jealously guards this role for the OECD and for parties to the Convention.

2. Taxes covered by the Convention

6. The Convention covers cooperation in those types of taxes that impact most directly on economic and tax justice. Article 2.1.a, which applies only to central government, states that the Convention covers taxes on income and profits, taxes on capital gains and taxes on net wealth. Article 2.1.b then extends the scope to most other known taxes, crucially to the taxes mentioned above if they are "imposed on behalf of political subdivisions or local authorities" (2.1.b.i). It also covers social security contributions (2.1.b ii), as well as estate, inheritance and gift taxes, taxes on immovable property, consumption taxes, etc. (2.1.b.iii).

7. While state parties can reserve against assistance (to "reserve against" means to exclude from a treaty) in some types of taxes, those mentioned under Article 2.1.a cannot be reserved against. Article 30.1.a and Art. 30.2 in combination prevent state parties from reserving against any taxes mentioned under Article 2.1.a, that is,

[9] http://www.oecd.org/dataoecd/8/62/49271927.pdf; 23.1.2012. See Annex A for an overview of signatories/ratifications.

[10] Such a mechanism is hardly ever available in the context of an international convention/treaty and represents a major obstacle in creating effective international cooperation. Such mechanisms should be developed.

against cooperation in centrally levied taxes on profits and income, capital gains and net wealth. However, a state can impose reservations against any other tax as mentioned under Article 2.1.b. This limit on reservations may act as a strong dividing device between those jurisdictions willing to "sacrifice" their tax haven activity for improved international cooperation and those not willing to do so.

3. Information exchange 'on request' under the Convention

8. Generally speaking, the 'upon request' mode of information exchange contained in the Convention establishes a lower threshold for requesting information than under an OECD 2002 TIEA[11]. The particular hurdles contained in the OECD TIEAs are that you effectively have to already know what you are looking for before you ask for it. The OECD model TIEA's Article 5, Para. 5, states that the information sought from a treaty partner must be "foreseeably relevant"; and sub-paragraphs a, b, c, d, and e of the TIEA impose daunting obligations on the requesting state (they have to provide the identity of a particular person, to make a statement on the information sought, to describe the particular tax purpose, to state the grounds for believing that the information is in possession of requested state, and to provide the name and address of a person in possession of the information). These represent powerful deterrents against making requests. The Convention contains none of these particular hurdles.

9. The Convention instead uses three paragraphs to regulate information exchange upon request: Articles 4, 5 and 18. Article 4 establishes as a general criterion that the information sought is "foreseeably relevant". A further specification takes place in Article 5 where it is stated that information shall be provided "which concerns particular persons or transactions". This effectively rules out general requests for information.

10. Article 18 specifies the information to be provided by the applicant state. For practical purposes, for a successful request for information exchange to be made, first a series of formal standards must be met: the form in which the information should be provided must be specified (Art 18.1.c), the requesting authority must be identified (Art. 18.1.a), and a statement that all reasonable measures available under the domestic law of the requesting state have been pursued must be submitted (Art 18.1.f and Art. 21.2.g). Apart from these fairly modest formal requirements, the list of additional conditions to be met is short:

> "the name, address, or any other particulars assisting in the identification of the person in respect of whom the request is made;" (Art. 18.1.b).

The absence of a requirement to explain the tax situation or to provide an initial lead about where to look for the data appears to make the Convention significantly stronger than the OECD 2002 TIEA.

11. As regards the obligation to provide relevant data when requested, the Convention contains similar language to the UN model tax convention[12] and to the OECD model double tax treaty[13] ('DTT') as well as to the OECD's 2002 model TIEA[14]. If the requested information is not available in the tax files of the requested state, the Convention obliges a state party to "take all

[11] http://www.oecd.org/dataoecd/15/43/2082215.pdf; 2.1.2012.

[12] http://www.un.org/esa/ffd/tax/Article%2026_Exchange%20of%20Information%20_revised_.pdf; 23.1.2012.

[13] Art. 26.4 See http://www.oecd.org/dataoecd/25/24/47213736.pdf; 2.1.2012.

[14] OECD 2002 TIEA Art. 5.2

relevant measures to provide the applicant State with the information requested." (Convention Art. 5.2). It further specifies in Art. 21.3 that "the requested State shall use its information gathering measures to obtain the requested information, even though the requested State may not need such information for its own tax purposes." (Art 21.3). Article 21.4 represents a standard anti-secrecy provision[15] which means that a request for information cannot be refused "solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person".

12. The Convention's article 21.2.a and 21.2.c, however, restrict the obligation to be able to obtain relevant information. A state party is not required "to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant State or its administrative practice;" (Art. 21.2.c). The OECD 2002 TIEA, by contrast, contains additional language with respect to the capacity to obtain relevant data. OECD's 2002 TIEA obliges states to be able to obtain information held by banks as well as ownership information on persons and arrangements (TIEA Art. 5.4). That specifically includes information on the likes of settlors, trustees and beneficiaries of trusts, foundations, Anstalt, etc. In this respect, therefore, the Convention is weaker than TIEAs.

13. Obviously, the reason for this language difference is that TIEAs are aimed specifically at secrecy jurisdictions, which necessitates the inclusion of such a provision. States joining the multilateral convention are assumed to have domestic taxes including income tax, and to have powers to obtain information to enforce those taxes, and are obliged to use those powers to assist others, even if they have no tax interest. The implications of a secrecy jurisdiction without income tax joining the Convention are therefore uncertain.

4. Other modes of EoI

14. The Convention provides for four other modes of information exchange apart from 'upon request' information exchange. Most importantly, it provides for automatic (Art. 6) and spontaneous (Art. 7) exchange of tax related information. In addition, simultaneous tax examinations (Art. 8) and participation in tax examinations abroad (Art. 9) are included as well. A party to the Convention cannot reserve categorically against any of these modes of information exchange (Art. 30.1 and 30.2).

15. Developing countries trying to counter transfer pricing by multinationals have often been thwarted by a lack of cooperation with other countries. For example, several African countries seeking to examine the case of SABMiller [16]were unable to, because of the lack of a multilateral instrument. The Convention's Articles 8 and 9 could, in theory, answer such a need (though other multilateral instruments with a more regional scope might be considered more appropriate, for example, ATAF is considering just such a regional instrument[17]).

16. The wording on automatic information exchange is as follows:

> "With respect to categories of cases and in accordance with procedures which they shall determine by mutual

[15] The language of this clause is based on Article 26 on the exchange of information of the aforementioned UN and OECD Model Tax Conventions.

[16] http://www.fm.co.za/Article.aspx?id=147737; 6.2.2012.

[17] http://www.businessday.co.za/Articles/Content.aspx?id=161723; 6.2.2012.

> agreement, two or more Parties shall automatically exchange the information referred to in Article 4." (Art. 6).

The word "shall" implies an obligation for all state parties to engage in automatic information exchange. When combined with the impossibility of reserving against this article 6, the Convention clearly asserts that automatic information exchange is a standard feature of effective tax cooperation. In this respect the multilateral Convention is a significant advance on both OECD's model bilateral DTT and TIEA, neither of which mention automatic EoI.

17. However, the qualification about agreeing categories of cases and procedures casts some doubt on the practical implications of Article 6. So far (27 February 2012), there are no indications that any two state parties anywhere have agreed the additional technical protocols necessary to implement automatic information exchange under this Convention. Also, given the unspecified nature of automatic information exchange, there is a risk that any bilateral arrangements to automatically exchange information can be easily circumvented by taxpayers through the interposition of third party legal entities and arrangements. So it remains open to question as to how far this Article will provide for effective, multilateral automatic information exchange.

18. As regards simultaneous tax examinations (Art. 8) and the participation in tax examinations abroad (Art. 9), each state party can decide on a case-by-case basis whether or not they want to proceed. On simultaneous tax examinations, article 8.1 states that the competent authorities "shall consult" about simultaneous examinations at the request of one – but each party "shall decide" whether or not to take part. Concerning voluntary participation in tax examinations abroad, Article 9.1 says that the initiative comes from the applicant state and Article 9.2 specifies that all decision-making power lies with the requested state. While these provisions allow for new forms of co-operation, it is unlikely that they will impose any serious obligation on the requested state to co-operate.

19. In contrast, a state party can reserve against (Art. 30.1.b and 30.1.d) additional modes of cooperation contained in the Convention, such as assistance in recovery of outstanding tax claims (Art. 11) and the serving of documents (Art. 17).

5. Information exchange beyond tax and treaty partner

20. A significant advantage of the multilateral convention over its alternatives is that it allows for multilateral sharing of information, in article 22.4, second sentence:

> "Information provided by a Party to another Party may be transmitted by the latter to a third Party, subject to prior authorization by the competent authority of the first-mentioned Party." (Art. 22.4, second sentence).

21. The OECD 2002 TIEA in contrast establishes a more demanding threshold for forwarding information.

> "The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party." (OECD 2002 TIEA: Art. 8, last sentence).

22. Whereas the TIEA demands an "express written consent" of the State providing the information, the Convention allows such transmission "subject to prior authorisation" by the authority providing the information. This opens the possibility that two or more

states authorise each other in general terms to pass on information to (specified) third parties, rather than in relation to a specific case.

23. Similarly, the sharing of this information with other state departments, such as money laundering agencies, appears to be easier under the Convention (Art. 22.4, first and second sentence) than under a TIEA. While the provision of TIEAs requiring an "express written consent" mentioned above relates equally to sharing of information with any other but the tax authorities in the respective state, the Convention is more admissive. If a state allows domestically the use of tax related information for other purposes, the competent authority may authorise a party to the Convention to do the same (Art. 22.4, first sentence). This may become an important tool for combating money laundering and corrupt practices through this Convention.

24. Another small, but possibly important obligation contained in the Convention concerns the treatment of conflicting information. Article 10 states:

> "If a Party receives from another Party information about a person's tax affairs which appears to it to conflict with information in its possession, it shall so advise the Party which has provided the information." (Art. 10).

25. In a world of hundreds of differing and disharmonious tax systems, it is quite reasonable to assume that information from different country sources may conflict because of differing legal concepts and administrative practices. Therefore, the obligation for a competent authority to report apparent conflicts to the senders of the piece of information in question will reduce errors and foster co-operation across borders.

6. Signature, Accession and General Scope

26. The Convention is open for signature by all OECD and Council of Europe ("CoEU") member states (Art. 28.1). In addition, any other state may also ask to become a party to the amended Convention. The decision to invite new members is taken by the Parties to the Convention through the coordinating body by consensus (Art. 28.5). This clearly gives the OECD and CoEU member states a privilege over non-members, since they are not required to be invited by the coordinating body. The list of signatures and ratifications as of 19 January 2012 is enclosed in Annex A[18].

27. One issue is of some concern in this respect: a note in the commentary of the Convention explains that the Convention's coordinating body, when deciding whether to invite a requesting country, "may also consider whether the State concerned is a member of the Global Forum[19] on Transparency and Exchange of Information."[20] (Commentary, Para. 303). The Global Forum is the body that promotes and reviews the implementation of OECD's tax information exchange standards. Implementation of these standards, while weak and riddled with loopholes, nevertheless imposes substantial costs on developing countries without obvious direct benefits to them.

[18] The ratification of the original Convention was in some cases extremely slow. For example, Canada signed only on 28 April 2004, but never ratified it until November 2011. Germany signed the original Convention on 17 April 2008, but never ratified it until November 2011.

[19] http://www.oecd.org/site/0,3407,en_21571361_43854757_1_1_1_1_1,00.html; 6.2.2012.

[20] http://taxjustice.blogspot.com/2011/11/g20s-convention-on-fighting-tax-evasion.html; 16.12.2011.

28. Developing countries joining in the Global Forum may have to make substantial and costly changes in their internal laws and regulations to comply with the standards. Compliance may not be a priority for a developing country because the standards review to what extent a country requires the collection of, can access and exchanges information about non-resident investors, rather than for the purpose of assessing its own taxpayers. Even if a developing country is not a host for large tax-evading foreign financial investments, it would still be required to prioritize access to information in the same way as required of secrecy jurisdictions.

29. So if a developing country wishes to reap the benefits of information exchange under the Convention but is required first to become member of the Global Forum, it risks diverting scarce resources to implement the obligations under the Global Forum, which may be materially irrelevant to improving the taxation of its citizens and corporations.

30. A second concern relates to the international role the Convention and the coordinating body assumes. Art. 24.3 states that the coordinating body of the convention's members,

> "shall monitor the implementation and development of this Convention, **under the aegis of the OECD**. To that end, the co-ordinating body **shall recommend any action** likely to further the general aims of the Convention. In particular it shall act as a forum for the study of new methods and procedures to increase international co-operation in tax matters and, where appropriate, it may recommend revisions or amendments to the Convention. […]"(Art. 24.3; own emphasis).

31. While it is certainly a welcome step to oblige monitoring of the implementation of the Convention, the procedure for doing so appears to be flawed. First, the body is effectively monitoring itself, without outside observers or requirements for publication. If civil society were given a role and key statistics published, trust and transparency would be increased.

32. Second, the location of the coordinating body "under the aegis of the OECD" is problematic, since developing countries have no voice in the OECD, which is a club of rich countries. So solutions to any potential conflicts under the Convention risk being biased towards OECD interests. In addition, the coordinating body's role of initiating new actions and methods in the field of international tax cooperation represents an inappropriate claim of growing authority that goes well beyond the current legal scope of the Convention. The Convention extends an unjustified amount of influence for the OECD in the future of international tax cooperation. A failure to refer to the United Nations is of particular concern in this respect.

33. Martin Hearson from Action Aid summarized these concerns succinctly as follows[21]:

> *"By making membership of one body contingent on being part of the other, and giving the Convention such a potentially wide remit, there is a risk that the Convention further shifts the centre of gravity of international taxation towards the OECD, a body in which most developing countries have no say. A global Convention should really have global origins, and chart a path towards a set of standards that developing, as well as developed, countries can influence."*

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[21] http://taxjustice.blogspot.com/2011/11/g20s-convention-on-fighting-tax-evasion.html; 16.12.2011.

7. Human Rights

34. A problem could arise if a country involved in severe human rights abuses wants to join the Convention. It is conceivable that an information request by such a state may be wanted for the purposes of political persecution, and would be abused. There is no direct reference to human rights safeguards in the Convention, but the commentary mentions human rights and a passage in the Convention mentions *ordre public* as a criterion allowing a state possibly to refrain from information exchange.

35. First, human rights appear in the commentary to Article 21 of the Convention. Article 21.1 reads:

> "Nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State." (Art. 21.1).

36. This passage appears to narrowly concern the rights and safeguards of persons under national law. So it may not cover a possible human rights abuse situation where an offending applicant state requires information about assets or accounts from the requested state. The commentary specifies that:

> "Such procedural rights and safeguards also include any rights secured to persons that may flow from applicable international agreements on human rights." (Commentary to the Convention, Para. 206).

37. It remains unclear whether this passage allows a requested state to deny cooperation if there is reason to believe that the applicant state might abuse the information provided, for instance in bogus court proceedings which do not respect minimum standards of the rule of law.

38. Second, human rights are mentioned in connection to the right to privacy (Commentary to the Convention, Para. 246). As such, this passage refers more generally to personal data protection than to situations where the applicant state apparatus is involved more broadly in human rights abuses.

39. The second source for the protection of human rights is contained in the *ordre public* clause contained in Article 21.2.b and 21.2.d of the Convention. The passages clarify that the Convention does not oblige states:

> "to carry out measures which would be contrary to public policy (*ordre public*);" (Art. 21.2.b);

> "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*);" (Art. 21.2.d).

40. The commentary to Article 21.2.d specifies that:

> "this limitation should only become relevant in extreme cases. For instance, such a case could arise if a tax investigation in the applicant State were motivated by political, racial, or religious persecution." (Commentary to the Convention, Para. 223).

41. This passage makes clear that a state does not have to provide information if it is suspected or assumed that the information exchanged would be abused for persecution of individuals or groups. Therefore, the Convention contains at least a basic human rights safeguard.

ANNEX A: LIST OF SIGNATORIES AND RATIFICATIONS AS OF 19 JANUARY 2012 (http://www.oecd.org/dataoecd/8/62/49271927.pdf)

STATUS OF THE CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS AND AMENDING PROTOCOL – 19 JANUARY 2012

COUNTRY	ORIGINAL CONVENTION			PROTOCOL (P)/ AMENDED CONVENTION (AC)		
	SIGNATURE (Opened on 25-01-1988)	DEPOSIT OF INSTRUMENT OF RATIFICATION, ACCEPTANCE OR APPROVAL	ENTRY INTO FORCE	SIGNATURE (Opened on 27-05-2010)	DEPOSIT OF INSTRUMENT OF RATIFICATION, ACCEPTANCE OR APPROVAL	ENTRY INTO FORCE
ARGENTINA				03-11-2011 (AC)		
AUSTRALIA				03-11-2011 (AC)		
AZERBAIJAN	26-03-2003	03-06-2004	01-10-2004			
BELGIUM	07-02-1992	01-08-2000	01-12-2000	04-04-2011 (P)		
BRAZIL				03-11-2011 (AC)		
CANADA	28-04-2004			03-11-2011 (P)		
DENMARK	16-07-1992	16-07-1992	01-04-1995	27-05-2010 (P)	28-01-2011	01-06-2011
FINLAND	11-12-1989	15-12-1994	01-04-1995	27-05-2010 (P)	21-12-2010	01-06-2011
FRANCE	17-09-2003	25-05-2005	01-09-2005	27-05-2010 (P)	13-12-2011	01-04-2012
GEORGIA	12-10-2010	28-02-2011	1-06-2011	03-11-2010 (P)	28-02-2011	01-06-2011
GERMANY	17-04-2008			03-11-2011 (P)		
ICELAND	22-07-1996	22-07-1996	01-11-1996	27-05-2010 (P)	28-10-2011	01-02-2012
INDONESIA				03-11-2011 (AC)		
IRELAND				30-06-2011 (AC)		
ITALY	31-01-2006	31-01-2006	01-05-2006	27-05-2010 (P)	17-01-2012	01-05-2012
JAPAN	03-11-2011			03-11-2011 (P)		
KOREA	27-05-2010			27-05-2010 (P)		
MEXICO	27-05-2010			27-05-2010 (P)		
MOLDOVA	27-01-2011			27-01-2011 (P)	24-11-2011	01-03-2012
NETHERLANDS	25-09-1990	15-10-1996	01-02-1997	27-05-2010 (P)		
NORWAY	05-05-1989	13-06-1989	01-04-1995	27-05-2010 (P)	18-02-2011	01-06-2011
POLAND	19-03-1996	25-06-1997	01-10-1997	09-07-2010 (P)	22-06-2011	01-10-2011
PORTUGAL	27-05-2010			27-05-2010 (P)		
RUSSIA				03-11-2011 (AC)		
SLOVENIA	27-05-2010	31-01-2011	1-06-2011	27-05-2010 (P)	31-01-2011	01-06-2011
SOUTH AFRICA				03-11-2011 (AC)		
SPAIN	12-11-2009	10-08-2010	01-12-2010	18-02-2011 (P)		
SWEDEN	20-04-1989	04-07-1990	01-04-1995	27-05-2010 (P)	27-05-2011	01-09-2011
TURKEY				03-11-2011 (AC)		
UKRAINE	30-12-2004	26-03-2009	01-07-2009	27-05-2010 (P)		
UNITED KINGDOM	24-05-2007	24-01-2008	01-05-2008	27-05-2010 (P)	30-06-2011	01-10-2011
UNITED STATES	28-06-1989	30-01-1991	01-04-1995	27-05-2010 (P)		