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### **Citation**

Mosquera Valderrama, I. J. (2010). EU and OECD Proposals for International Tax Cooperation: A New Road? *Tax Notes International*, 59(8), 609-622. Retrieved from <https://hdl.handle.net/1887/62381>

Version: Not Applicable (or Unknown)

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**Note:** To cite this publication please use the final published version (if applicable).

## EU and OECD Proposals for International Tax Cooperation: A New Road?

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Reprinted from *Tax Notes Int'l*, August 23, 2010, p. 609

# SPECIAL REPORTS

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## EU and OECD Proposals for International Tax Cooperation: A New Road?

by Irma Johanna Mosquera Valderrama

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**T**he recent economic crisis has increased the need for countries and international organizations to find better solutions for tackling tax evasion due to the illicit flow of capital resulting from the use of tax havens and offshore financial centers.<sup>1</sup> The economic crisis also has heightened the need to prevent bank secrecy. Consequently, governments<sup>2</sup> and international organizations<sup>3</sup> have placed higher on the political

agenda the importance of achieving more transparency and exchange of information by increasing international tax cooperation.<sup>4</sup>

At the international level, organizations such as the OECD, the United Nations, and the European Union are presenting their own solutions in order to enhance global cooperation on taxation. For instance, while the OECD decided to start a peer review of the application of the OECD standards for transparency and exchange of information in at least 100 jurisdictions — including OECD and non-OECD countries — the European Commission decided to present a communication that deals with the introduction of good governance in tax matters.<sup>5</sup> The communication was adopted by resolution of the European Parliament.<sup>6</sup> For the EU, in order to protect the financial system from noncooperative jurisdictions and tax havens, action needs to be taken to achieve international good governance in the tax area. Such action includes encouraging transparency, exchange of information, and

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<sup>1</sup>Even though a tax haven can also be regarded as an offshore financial center, there are differences in the two concepts. Offshore financial centers “reduce revenue available to developing countries where they act as a destination for income streams and wealth protected by a lack of transparency and show a refusal or inability to exchange information with revenue authorities who may have taxing rights in respect of that income or those assets.” OECD, “Promoting Transparency and Exchange of Information for Tax Purposes: A Background Information Brief,” Apr. 21, 2010, at 6.

<sup>2</sup>For example, in the G-20 summits in Washington, London, and Pittsburgh, and G-8 summits in L’Aquila and Lecce (Italy) and Hokkaido (Japan), political leaders expressed their commitment to tackle tax evasion, and their willingness to take action against noncooperative jurisdictions, including tax havens, and against those countries that do not meet OECD international standards for transparency and exchange of information.

<sup>3</sup>In October 2009, a global conference on “Financial Institutions and Instruments — Tax Challenges and Solutions” was organized by the International Tax Dialogue. This conference explored the weaknesses and strengths of the existing international architecture of taxation in this area, questioned the extent to which tax policies may have contributed to the current financial crisis, and sought to develop forward-looking solutions to identified problems. The International Tax Dialogue is a collaborative arrangement involving the EU, IMF, OECD, and World

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Bank to encourage and facilitate discussion of tax matters among national tax officials, international organizations, and other key stakeholders.

<sup>4</sup>OECD, *supra* note 1, at 2.

<sup>5</sup>Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee; “Promoting Good Governance in Tax Matters” COM(2009) 201 final, Brussels, Apr. 28, 2009.

<sup>6</sup>European Parliament Resolution, Feb. 10, 2010, on Promoting Good Governance in Tax Matters; P7 TA 2010 (0020).

(Footnote continued in next column.)

fair tax competition in the global arena. The EU communication and resolution encourage transparency and exchange of information not only for EU countries and potential candidates, but also for third countries that require EU development aid or countries that conclude agreements with the EU or with EU member states. The U.N. is following to some extent the OECD approach; it has also decided to introduce a new Code of Conduct on Cooperation in Combating International Tax Evasion, which will be applicable to developing countries.

This article reviews the current work on international tax cooperation carried out by the OECD, the EU, and the U.N. The article also presents and compares the EU communication and resolution, and it analyzes the reasoning behind the adoption by the commission and European Parliament of the principles to promote good governance in tax matters. This piece also discusses some recommendations for further research on international tax cooperation. The main focus of the essay is the EU work to promote good governance in tax matters. In order to provide a broad perspective on the current work on international tax cooperation, the article will address and compare the OECD and the U.N. proposals on transparency and exchange of information. Given that the U.N. follows to some extent the OECD's approach, this essay will only present some of the important issues in which the U.N.'s work on international tax cooperation deviates from the work of the OECD.

## I. International Tax Cooperation

### A. OECD

In order to tackle tax evasion, bilateral and multilateral tax solutions are required. More than 10 years ago, the OECD introduced international tax cooperation measures. Today, these measures are the standards of transparency and exchange of information contained in article 26 of the OECD model tax convention (the OECD model) and the 2002 OECD Agreement on Exchange of Information on Tax Matters (OECD TIEA). The roots of this project on international tax cooperation may be found in the report analyzing preferential regimes and identifying tax havens presented by the OECD in 1998. As a result of this report, the relevant countries decided to negotiate bilateral tax treaties containing exchange-of-information and transparency provisions as stated in article 26 of the OECD model and to conclude agreements based on the 2002 OECD TIEA. In general terms, the OECD standards require the following:

- exchange of information on request when it is "foreseeably relevant" in accordance to the domestic laws of the treaty partner;
- no restrictions on exchange caused by bank secrecy or domestic tax interest requirements;

- availability of reliable information and powers to obtain it;
- respect for taxpayers' rights; and
- strict confidentiality of information exchanged.<sup>7</sup>

For the OECD, "better transparency and information exchange for tax purposes are key to ensuring that taxpayers have no safe haven to hide their income and assets and that they pay the right amount of tax in the right place."<sup>8</sup> Under this framework of cooperation, tax havens, offshore financial centers, and bank secrecy are being tackled. The OECD standards have been adopted by governments in the G-8 and G-20 meetings. According to the OECD, these standards are universally endorsed, and hundreds of tax information exchange agreements have been concluded. Even jurisdictions opposed to exchanging bank information (such as Austria, Switzerland, Belgium, Luxembourg, Brazil, Chile, and Thailand) and jurisdictions that frequently act as offshore financial centers (such as the Cayman Islands, British Virgin Islands, and Bermuda) are participating in the effort.<sup>9</sup>

In order to make comparisons with the EU proposals to promote good governance in tax matters, the general features of both article 26 of the OECD model and the OECD TIEA are presented below.

#### 1. Article 26 of the OECD Model

Generally, article 26 of the OECD model states that the scope of information exchanged includes taxes of every type and description; that is, national and subnational taxes (paragraph 1). Some exceptions to information exchange have been removed, including the exception for domestic bank secrecy laws (paragraph 5). Article 6 of the OECD model also states that the exchange of information is on request. Nevertheless, the OECD commentary states that it is possible to have other forms of exchange, such as spontaneous or automatic.<sup>10</sup>

#### 2. 2002 OECD TIEA

The 2002 OECD TIEA contains a standard of what constitutes effective exchange of information, but it does not prescribe a specific format on how this standard should be achieved.

The OECD TIEA is "only one of several ways in which the standard can be implemented. Other instruments, including double taxation agreements, may also be used provided both parties agreed to do so, given

<sup>7</sup>OECD, *supra* note 1, at 4.

<sup>8</sup>*Id.*, at Annex V. For a list of the countries that have implemented the standards, see the OECD website at <http://www.oecd.org>.

<sup>9</sup>OECD, *supra* note 1, at 3 and 4.

<sup>10</sup>OECD commentary to article 26, paras. 9 and 9.1.

that other instruments are usually wider in scope.”<sup>11</sup> This means that countries may choose whether to conclude TIEAs or bilateral tax treaties in which the contents of article 26 of the OECD model are introduced. Article 5 of the OECD TIEA provides only for exchange of information upon request (paragraph 1 article 5); however, the commentary to article 5 of the OECD TIEA states that “the Contracting Parties may wish to consider expanding their co-operation in matters of information exchange for tax purposes by covering automatic and spontaneous exchanges and simultaneous tax examinations.”<sup>12</sup> Thus, as in the OECD commentary to article 26, the commentary to article 5 of the OECD TIEA makes it possible for the parties to agree on other forms of exchange of information that will cover automatic or spontaneous exchange of information. Further reference to these forms of information exchange will be made in the comparison of the EU and OECD, which will be presented in Section III.B below.

The OECD TIEA contains both a multilateral and a bilateral model of agreements. A multilateral agreement provides the basis for an integrated bundle of tax treaties to which parties are bound insofar as those parties have mutually identified each other in their instruments of ratification, approval, and acceptance. Thus, multilateral agreement does not mean multilateral agreement in the traditional sense (that is, one agreement for all parties). Instead, this multilateral version makes it possible for a party to be bound to the specific parties to which it wishes to be bound. Until now, no TIEA in a multilateral version have been signed, and the reason for the OECD can be the novelty of the multilateral approach.<sup>13</sup> The bilateral version is a model for bilateral exchange-of-information agreements and can be modified in accordance with the wishes of the parties entering into the agreement. In principle, not all countries were willing to sign these TIEAs, and therefore, a list of jurisdictions that were not substantially implementing the OECD standards was published. In order to be removed from that list, a jurisdiction must have “substantially implemented” the OECD standards (that is, signed at least 12 TIEAs). Since April 2009, 25 jurisdictions have substantially implemented the OECD standards and have been removed from that list as of April 2010.<sup>14</sup>

### 3. Global Forum

The Global Forum on Transparency and Exchange of Information was created in 2000 with OECD and non-OECD countries. This forum meets annually, and the last meeting took place in Mexico on September

1-2, 2009. In that meeting, a self-standing secretariat based in the OECD was established, and the attendees agreed on reviewing the effective implementation of the OECD standards by means of carrying out a monitoring and peer review of at least 100 jurisdictions that have implemented these standards. This review will take place in two phases: first, to review the quality of a jurisdiction’s legal and regulatory framework for the exchange of information; and second, to review the practical application of this framework. This review was launched in March 2010 for the first group of 18 countries.<sup>15</sup> Thus, it should be reasonably expected that in the coming years, more attention will be given to international tax cooperation not only as a result of the financial crisis, but also as a result of the OECD work on promoting the standards for transparency and exchange of information.

## B. United Nations

For developing countries, the U.N. Committee of Experts on International Cooperation in Tax Matters adopted article 26 of the OECD model in 2008.<sup>16</sup> As a result, article 26 of the U.N. model was introduced with a revised commentary by the U.N. committee that will be included in the next version of the U.N. Model Double Taxation Convention Between Developed and Developing Countries. Even though the proposed article 26 of the U.N. model substantially follows article 26 of the OECD model — and therefore, the OECD commentary is relevant in interpreting article 26 of the U.N. model — article 26 of the U.N. model is broader on some issues in comparison to article 26 of the OECD model. The following section provides a description of the issues in which article 26 of the OECD model and article 26 of the U.N. model differ.

### 1. Article 26 of the U.N. Model

Article 26, paragraph 1 of the U.N. model contains an additional sentence stating that “in particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes.” In contrast, article 26 of the OECD model does not include such a sentence or any reference to the purposes of exchange of information. According to the U.N. committee, this additional sentence is intended to provide guidance to the contracting states on the proper interpretation of the article.<sup>17</sup> The U.N. committee considers that mutual assistance in combating tax evasion and tax avoidance are important not

<sup>11</sup>OECD TIEA, introduction number 5.

<sup>12</sup>Commentary to article 5, para. 39 of the TIEA.

<sup>13</sup>OECD, *supra* note 1, at 7.

<sup>14</sup>*Id.*, at 4, and Annex II, at 14.

<sup>15</sup>These countries are Australia, Barbados, Bermuda, Botswana, Canada, Cayman Islands, Denmark, Germany, India, Ireland, Jamaica, Jersey, Mauritius, Monaco, Norway, Panama, Qatar, and Trinidad and Tobago.

<sup>16</sup>Fourth session of the Committee of Experts on International Cooperation in Tax Matters, Geneva, Oct. 20-24, 2008.

<sup>17</sup>2008 revised commentary to article 26 of the U.N. model, paras. 4.2 and 4.3.



only for helping countries to examine whether an aggressive tax structure results in tax avoidance or tax evasion, but also for providing more knowledge to lawmakers on how to close possible tax loopholes.<sup>18</sup>

Also, article 26 of the U.N. model contains an additional provision to paragraph 6, stating that “the competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made.” According to the U.N. committee, the reason for this language is to authorize the competent authorities to exchange information on request, automatic or spontaneous.<sup>19</sup> Further, in its commentary to article 26, the U.N. committee states that if the state wants to introduce information exchange not only on request, but also automatically or spontaneously, those countries may wish to add the following language to the end of paragraph 6:

In addition to responding to specific requests for information, the competent authorities shall exchange information on a routine and spontaneous basis. They shall agree from time to time on the types of information or documents which shall be furnished on a routine basis.<sup>20</sup>

Given the concern of some developing nations regarding the extraordinary costs that automatic or spontaneous information exchange may create for the tax administration of those countries, it could be agreed that those extraordinary costs should be assumed by the country that requests the information. For this purpose, an additional standard provision can be included as follows:

Extraordinary costs incurred in providing information shall be borne by the Contracting Party which requests the information. The competent authorities of the Contracting Parties shall consult with each other in advance if the costs of

providing information with respect to a specific request are expected to be extraordinary.<sup>21</sup>

## 2. The Code of Conduct

In October 2009, the U.N. committee approved the U.N. Code of Conduct on Cooperation in Combating International Tax Evasion.<sup>22</sup> This code contains a commitment of countries:

- to exchange information in criminal and civil tax matters<sup>23</sup>;
- to have appropriate confidentiality rules for information exchanged; and
- to ensure that reliable information such as bank account, ownership, identity, and relevant accounting information would be available in response to a specific request.<sup>24</sup>

The code states that countries should commit to a minimum level of cooperation that is accepted by the U.N., but individually, countries may aspire to a higher level of cooperation than the one presented in the code. This code provides for unilateral, bilateral, and multilateral measures including regional actions. Countries are thus required to amend their domestic legislation and practices and to conclude agreements implementing the substance of article 26 of the U.N. model and the accompanying commentary.<sup>25</sup> Further reference to the U.N. work, including its code of conduct, is found in Section III.B below.

## C. European Union

In April 2009, the commission presented a communication titled “Promoting Good Governance in Tax Matters” for EU member states, EU potential candidates, and third countries including those receiving EU development aid.<sup>26</sup> For the EU, in order to protect the financial system from noncooperative jurisdictions and tax havens, actions to achieve international good governance in the tax area — including transparency, exchange of information, and fair tax competition — must be implemented. This communication was adopted by resolution of the European Parliament on February 10, 2010.

Also, the EU is now discussing an amendment to the existing measures to promote tax cooperation in the EU:

<sup>18</sup>*Id.*, at para. 4.3 states:

although tax evasion is illegal and tax avoidance is not, both result in the same loss of revenue to the government, and, by definition, both defeat the intent of the government in enacting its taxing statutes. Consequently, mutual assistance in combating tax avoidance is an important aspect of mutual cooperation on tax matters. In addition, some forms of aggressive tax avoidance are so close to the line between avoidance and evasion that a Contracting State is unlikely to know for sure whether the information it is requesting deals with avoidance or evasion until after it obtains the requested information. Information on tax avoidance may be extremely useful to a Contracting State in its efforts to close possible loopholes in its taxing statutes.

<sup>19</sup>*Id.*, at para. 5.4.

<sup>20</sup>*Id.*, at para. 29.2.

<sup>21</sup>*Id.*, at paras. 29.3 and 29.4.

<sup>22</sup>Fifth Session of the Committee of Experts on International Cooperation in Tax Matters, Geneva, Oct. 19-23, 2009.

<sup>23</sup>The TIEA also states that information must be exchanged for both civil and criminal matters. *See* article 5, para. 1 of the TIEA and para. 39 of its commentary.

<sup>24</sup>Report of the Fifth Session of the Committee of Experts on International Cooperation in Tax Matters, at 14.

<sup>25</sup>*Id.*, at Annex.

<sup>26</sup>*Supra* note 5.

- the proposals — which replace the mutual assistance directive<sup>27</sup> — for a directive on administrative cooperation and a directive on recovery of claims;
- the proposal for amendment to the savings taxation directive<sup>28</sup>; and
- the code of conduct to tackle harmful tax competition in taxation of companies.

This new approach is the result of the political statement of the Economic and Financial Affairs Council (May 2008) that, in light of recent events,<sup>29</sup> stated that it is necessary to reinforce the efforts to tackle tax fraud and evasion, and for this purpose, ECOFIN acknowledges the need for “implementing, on as broad a geographical basis as possible, the principles of good governance in the tax area.”<sup>30</sup> In contrast to the OECD approach, the EU “objective is not to target tax havens per se but to reach agreement with as many third countries as possible on common principles of cooperation and transparency.”<sup>31</sup> The outcome will be a provision on good governance added to the relevant agreements concluded by the EU and the EU member states with third countries. This provision describes the commitment of the parties to improve international tax cooperation and to facilitate the collection of legitimate tax revenues.<sup>32</sup>

## II. Good Governance in Tax Matters

### A. The Communication

#### 1. Background

In the EU communication “Promoting Good Governance in Tax Matters,” the commission adopted the definition of good governance as presented by

ECOFIN (May 2008).<sup>33</sup> ECOFIN defined “good governance in the tax area as meaning the principles of transparency, exchange of information, and fair tax competition.”<sup>34</sup>

In order for the commission to strengthen the principle of tax governance within the EU and internationally, actions that result in better tax governance within the EU and in third countries must be taken. The EU’s objective is to strengthen actions to achieve international good governance in the tax area as presented in the contribution of EU finance ministers to the G-20 meeting of March 14, 2009, and ratified by the European Council of March 19-20, 2009. In the communication, the commission recognizes the importance of combating not only tax fraud and tax evasion, but also money laundering, corruption, and terrorism by means of promoting good governance in tax matters. Further, the commission stated that there is clearly a growing global consensus on the need for a continuing coordinated response to this problem, consisting of complementary initiatives in the areas of financial regulation and taxation.<sup>35</sup> The contents of these initiatives are not clear, and therefore, some proposals for further research in the area of tax, accounting, and financial regulation are offered in Section IV.B below.

The goals of this EU communication are to consider the tools to improve and promote good governance within the EU and internationally, and to increase the scope of coordinated action by EU member states so that the efforts to promote transparency and exchange of information are reinforced.

The European Commission acknowledges the work of the OECD on harmful tax competition and international tax cooperation, the importance of the OECD standards on exchange of information and transparency, and the commitments made at the Global Forum on Transparency and Exchange of Information. The commission proposes “coordinated action by Member States to ensure an appropriate follow-up where this is in the interest of the EU.”<sup>36</sup> For instance, the commission refers to the proposed derogation of the special

<sup>27</sup>On February 2, 2009, two proposals of the directive were presented by the European Commission: the proposal for a Council directive on administrative cooperation in the field of taxation (COM(2009)0029 as amended (C6-0062/2009 — 2009/0004(CNS))); and the proposal for a Council directive concerning mutual assistance for the recovery of claims relating to taxes, duties, and other measures (COM(2009)0028) as amended C6-0061/2009 — 2009/0007(CNS)).

<sup>28</sup>The European Commission presented a proposal of November 13, 2008, amending Directive 2003/48/EC on taxation of savings income in the form of interest payments (COM(2008)0727).

<sup>29</sup>Even though ECOFIN does not mention what recent events, it could be argued that in addition to the financial crisis, the interest in exchange of information and transparency is the result of recent events such as the 2008 Liechtenstein affair and the collapse of the financial system worldwide.

<sup>30</sup>ECOFIN Meeting of May 14, 2008, 8850/08 (Presse 113) at 22.

<sup>31</sup>*Supra* note 5, at 7.

<sup>32</sup>*Id.*, at 23.

<sup>33</sup>In this communication, the commission proposes actions to improve tax governance, stating that agreements (which cover common standards and cooperation, including on tax matters) are required given that with the current financial and economic crisis, national budgets and tax systems are under increased threat, and that the need for international tax cooperation and common standards has become a regular feature of international discussions. *Id.*, at 5.

<sup>34</sup>*Supra* note 30.

<sup>35</sup>*Supra* note 5, at 4.

<sup>36</sup>*Id.*, at 7.

arrangements in the savings taxation directive<sup>37</sup> and promotes the adoption of the OECD standards on information exchange by all member states,<sup>38</sup> and by countries that have saving tax agreements with the EU<sup>39</sup> in which a withholding tax instead of information exchange requirement was made. Also, the commission states that it is important for all member states to move toward automatic exchange of information; however, in contrast to the OECD standards in which exchange of information takes place on request, the EU endeavors to introduce automatic exchange of information as a compulsory and binding requirement.

## 2. Ongoing Actions and Proposed Measures

In the communication, ongoing and new actions are proposed in order to improve good governance at the EU level and at the international level for all countries, including specific actions for countries receiving aid from the EU.

*a. At the EU level.* At the EU level, the following measures are presented in the communication:

- The communication mentions the introduction of two proposals in February 2009 to replace the mutual assistance directive: one, the proposal for a Council directive on administrative cooperation in the field of taxation; and two, the proposal for a Council directive concerning mutual assistance for the recovery of claims relating to taxes, duties, and other measures. These two proposals are necessary to reinforce EU action at the international level against tax fraud and tax evasion.<sup>40</sup> Interestingly, in the mutual assistance directive, in addition to the introduction of automatic exchange of information<sup>41</sup> and the prohibition on member states to invoke bank secrecy “for nonresidents as

a reason for refusing to supply information to the State of Residence,” a most-favored-nation clause in the field of international cooperation has been introduced.<sup>42</sup> According to this principle, a “Member State has to provide cooperation to other Member States under the same conditions as to a third country.”<sup>43</sup> The scope of the application of this clause can only be determined once the proposed mutual assistance directive is adopted. At the time of this writing, these proposals for directives have not yet been adopted.<sup>44</sup>

- Application of the EU savings directive to third countries and dependent and associated territories of member states is another measure presented in the communication. Also, in 2008 the commission proposed to amend this directive in order to extend the “coverage of the directive to certain interest payments to EU residents which are channelled through intermediate tax-exempted structures established in non-EU countries.” At the time of this writing, this proposed amendment to the directive has not yet been adopted.
- Another proposed measure is the application of the Code of Conduct for Business Taxation to all member states and dependent and associated territories of member states.
- In EU relationships with the European Economic Area (Iceland, Liechtenstein, and Norway) and with Switzerland, actions are being taken that will result in more administrative cooperation with the EU. For instance, with Liechtenstein, negotiations

<sup>37</sup>In this directive, three member states (Austria, Belgium, and Luxembourg) have a special arrangement in which they charge EU resident foreign account holders a withholding tax instead of exchanging information.

<sup>38</sup>Recently, Andorra, Monaco, Liechtenstein, and San Marino have endorsed the OECD standards, and Austria, Belgium, Luxembourg, and Switzerland have withdrawn their reservations to article 26 of the OECD model.

<sup>39</sup>These countries are Liechtenstein, Switzerland, Monaco, Andorra, and San Marino. *Supra* note 5, at 11.

<sup>40</sup>*Id.*, at 10.

<sup>41</sup>The discussion of the directive on administrative cooperation took place in the Economic and Social Committee and the Working Party on Tax Questions at the Council of the European Union. In these discussions, some member states have presented their reservations about the automatic exchange of information of article 8. Later, the Presidency of the Council of the European Union (Sweden at that time) prepared a new compromise text in which a number of categories of income and capital was established, and to which this method of automatic exchange would have to apply (article 8, para. 1). Also introduced was the

possibility of establishing a double limit, depending on the categories for which information is communicated or the amount that triggers the mechanism (article 8, para. 2). Council of the European Union, Presidency, Document 15145/09 FISC 139, Oct. 29, 2009. The amended directive was approved by the European Parliament on February 10, 2010 (P7 TA (2010)0013).

<sup>42</sup>Article 18 of the Council directive on administrative cooperation stating that “Where a Member State provides a wider cooperation to a third country than is provided for under this Directive, it may not refuse to provide such wider cooperation to the other Member State.” Council directive on administrative cooperation in the field of taxation (COM(2009)0029 as amended (C6-0062/2009 — 2009/0004(CNS))).

<sup>43</sup>*Id.*, at 7.

<sup>44</sup>Both directives have been amended by the commission on request of the member states. In the proposal for administrative cooperation, some categories and limits to the automatic exchange of information were introduced (article 8, paras. 1 and 2). This amended text has been approved by the EU Parliament on February 10, 2010; see P7 TA(2010)0013. Approval by the EU Council of this proposal has not yet taken place. In the Directive on Recovery of Tax Claims, as approved by the EU Council on March 16, 2010, the exchange of information without request was also included (art. 6). Council Directive 2010/24/EU, OJ L84/1 of March 31, 2010.



on a new “antifraud agreement are ongoing, including on the issue of information exchange for direct taxation.”<sup>45</sup>

- For candidate and potential candidate countries to the EU and as part of the EU enlargement strategy, good governance should be included as one of the areas to be addressed at an early state of the preaccession process.

*b. At the international level and for countries receiving aid for development.* At the international level, in May 2008 ECOFIN introduced a provision to be included in relevant agreements to be concluded with third countries by the EU and its member states. ECOFIN considered the following text to be appropriate:<sup>46</sup>

With a view to strengthening and developing economic activities while taking into account the need to develop an appropriate regulatory framework, the Parties recognise and commit themselves to implement the principles of good governance in the tax area as subscribed to by Member States at Community level. To that effect, without prejudice to Community and Member States’ competences, the Parties will improve international cooperation in the tax area, facilitate the collection of legitimate tax revenues, and develop measures for the effective implementation of the abovementioned principles.

Even though, in the communication, this provision was not explicitly adopted, the commission made reference to the negotiation of provisions on good governance in the tax area with third countries. Also, the communication states:

the Council should give the Commission sufficient flexibility in its negotiations on wording, while preserving the substantial elements and objectives of good governance, so as to be able to negotiate solutions that best fit the specific case of each country.<sup>47</sup>

The EU communication stated that the provision to be introduced in the agreements should be mentioned as early as possible in the negotiation of the agreement, and “in cases where it is known in advance that the discussion of the principles of good governance in the tax area will be contentious, or where such principles are not understood,” the introduction of this provision should be addressed in advance (for instance, in trade-related negotiations).<sup>48</sup>

In general terms, EU member states are required to include in their future tax agreements with third coun-

tries provisions on transparency and exchange of information. The EU has stated that third countries eligible for development aid<sup>49</sup> should also enhance commitments on tax governance. Otherwise, aid funding may be reallocated to other countries, or in some cases even canceled.<sup>50</sup> This means that for the commission, good governance in the tax area is exemplified by international tax cooperation. Thus, tax agreements to increase transparency and exchange of information should be concluded with third countries. Third countries are also asked to change their tax systems in the field of international cooperation in order to continue their dealings with EU member states or to receive EU aid. The specific changes in the tax systems that need to be made are not presented in this EU communication; however, it could be expected that these changes may include provisions to provide automatic exchange of information, to remove the bank secrecy for nonresidents and residents,<sup>51</sup> and to guarantee the privacy of the information exchanged. These changes may require constitutional and tax-law amendments in these countries; therefore, I believe that the EU should also study the constitutional and legal frameworks of the involved nations before the provision to promote good governance is introduced in EU member states and third countries.

## B. European Parliament Resolution

### 1. Background

The motion on Promoting Good Governance in Tax Matters was presented by the Committee on Economic and Monetary Affairs on February 2, 2010, to obtain a resolution of the European Parliament on this issue. This motion was debated and a resolution was adopted by the European Parliament on February 10, 2010. The resolution was based on the EU communication, the proposed Council directives of February 2009 on administrative cooperation and recovery of tax claims, and the 2008 amendment to the savings tax directive. Also, the declarations since 2008 following the G-20 meetings as well as the recommendations of ECOFIN in May 2008 were taken into account.

<sup>49</sup>The main reason for this approach toward tax and development was presented by the commission in the 2009 conference on “Tax and Development.” For the commission, the financial and economic crisis has increased the need to secure tax revenues in developing countries, which have been severely hit by shrinking commodity prices and the contraction of international trade. Developing countries often suffer high tax losses due to inefficiencies in their tax systems. Also, the global system of financial transactions and the abundance of noncooperative jurisdictions have made tax evasion feasible and artificial tax avoidance risky.

<sup>50</sup>*Supra* note 5, at 12.

<sup>51</sup>The EU communication and the EU resolution are not clear on whether the exchange of information will apply to residents and nonresidents or only to nonresidents.

<sup>45</sup>*Supra* note 5, at 8.

<sup>46</sup>*Supra* note 30, at 23.

<sup>47</sup>*Supra* note 5, at 11.

<sup>48</sup>*Id.*

The European Parliament took into account the global consensus at the EU and at the international level that good governance in the field of taxation means transparency, exchange of information, and fair tax competition. The resolution states:

whereas the combined efforts of the G-20 and the U.N., together with the efforts made as part of OECD-led initiatives, have produced some promising results in the area of tax governance; whereas those results remain insufficient to cope with the challenges presented by tax havens and offshore centres and must be followed by decisive, effective and consistent action.<sup>52</sup>

One of the main criticisms of the EU toward the OECD is that until now the exchange of information takes place only upon request of a tax authority. The EU advocates for a global standard on automatic exchange of information.<sup>53</sup> Further, the European Parliament stressed that:

instead of bank secrecy, automatic information exchange should take place in all circumstances, including in all the member States and dependent territories; welcomes in this respect the Commission's proposal on administrative cooperation in the field of taxation because inter alia, it extends cooperation between the Member States to cover taxes of any kind, abolishes bank secrecy and establishes the automatic exchange of information as a general rule.<sup>54</sup>

In a resolution, the European Parliament condemned the role played by tax havens in encouraging and profiteering from tax avoidance, tax evasion, and capital flight. The resolution urges member states to fight against tax havens, tax evasion, and illicit capital flight. Moreover, in the European Parliament's judgment, a lack of good governance in tax matters encourages tax fraud and tax evasion. Regarding good

governance, the Parliament stated that it "is understood to mean — transparency, exchange of information at all levels, effective cross-border cooperation and fair tax competition — and as such good governance is a key element in rebuilding the global economy after the 2008 financial collapse." The European Parliament wants to strengthen good tax governance within the EU so that the EU "has a political and moral basis from which to demand good tax governance of third countries."<sup>55</sup> For the Parliament, tax governance is a key element in rebuilding the world economy, and in order to achieve tax governance, the Parliament proposes that instead of bank secrecy, automatic exchange of information must take place and be extended to cover taxes of any kind.

## 2. Actions of the European Parliament

*a. At the EU level.* For a genuine policy of good tax governance, the first step is to clamp down on tax havens in the EU.<sup>56</sup> The second step is the approval of the directives, and to establish the principle of automatic exchange of information. Further, the European Parliament acknowledges the importance of reducing the differences among 27 tax systems, which requires improving international cooperation, introducing a common consolidated corporate tax base, and coordinating EU policies in order to enhance the implementation of antiavoidance rules.<sup>57</sup>

The Parliament proposes, among others, the following actions:

- One proposed action is the adoption of the proposed amendment to the savings tax directive that (i) ends the temporary derogation that allows Austria, Belgium, and Luxembourg to avoid exchanging information by applying a withholding tax; and (ii) extends the scope to cover private companies, trusts, and other forms of investment income. The European Parliament also recalls "that the provisions of the Directive should be extended to Singapore, Hong Kong, Macao, and other jurisdictions such as Dubai, New Zealand, Ghana, and certain states of the United States which are not bound by the Directive and are therefore a favoured location for tax evaders."<sup>58</sup>
- Another proposal is the acceleration of the conclusion of the antifraud agreement with Liechtenstein, and the negotiation of similar agreements with Andorra, Monaco, San Marino, and Switzerland.

<sup>52</sup>*Supra* note 6, at Consideration K.

<sup>53</sup>The Committee on Economic and Monetary Affairs stated in the report that:

the OECD framework for combating tax havens is unsatisfactory; highlights the need to improve the indicator for achieving the status of a cooperating jurisdiction by, for example, giving it a qualitative value; is critical of the fact that this indicator requires the conclusion of a mere 12 tax information exchange agreements; regrets, in this context, that the exchange of information takes place only on request rather than being a compulsory and binding requirement, and, furthermore, that the OECD allows governments to escape its blacklist merely by promising to comply with the information exchange principles, without ensuring that those principles are actually put into practice.

EU Report of the Committee on Economic and Monetary Affairs to the EU Parliament, A7 0007/2010 at 8.

<sup>54</sup>*Supra* note 6, at para. 3.

<sup>55</sup>*Id.*, at Consideration H.

<sup>56</sup>*Id.*, at para. 1.

<sup>57</sup>*Id.*, at paras. 24 and 25.

<sup>58</sup>*Id.*, at para. 6.

- The European Parliament also recommends the increase of cooperation, including the introduction of “the automatic exchange of information between countries, with a view to facilitating the recovery of capital moved abroad via illegal activity to the detriment of the internal market.”<sup>59</sup> This means that in contrast to the OECD work in which exchange of information takes place on request, the EU is proposing an automatic exchange of information. Whether this requirement can be applicable to all EU member states is not clear yet. However, it is clear that in some EU jurisdictions — such as Austria — which have recently introduced domestic legislation adopting the OECD standards in information exchange, this requirement of automatic exchange has not been followed. Instead, Austria provides for exchange of information upon request and takes the position that there will not be automatic or spontaneous exchange of information.<sup>60</sup>
- The Parliament also proposes the implementation of the Code of Conduct for Business Taxation<sup>61</sup> in their relations with third countries in a manner consistent with EU efforts to promote good governance in tax matters.

*b. At the international level and for countries receiving aid for development.* The EU approach is to promote good governance in tax matters in the EU Neighbourhood Policy, Enlargement Policy, and Development Cooperation Policy.

- Regarding third countries, the European Parliament considers that EU aid funds for development for a third country should be made conditional on the compliance of such country:

with good tax governance standards, including the effective implementation, on the basis of legally binding rules, of the principle of automatic exchange of information; stresses in particular that progress made on tax governance standards within international forums such as

the OECD and the G-20 should not prevent the European Union from applying higher standards.<sup>62</sup>

- Moreover, the European Parliament welcomes the work in the area of good tax governance from the G-20, G-8, the U.N., and the OECD, but it considers “nevertheless, that the commitments made by the G-20 to date are not sufficient to address the challenges posed by tax evasion, tax havens, and offshore centers.”<sup>63</sup>
- The European Parliament asks the commission to report on the ECOFIN (May 2008) recommendation to include a tax governance provision in all agreements to be concluded with third countries by the EU and its member states. Moreover, the Parliament stresses the need for provisions on good governance to be negotiated in general or specific agreements with third countries, and the need to ensure an effective process for monitoring their implementation.<sup>64</sup>
- The European Parliament considers the influence that the lack of transparency in tax systems of developing countries has in the collection of tax revenue by these countries. The Parliament stresses that “the tax governance policy should actively contribute to building sustainable and transparent tax systems in developing countries.” The goals of this policy should be to eradicate tax fraud and to raise revenue. Moreover, in developing countries, tax governance will ultimately attract investment insofar as it contributes to legal certainty, transparency, and stability.<sup>65</sup>
- The European Parliament also introduces the possibility to establish coercive measures to promote good tax governance. For example, the Parliament mentions “a special levy on movements to or from non-cooperative jurisdictions, non-recognition within the EU of the legal status of companies set up in non-cooperative jurisdictions and a prohibition on EU financial institutions establishing or maintaining subsidiaries and branches in non-cooperative jurisdictions.”<sup>66</sup>

### C. The EU Proposal in a Nutshell

The EU resolution and the EU communication contain measures to promote good governance in tax matters not only at the EU level (including potential EU

<sup>59</sup>*Id.*, at para. 11.

<sup>60</sup>C. Hasenauer and J. Prinz, “Austria: Implementation of OECD Standard on Exchange of Information,” *Int’l Tax Rev.*, Feb. 2010.

<sup>61</sup>The EU Council in December 2008 committed to continue to fight against illicit finance risks from noncooperative jurisdictions and to fight against tax havens. In this commitment, the EU Council approved a new work program for the implementation of the Code of Conduct aiming at eliminating harmful tax competition in the EU. EU Council meeting of Dec. 2, 2008, 6231/1/08 REV 1.

<sup>62</sup>*Supra* note 6, at para. 7.

<sup>63</sup>*Id.*, at para. 14.

<sup>64</sup>*Id.*, at para. 12.

<sup>65</sup>*Id.*, at para. 22.

<sup>66</sup>*Id.*, at para. 27.



candidates), but also at the international level (including countries receiving EU aid for development). Further, the EU resolution explicitly stated that the main objective of the EU is to achieve a global framework of automatic exchange of information. For the European Parliament, the OECD has achieved some results, but those results are insufficient to address the challenges posed by tax evasion, tax havens, and offshore centers.

In the EU resolution, the Parliament not only focuses on the approval of the proposed directives (savings tax directive, administrative cooperation, and recovery of tax claims), the code of conduct, and the signing of antifraud agreements, but it also provides for a broader scope of the actions to promote good governance than the EU communication. At the EU level, the Parliament stresses the importance of requiring international cooperation from all EU member states, introducing a common consolidated corporate tax base, and coordinating the EU policies in order to enhance the implementation of antiavoidance rules by all countries.

The Parliament also stresses the importance of a consistent approach to tax governance in the context of the EU Neighbourhood Policy, the Enlargement Policy, and the Development Cooperation Policy. As a result, third countries such as Switzerland and Liechtenstein, potential EU candidates, and countries receiving EU aid are also required to comply with the EU standards for good governance. It should be reasonably expected that future agreements or commitments by these countries with the EU and/or EU member states will also have the requirement to implement automatic exchange of information and to remove bank secrecy, among other measures.

Third countries concluding agreements with the EU and EU member states are also required to comply with the principles of good governance. Whether the wording of the provision as presented by ECOFIN in May 2008 will be implemented has not yet been decided by the European Commission. Thus, the European Parliament has urged the commission to report and make a decision regarding the contents of the provision. Finally, the resolution contains incentives and coercive measures for third countries that are not complying with the EU standards on good governance.

### III. Int'l Tax Cooperation Proposals

The OECD (followed to some extent by the U.N.) and the EU are presenting proposals to enhance international tax cooperation by means of introducing provisions for transparency and exchange of information to be applicable not only to OECD countries and EU member states, but also to non-OECD countries and to non-EU countries. The EU is also taking a step further by requesting that third countries apply this framework of international tax cooperation in order to receive or continue receiving international aid for development.

#### A. Good Governance in Tax Matters

The reason why the EU decided to define good governance in tax matters as exchange of information and transparency is neither specified in the EU communication nor in the EU resolution. The definition was adopted by ECOFIN in May 2008 and was introduced as such by the European Commission and the European Parliament. However, one may argue that by doing so, the EU has taken the attention away from the concept of governments being open, accountable, and responsive not only to international donors, but also to citizens. In the past, the European Commission in a white paper on European governance defined good governance as containing the following principles: openness, participation, accountability, effectiveness, and coherence.<sup>67</sup> Neither the EU communication nor the EU resolution referred to the white paper or to any other definition other than the one presented by ECOFIN. In contrast to the EU approach, the OECD and the U.N. have referred to transparency and information exchange as measures to promote international tax cooperation and not as measures to promote good governance.

#### B. Forms of Exchange of Information

The European Commission and the European Parliament consider that the OECD work on exchange of information, even though it has made progress, is insufficient. Thus, the EU believes that further actions need to be taken at the EU level, and also in the relationships with third countries. The EU's criticisms regarding the OECD work can be summarized as follows:

- the exchange of information proposed by the OECD is upon request rather than being a compulsory and binding requirement;
- the OECD framework for combating tax havens is unsatisfactory given that this framework is not based on qualitative values, and thus, if a country concludes 12 TIEAs, the country is regarded as "substantially implementing" the OECD standards, and therefore, as a cooperative jurisdiction; and
- the OECD allows "governments to escape its blacklist merely by promising to comply with the information exchange principles, without ensuring that those principles are actually put into practice."<sup>68</sup>

The EU's objectives are twofold. The first objective is to contribute to the OECD's work by promoting the improvement of the OECD standards, but with the

<sup>67</sup>"European Governance: A White Paper," EU communication of July 25, 2001, COM(2001) 428 final, at 10.

<sup>68</sup>*Supra* note 6, at para. 16.



goal to make automatic, multilateral exchange of information the global standard. The second objective is to encourage the OECD to involve the European Commission in the peer review exercise that has been initiated in the OECD Global Forum on Transparency and Exchange of Information in September 2009.<sup>69</sup>

Even though the wording of the OECD standards in article 26 of the OECD model and article 5 of the OECD TIEA states that exchange of information is made on request — and therefore, other forms of exchange such as automatic or spontaneous are not included — the commentaries to article 26 of the OECD model and to article 5 of the OECD TIEA authorize the countries to include other forms of information exchange such as automatic and/or spontaneous exchange. The U.N. commentary to article 26 of the U.N. model also includes the possibility for countries to exchange information automatically and/or spontaneously, and it has gone a little further than the OECD by introducing a specific standard option provision that can be included in the bilateral tax treaties following the U.N. model. This standard provision was presented in Section I.B above, and it states that exchange of information can be made not only on request, but also that the competent authorities can agree on exchange of information on a routine and spontaneous basis. Moreover, the clause states that the competent authorities may also agree on the type of information or documents that can be exchanged automatically (routine basis).

Although the OECD did not introduce an additional clause for automatic or spontaneous exchange of information, one may argue that if a standard provision as outlined in the U.N. commentary can be introduced in the OECD commentary to article 26 of the OECD model or to article 5 of the OECD TIEA, the OECD will provide countries with the possibility to introduce such provisions in their bilateral tax treaties or TIEAs. Only bilateral tax treaties and bilateral (no multilateral) TIEAs have been concluded. The introduction of such an additional clause to the wording of article 26 of the OECD model or article 5 of the OECD TIEA will only require the approval of both parties to the agreement.

From this analysis, I believe that the EU criticism of the OECD regarding the form (that is, on request) of the exchange of information is not accurate, given that the OECD and the U.N. have stated the possibility for countries to agree on other forms of exchange of information that go further than on request. The problem with adopting forms other than on request could be more budget and administrative issues, which result in countries' lack of willingness to introduce automatic exchange of information. One of the issues addressed

by the U.N. deals with the extraordinary costs that automatic or spontaneous exchange of information may create for the tax administration of developing countries. It is therefore suggested that the EU institutions must conduct further research on the administrative, legislative (constitutional), and budgetary problems of other countries.

Unfortunately, the U.N. did not follow this broader approach in its proposed Code of Conduct on Cooperation in Combating International Tax Evasion, which included exchange of information on request as the minimum level for international tax cooperation. The exchange on request was introduced as a result of the discussion on whether information should be automatically exchanged or be exchanged on request. Accordingly, during the discussion of the code, it was stated that some believed that the code should have an automatic exchange of information to:

make a strong statement against tax evasion and to assist developing countries — which might have trouble achieving the level of knowledge needed to make a request for exchange of information, such as bank account details. Others noted the potential burden of an over-use of automatic exchange, including the logistical issues in achieving effective automatic exchange of information.<sup>70</sup>

This approach by the U.N. in its code of conduct has been recently criticized by the Tax Justice Network, which urged the U.N. to work toward automatic exchange of information (which is more effective) and to assist developing countries with implementing such automatic exchange of information.<sup>71</sup>

Finally, one may argue that issues such as the option of introducing incentives and coercive measures are very important to the EU's goals for good governance in tax matters. These incentives and coercive measures would apply not only to EU member states, but also to third countries. They would include granting more or less EU aid for development, enacting special levies in trade, and choosing not to recognize the legal status of companies in third countries that do not adhere sufficiently to standards of good governance.

However, it can also be argued that such measures could have negative effects. Right now, the EU goal is to create a global framework in which automatic exchange of information would be the general rule. If the OECD has — until now — only been able to get its standards approved by means of introducing an exchange of information on request, there is a danger that when the EU introduces automatic exchange and

<sup>69</sup>*Id.*, at paras. 16 and 21.

<sup>70</sup>*Supra* note 24, at 15.

<sup>71</sup>Tax Justice Network, Brief to the U.N. Tax Committee, Dec. 15, 2009.

uses coercive measures to achieve the exchange, third countries may respond by introducing coercive measures against EU member states.<sup>72</sup>

### C. Bilateral and Multilateral Agreements

Even though the OECD introduced a multilateral version of the TIEA, this has not been adopted by countries. Currently, only bilateral agreements that include article 26 of the OECD model or that are based on the OECD TIEA have been concluded. Nonetheless — and in order to speed up the process of implementing an adequate level of exchange of information — the OECD has successfully promoted multilateral negotiations toward bilateral agreements for the exchange of information. Three pilot projects took place, two in the Caribbean and one in the Pacific, and the result was that as of February 2010, more than 80 agreements were signed or are now being concluded. The OECD states that this initiative “has allowed a number of smaller jurisdictions such as Antigua and Barbuda, the Cook Islands, Samoa, and the Turks and Caicos Islands to quickly put in place a significant network of agreements with OECD countries.”<sup>73</sup>

It is not clear whether these agreements will follow the TIEAs or whether only the provision presented by ECOFIN in May 2008<sup>74</sup> containing the commitment of countries to promote good governance in tax matters will be included in EU agreements with third countries. The European Parliament urged the European Commission to make a statement regarding the provision presented by ECOFIN and also to further develop this provision. Also, the types of agreements that are going to have a clause to promote good governance are not explicitly described by the EU. However, one may consider that these agreements could be bilateral tax agreements between EU member states and third countries, partnership agreements between the EU and third countries, and trade agreements between EU and/or EU member states with third countries. The way that negotiation and application of this provision will take place should be further developed by the European Commission.

## IV. Proposals for Further Research

### A. Peer Review and Study of Tax Culture

In order to create an international tax environment that enhances tax cooperation, the OECD’s first step

was to sign agreements containing OECD standards for OECD countries; tax havens, including offshore financial centers; and developing countries. The next step is for the OECD to carry out a peer review of the implementation of these agreements in at least 100 jurisdictions that have implemented the OECD standards. In this review, the legal and regulatory framework for exchange of information as well as the practical application of this framework will be addressed. This peer review began in March 2010 for the first group of 18 jurisdictions.<sup>75</sup> The OECD expects to have the first results of this peer review in 2014.<sup>76</sup>

I believe that this peer review offers a unique opportunity to study comparatively the tax culture of the countries in which these standards have been implemented. In crafting solutions, attention must be paid to the tax culture of each country and the way in which that culture will interface with and influence these changes. For this article, legal culture is defined as the organization, institutional features, operation of a legal system (external factors), and the description of values, beliefs, and attitudes toward law (internal factors). Research carried out in the past by this author in the field of leasing shows that the differences in culture provide the local fine-tuning that makes room for a transplanted concept. The rules are different in the recipient country than the ones in the donor country.<sup>77</sup>

Describing and measuring culture is a difficult task, and thus, different conclusions can be drawn in accordance with the elements to describe legal culture. For purposes of analysis of the legal culture in the OECD’s peer review exercise, the OECD should identify the specific institutional features and beliefs that have an influence in the development of tax rules used to implement the OECD standards. These issues may include:

- differences in tax systems (for example, common law, civil law, or Nordic systems);
- the objectives of lawmakers when implementing the OECD standards (for example, certainty, transparency, and equality);

<sup>72</sup>For instance, one may think that countries such as Canada, the United States, and Chile (who until recently had opposed the OECD standards) are not going to agree on an automatic exchange of information with coercive measures, and the result could be that these countries will also introduce coercive measures in their dealings with EU member states and the EU.

<sup>73</sup>OECD, *supra* note 1, at 7.

<sup>74</sup>See Section II.A.2.b of this article.

<sup>75</sup>These countries are Australia, Barbados, Bermuda, Botswana, Canada, the Cayman Islands, Denmark, Germany, India, Ireland, Jamaica, Jersey, Mauritius, Monaco, Norway, Panama, Qatar, and Trinidad and Tobago. The OECD published on the OECD website together with the launch of the first group review, the assessment criteria, the methodology to conduct this review, and the terms of reference explaining the information exchange standard countries must met.

<sup>76</sup>OECD, *supra* note 1, at 5.

<sup>77</sup>See I.J. Mosquera Valderrama, “Leasing and Legal Culture — Towards consistent behaviour in tax treatment in civil law and common law jurisdictions,” dissertation, 2007.

- the role and influence of courts with tax competence, tax lawmakers, taxpayers, tax administration, and tax advisers in the drafting and application of the rules implementing the OECD standards; and
- the different instruments and strategies used to implement the OECD standards (for example, law, resolution of the Ministry of Finance or tax administration, and case law).

My approach in tax culture was followed regarding the place of effective management in order to determine the tax residence of a legal body. In the analysis of this issue by Burgers, the main conclusion is that the “OECD proposal does not ensure unanimous views.” These differences are due to differences in the tax systems of the countries in which the place of effective management is being applied. The approach toward the development of case law in a mixed system such as the Netherlands is in contrast to civil-law countries such as Germany and common-law countries such as Australia, Canada, and the United Kingdom. Likewise, the differences in fiscal culture were addressed as an obstacle to a common approach toward the place of effective management.<sup>78</sup>

In the field of development, the OECD has addressed the issue of culture — for instance, in the study of the influence of taxation on good governance.<sup>79</sup> As the OECD rightly stated, the approach toward tax reforms should take into account aspects that promote local leadership and locally designed solutions in tax reforms that are sensitive to each country’s specific socioeconomic environment.<sup>80</sup>

I believe that changes in the field of taxation — whether introduced voluntarily or involuntarily, by means of tax reforms promoted by international organizations, and/or required by investors — must also take into account the local, economic, institutional, and social framework of the countries in which the new changes are going to be applicable. The result of this new approach may be the acceptance of the tax changes that these international organizations may require or impose, and the more efficient way to implement these changes that may improve not only the acceptance of the work carried out by international organizations, but also the institutional framework of the country itself.

<sup>78</sup>I.J.J. Burgers, “Some Thoughts on Further Refinement of the Concept of Place of Effective Management for Tax Treaty Purposes,” *Intertax*, Vol. 35, No. 6/7, 2007, Kluwer Law International, at 378.

<sup>79</sup>Even though the OECD mentioned socio-economics, environment, and culture, no further reference was given to the way that the study of this framework and culture should take place.

<sup>80</sup>OECD, “Governance, Taxation and Accountability: Issues and Practices,” Development Assistance Committee, 2008, at 29.

## B. Financial Crisis

Given the international tax cooperation proposals of the EU, U.N., and the OECD, one may argue that the main contribution of the financial crisis is the political support of governments to agree on tackling tax evasion by means of implementing standards for transparency and exchange of information. However, the financial crisis is not only the result of tax havens and offshore financial centers. It is also due to the lack of regulation of financial institutions, including the relaxed rules on capital adequacy and accounting. According to Hemmelgarn, the increase in the leverage of financial institutions was facilitated by the possibilities in:

[the] Basel II Agreements, which entered into force in 2008 and gave more scope for financial institutions to assess their risks as well as by the introduction of the International Accounting Standards in 2005, which forced companies to register immediately gains and losses on financial assets, leading to more stock volatility.<sup>81</sup>

Hemmelgarn also argues that the leverage of companies influenced by the differences in tax treatment between debt and equity and the use of complex financial instruments<sup>82</sup> also contributed given the lack of regulations and knowledge by lawmakers and tax administrations regarding the tax consequences of the use of such complex tax instruments.

These issues are not easy to solve given the complexity of the use of tax, financial, and accounting regulations by a country, and also the unwillingness of countries to change their tax systems. We must take into account the tax sovereignty of these nations. Some of those issues were also dealt with in the resolution of the European Parliament, stating that the financial crisis was due to new types of complex financial instruments and derivatives placed — to a large extent — in funds domiciled in secrecy jurisdictions, to tax havens hosting complex financial products, and to off-balance-sheet liabilities located in tax havens. All of this shows the risk associated with the lack of good governance and opaque jurisdictions.<sup>83</sup> Even though this article does not deal with these issues, further research needs to be done regarding the relationship of taxes with accounting and financial law, and if necessary, research

<sup>81</sup>T. Hemmelgarn and G. Nicodème, “The 2008 Financial Crisis and Taxation Policy,” Taxation Paper, Jan. 11, 2010, European Commission, at 9-10.

<sup>82</sup>Examples of such instruments include derivatives such as credit default swaps, collateralized debt obligations, and the use of special purpose vehicles, “which is a legal entity outside the balance sheet of the financial institution, allows them to bypass capital ratios regulations.” *Id.*, at 12.

<sup>83</sup>*Supra* note 6, at 6.



must also be done to introduce changes in the way that financial institutions are being regulated and supervised.<sup>84</sup>

## V. Conclusions and Recommendations

The current work on international tax cooperation is not only the result of the 2008 financial crisis, but also a continuation of the work carried out by the OECD, the U.N., and the EU. Generally, the OECD is promoting the implementation of the OECD standards to enhance transparency and exchange of information by OECD countries and third countries. The OECD Global Forum on Transparency has agreed on a peer review on the implementation of these OECD standards in at least 100 jurisdictions; the first results are expected in 2014. This peer review was launched in March 2010 with 18 jurisdictions. The U.N. introduced article 26 of the U.N. model that follows to some extent article 26 of the OECD model. The U.N. has also introduced the Code of Conduct on Cooperation in Combating International Tax Evasion, which includes exchange of information for developing countries. All these issues have been dealt with by the OECD and the U.N. as international tax cooperation measures.

The EU introduced in ECOFIN (May 2008) the 2009 EU communication and the 2010 European Parliament resolution as well as the principle of promoting

good governance in tax matters (that is, transparency and exchange of information not only for EU member states and possible EU candidate countries, but also for third countries, including developing nations and nations eligible for development aid). Both the OECD and EU approaches promote transparency and exchange of information; however, in contrast to the OECD, the EU has proposed to address these issues as good governance in tax matters. For this purpose, the EU calls for the approval of the proposed directives on administrative cooperation, recovery of tax claims, and savings tax directive; the introduction of more anti-fraud agreements; and the introduction of a provision to promote good governance in tax matters in agreements concluded by the EU or EU member states with third countries.

Despite the domestic and international measures adopted by countries and international organizations to tackle tax avoidance and to enhance international tax cooperation, the complexity of international businesses has resulted in the search for new solutions to these problems. One may argue that globalization also makes possible an exchange of cultural, legal, and tax issues as well as solutions to the problems that countries may face due to the openness of economies and the complexity of international businesses. Therefore, it is suggested that in carrying out the peer review study on the legal and regulatory framework for transparency and exchange of information, the OECD needs to give attention to the way that the tax culture of a given country influences the implementation of this framework. The OECD should identify the specific institutional features and beliefs that have an influence in the development of tax rules used to implement the OECD standards.

This approach toward tax culture not only contributes to a better understanding on the implementation of the OECD standards, but also contributes to future tax reform, harmonization, and convergence projects carried out by international organizations. ◆

<sup>84</sup>The European Parliament has also called for:

[the] need to revise the current international accounting standards with the aim of increasing transparency; calls in this regard for a requirement for the disclosure in companies' annual accounts, on a country-by-country basis, of accounting information relating to tax havens, and suggests an EU public register listing the names of individuals and undertakings having set up companies and accounts in tax havens, with a view to unveiling the true beneficiaries shielded by offshore companies.

*Id.*, at para. 23.