

## THE ROOTS OF LEGAL PROBLEMS ARISING IN THE COURSE OF AUTOMATIC EXCHANGE OF INFORMATION IN TAX MATTERS BETWEEN THE EU AND RUSSIA

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*This article is devoted to the roots of material and procedural legal problems arising in the course of the automatic exchange of information between the European Union (EU) and Russia. This matter is topical since automatic exchange of information is a method of cooperation between tax authorities from different countries that is new and rapidly developing. From our point of view, it is high time to discuss some of the legal problems that are inherent in automatic exchange of information. As far as we can see, the fundamental problems are: (1) the problem of choosing an appropriate legal basis for automatic exchange of information and (2) the problem of the international standards for automatic exchange of information developed by the Organisation for Economic Co-operation and Development (OECD) being implemented to differing extents in the national legislation of different countries. In this article we suggest ways of solving the aforementioned problems in order to make automatic exchange of information between the EU and Russia more comfortable at the intergovernmental level. The solution of these problems will help to concentrate on another issue – the problem of protecting taxpayers' rights, primarily the right to confidentiality, which is beyond the scope of this article but still very important in the light of the enhancement of global tax transparency.*

*Keywords: automatic exchange of information; EU Directive on Administrative Cooperation (DAC); Tax Code of the Russian Federation; Common Reporting Standard (CRS); Country-by-Country Reporting (CbCR); OECD; Base Erosion and Profit Shifting (BEPS) Action*



*Plan; Convention on Mutual Administrative Assistance in Tax Matters; CRS Multilateral Competent Authority Agreement; CbC Multilateral Competent Authority Agreement.*

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## Introduction

Today automatic exchange of information in tax matters is an integral part of administrative cooperation between tax authorities from different countries. The main goal of this type of administrative cooperation is to enhance global tax transparency. Thus, Xavier Oberson writes that

international organizations and governments entered into exchange of information networks around the world with a view to fostering global transparency.<sup>1</sup>

Global tax transparency is crucial since business activities are no longer limited by national boundaries. For national tax authorities whose powers are limited by national jurisdictions, it can be troublesome to acquire important information on the activities of their taxpayers abroad and they have to cooperate with each other.

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<sup>1</sup> Xavier Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* 1 (2015).



The methods of cooperation are different and include a request for information, simultaneous tax examinations, tax examinations abroad and so on. All these forms of administrative cooperation are enlisted in the Convention on Mutual Administrative Assistance in Tax Matters of 1988,<sup>2</sup> which is the only universal tax treaty to date.<sup>3</sup> Of course, bilateral tax treaties that were signed before 1988 also contained provisions on administrative assistance.

Moreover, as Viktoria Wöhrer writes:

Provisions for the automatic exchange of bank information can be found in a few treaties concluded between 1936 and 1942. The France-Sweden Income and Capital Tax Treaty (1936), the Sweden-USA Income and Capital Tax Treaty (1939), and the Canada-USA Income Tax Treaty (1942) each include a list of information that has to be provided to the tax administration of the other contracting state.<sup>4</sup>

However, the technologies of those times did not allow practical use to be made of automatic exchange of information.

We can say that automatic exchange of information has become relevant since 2003 when it was included in the EU Savings Directive.<sup>5</sup> This opinion is shared, for example, by Viktoria Wöhrer who points out that

the EU Savings Directive ... is the first well-known attempt to effectively implement automatic exchange of information on financial accounts in a broader geographical context.<sup>6</sup>

Then automatic exchange of information was used by U.S. legislators as a core idea of the Foreign Account Tax Compliance Act (FATCA).<sup>7</sup> This act has always been quite controversial. Thus, for instance, Xavier Oberson writes that

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<sup>2</sup> OECD, Convention on Mutual Administrative Assistance in Tax Matters of 1988 (Nov. 11, 2020), available at [https://read.oecd-ilibrary.org/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters\\_9789264115606-en#page1](https://read.oecd-ilibrary.org/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en#page1).

<sup>3</sup> All the EU Member States as well as Russia have ratified the Convention as amended by the Protocol of 2010.

<sup>4</sup> Viktoria Wöhrer, *Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information* 16 (2018).

<sup>5</sup> Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (Nov. 11, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0048>.

<sup>6</sup> Wöhrer 2018, at 82.

<sup>7</sup> Foreign Account Tax Compliance Act (FATCA), 26 U.S.C. §§ 1471–1474.



FATCA, as a unilateral tax enforcement measure with extraterritorial effects, has raised criticism and concerns.<sup>8</sup>

Ross K. McGill et al. express an even more radical point of view:

There are many outside the US that believe that FATCA is both disproportionate to its intent and politically the worst example of extraterritoriality seen in recent times.<sup>9</sup>

In order to smooth the application of FATCA, the U.S. concluded intergovernmental agreements (IGAs)<sup>10</sup> which were then used by the OECD as an example for model competent authorities agreements that are necessary for automatic exchange of information between countries.

One of the positive points about FATCA is that it has accelerated the work of the OECD<sup>11</sup> on the global system of automatic exchange of information. Thus, in 2013 the Group 20 Leaders endorsed a new standard at the conference in St. Petersburg, Russia,<sup>12</sup> and in 2014 the OECD developed the Common Reporting Standard (CRS).<sup>13</sup> Meanwhile, as a part of the Base Erosion and Profit Shifting (BEPS) Action Plan,<sup>14</sup> it has created Action 13, a part of which is Country-by-Country Reporting (CbCR). Both initiatives have become globally accepted international standards of automatic exchange of information. They are globally accepted since most countries have implemented them in national legislation. An exception is the U.S. where FATCA is still a substitute for the CRS.

From our point of view, it will be logical to make an overview of these international standards before we start with the analysis of the main problems. Having done this, we will study how these standards of automatic exchange of information by the OECD have been implemented in the EU and Russia.

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<sup>8</sup> Oberson 2015, at 156.

<sup>9</sup> Ross K. McGill et al., *G.A.T.C.A.: A Practical Guide to Global Anti-Tax Evasion Frameworks (Global Financial Markets)* 12 (2017).

<sup>10</sup> List of the current IGAs, U.S. Treasury (Nov. 11, 2020), available at <https://home.treasury.gov/about/offices/tax-policy/foreign-account-tax-compliance-act>.

<sup>11</sup> Almost all the EU Member States participate in the OECD except for Bulgaria, Cyprus, Malta, Romania and Croatia. Russia is also not an OECD Member.

<sup>12</sup> OECD, Group 20 Leaders' Declaration (September 2013) (Nov. 11, 2020), available at <https://www.oecd.org/g20/summits/saint-petersburg/Saint-Petersburg-Declaration.pdf>.

<sup>13</sup> OECD, Standard for Automatic Exchange of Financial Account Information in Tax Matters (2<sup>nd</sup> ed. 2017) (Nov. 11, 2020), available at [https://read.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition\\_9789264267992-en#page1](https://read.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition_9789264267992-en#page1).

<sup>14</sup> BEPS Actions, OECD (Nov. 11, 2020), available at <http://www.oecd.org/tax/beps/beps-actions/>.



At present, we can say that in the EU they are implemented in the national legislation of the Member States indirectly – through the EU Directive on Administrative Cooperation (DAC). Meanwhile, in Russia the international standards by the OECD are implemented directly – via the amendments to the Tax Code of the Russian Federation.

Then we will make a comparison and see that these standards are also implemented to different extents. We will then be able to address the problem of choosing the appropriate legal basis for automatic exchange of information between the EU and Russia because this is not as obvious as it may seem.

The choice of an inappropriate legal basis is in itself a serious problem. When there are no disputes between the countries, it is not so important whether such basis is a bilateral tax treaty or the Convention on Mutual Administrative Assistance in Tax Matters of 1988 since both of these contain provisions on exchange of information. However, the scopes of rights and obligations as well as liability may be different in these documents. Therefore, when there is a dispute between the countries, it may not be easy to say who is right because of the absence of a generally accepted understanding of what is an appropriate legal basis.

Russia and the EU are economically interconnected and international taxation is a factor that influences trade and investments between these subjects of international law. According to the theory of international tax law, one of its basic principles is the principle of tax neutrality. This means that taxation should not influence a decision of individuals or companies to do business abroad.<sup>15</sup> However, in practice taxation has an influence on business activities and for this reason it is taken into account by taxpayers. If taxpayers see that the automatic exchange of information is smooth between the countries, they will be sure that they will not be suspicious for either government. Naturally this is not the case for taxpayers who avoid or evade taxes. For countries a smooth automatic exchange of information is important because it enables them to rather effectively prevent tax offences.

## **1. International Standards of Automatic Exchange of Information Developed by the OECD**

As previously noted, it is the OECD that has developed such important standards of automatic exchange of information as the Common Reporting Standard and Country-by-Country Reporting. Below we will make an overview and a brief analysis of these international standards.

The Common Reporting Standard was created by the OECD as a core of the global system of automatic exchange of information. This system is similar to the

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<sup>15</sup> Mindy Herzfeld & Richard L. Doernberg, *International Taxation in a Nutshell* 5 (11<sup>th</sup> ed. 2018); Pietro Boria, *Taxation in European Union* 193 (2<sup>nd</sup> ed. 2017).



system of automatic exchange of information under FATCA even structurally and includes four elements: (1) the Common Reporting Standard; (2) an agreement between competent authorities; (3) an appropriate legal basis; and (4) the consent of competent authorities to exchange information. As far as we can see, the first three elements are objective while the fourth is subjective. The second and the third elements are quite similar and this leads to the problem that we have referred to as the problem of choosing an appropriate legal basis. We will study this problem later. For now, we will concentrate on the first element of the system.

According to the CRS Implementation Handbook,<sup>16</sup> the Common Reporting Standard can be described as a process where

reporting financial institutions review their financial accounts to identify reportable accounts by applying due diligence rules and then report the relevant information.

As is stated in the Common Reporting Standard itself,

it sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.

Section IX of the Common Reporting Standard is entitled “Effective Implementation.” It states that

a jurisdiction must have rules and administrative procedures in place to ensure effective implementation of, and compliance with, the reporting and due diligence procedures set out above.

Speaking about the Country-by-Country Reporting, or BEPS Action 13:

All large multinational enterprises (MNEs) are required to prepare a country-by-country (CbC) report with aggregate data on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which it operates. This CbC report is shared with tax administrations in these jurisdictions, for use in high level transfer pricing and BEPS risk assessments.<sup>17</sup>

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<sup>16</sup> OECD, CRS Implementation Handbook (2<sup>nd</sup> ed. 2018) (Nov. 11, 2020), available at <https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf>.

<sup>17</sup> BEPS Action 13, OECD (Nov. 11, 2020), available at <http://www.oecd.org/tax/beps/beps-actions/action13/>.



Like the Common Reporting Standard, Country-by-Country Reporting needs to be implemented in national legislation and it requires an appropriate legal basis between countries. There should be a competent authorities agreement between the countries and the consent of the competent authorities to exchanging information.

BEPS Action 13, named “Transfer Pricing Documentation and Country-by-Country Reporting,” provides that:

Consistent and effective implementation of the transfer pricing documentation standards and in particular of the Country-by-Country Report is essential. Therefore, countries participating in the OECD/G20 BEPS Project agreed on the core elements of the implementation of transfer pricing documentation and Country-by-Country Reporting.<sup>18</sup>

One of these core elements may be found in Annex IV to Chapter V “Country-by-Country Implementation Package.” It is called “Model Legislation Related to Country-by-Country Reporting” and countries should adapt it to their legal systems.

We have made a quick overview of these international standards without delving into detail because we wanted to show the following: (1) there are only two internationally accepted standards of automatic exchange of information; (2) the Common Reporting Standard deals with individuals and their financial accounts while Country-by-Country Reporting is aimed at companies and transfer-pricing within groups of multinational enterprises; (3) the Common Reporting Standard is a separate initiative by the OECD while the Country-by-Country Reporting is a part of BEPS Action Plan; and (4) both standards provide mechanisms for their implementation that are quite similar but only Country-by-Country Reporting includes model legislation. For the Common Reporting Standard the situation is different because there is only a general requirement for countries to implement the reporting and due diligence procedures stated in the Standard.

## **2. Implementation of International Standards Developed by the OECD in the EU and Russia**

### ***2.1. Implementation of International Standards Developed by the OECD in the EU***

As already mentioned, the new era of automatic exchange of information started with the EU Savings Directive in 2003. This mechanism was used by the competent authorities of the EU Member States only when taxation of savings income in the form of interest occurred. This scope was insufficient and that was one of the reasons

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<sup>18</sup> OECD, Transfer Pricing Documentation and Country-by-Country Reporting: Action 13 – 2015 Final Report (2015) (Nov. 11, 2020), available at [https://read.oecd-ilibrary.org/taxation/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report\\_9789264241480-en#page1](https://read.oecd-ilibrary.org/taxation/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report_9789264241480-en#page1).



why the Directive was replaced by the EU Directive on Administrative Cooperation in 2016. Of course, the EU Directive on Administrative Cooperation (known as DAC 1<sup>19</sup>) was adopted in 2012 but it contained no provisions concerning automatic exchange of information. Only since DAC 2<sup>20</sup> has it become the main legal instrument on automatic exchange of information in the EU.

Thus, DAC 2 incorporated the Common Reporting Standard and DAC 4<sup>21</sup> incorporated Country-by-Country Reporting. DAC 3<sup>22</sup> was devoted to automatic exchange of advance cross-border tax rulings (ATR) and advance pricing agreements (APA) while DAC 6<sup>23</sup> was devoted to automatic exchange of information in relation to reportable cross-border arrangements. DAC 5<sup>24</sup> added a definition of beneficial owner that was taken from the Financial Action Task Force (FATF) Recommendations of 2012 (Recommendation 10).<sup>25</sup>

At this point we can offer the following comments: (1) DAC 2 and DAC 4 will be subject to further analysis since the international standards by the OECD are implemented in the EU through these legal instruments; (2) DAC 3 and DAC 6 show that the approach to automatic exchange of information in the EU is much broader than internationally accepted standards (the consequence of Article 19 of the EU DAC); and (3) DAC 5 is important in general since the concept of a beneficial owner is widely applicable in international tax law.

Some people may say that DAC 5 incorporated a global standard of exchange of information on tax rulings that is present in BEPS Action 5.<sup>26</sup> Since DAC 5 deals with

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<sup>19</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (Nov. 11, 2020), available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32011L0016>.

<sup>20</sup> Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (Nov. 11, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0107>.

<sup>21</sup> Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (Nov. 11, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0881>.

<sup>22</sup> Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (Nov. 11, 2020), available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015L2376>.

<sup>23</sup> Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (Nov. 11, 2020), available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L0822>.

<sup>24</sup> Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (Nov. 11, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L2258>.

<sup>25</sup> FATF, FATF Recommendations (2012) (Nov. 11, 2020), available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

<sup>26</sup> BEPS Action 5, OECD (Nov. 11, 2020), available at <http://www.oecd.org/tax/beps/beps-actions/action5/>.





automatic exchange of information, BEPS Action 5 is probably another internationally accepted standard of automatic exchange of information. However, this is untrue because BEPS Action 5 prescribes, as a minimum standard, the spontaneous exchange of information on tax rulings.<sup>27</sup> This means that the automatic form of such an exchange is the initiative of the EU only, which proves our suggestion that the concept of automatic exchange of information in the EU is much broader than that on the international level.

It is interesting that there were already provisions in EU legislation on mandatory spontaneous exchange of information on tax rulings but they turned out to be rather ineffective. In its MEMO/15/4609 the European Commission stated that:

This system leaves a lot of room for interpretation by the Member State issuing the tax ruling. That State decides what is “relevant” and which other Member States should receive the information. In some cases, this leeway may be deliberately exploited to avoid sharing information. In other cases, the Member State issuing the tax ruling may simply not realize that this information could be useful to another Member State, so it does not spontaneously exchange it.<sup>28</sup>

Thus, it is not only the label that makes a difference between automatic exchange of information and mandatory spontaneous exchange of information. The essential difference lies in the mechanism of the exchange. In the case of automatic exchange of information there is no room left for discretion.

As we have already noticed, the implementation of the Common Reporting Standard in national legislation of the EU Member States is done indirectly, or through DAC 2. This is rational for at least two reasons: (1) since directives are the legal instruments of harmonization, the national laws of different Member States transposing the same provisions of the Directive will be similar to a significant degree; and (2) the EU has implemented the Common Reporting Standard extensively because it incorporated in DAC 2 not only the Standard itself (Annex I) but complementary rules as well (Annex II).

Since the Common Reporting Standard was incorporated in the EU DAC word-for-word as Annex I, there is no need to make a comprehensive comparison between them. The only article in Annex I that makes difference is an additional Section X “Implementation dates as regards reporting financial institutions located in Austria.”

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<sup>27</sup> OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance: Action 5 – 2015 Final Report* (2015) (Nov. 11, 2020), available at [https://read.oecd-ilibrary.org/taxation/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report\\_9789264241190-en#page1](https://read.oecd-ilibrary.org/taxation/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report_9789264241190-en#page1).

<sup>28</sup> European Commission, *Combatting Corporate Tax Avoidance: Commission Presents Tax*, 18 March 2015 (Nov. 11, 2020), available at [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_15\\_4609](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_4609).



However, as this does not affect the general result of the analysis, we will disregard it and move on to Annex II containing complementary reporting and due diligence rules for financial account information.

It covers six issues: (1) a change in circumstances; (2) self-certification for new entity accounts; (3) the residence of a financial institution; (4) the account that is maintained; (5) trusts that are passive non-financial entities (NFEs); and (6) the address of an entity's principal office. Actually all of these provisions are from the Commentaries on the Common Reporting Standard. And the question is why only these provisions from the Commentaries have been implemented in the EU via DAC 2 as complementary rules. At first glance, the answer is obvious: the decision and policy makers in the EU decided that these issues are of special importance and they should be implemented in national legislation of the EU Member States. But the very same question becomes more complicated if we speculate on the legal effect of the Commentaries on the Common Reporting Standard.

There is no doubt that the Common Reporting Standard and the Commentaries on it as international standards are not binding on countries. But countries follow the Common Reporting Standard and implement it in national legislation since they decided that it would be a global trend. The key word is "implement" because without implementation in national legislation neither the Common Reporting Standard nor the Commentaries on it have legal effect. But the nature of the Commentaries becomes ambiguous when there is a need for the Common Reporting Standard to be interpreted in a country that has implemented the Standard but not the Commentaries on it. There is no universal approach to this problem.

If we apply this speculation to the EU, then we will see that after implementation via DAC 2 only the Standard and a small part of the Commentaries on it have become binding on national courts of the EU Member States and the European Court of Justice (ECJ). The other part of the Commentaries may be addressed by courts as a source of information but not as a source of law.

There must be reasons why the EU's policy and decision makers chose only these provisions of the Commentaries and called them complementary rules to the Common Reporting Standard but that is a matter for separate discussion. We had better stop at this point and say that the extent to which the Common Reporting Standard is implemented in the EU is the Standard itself and six complementary rules that represent some of the provisions from the Commentaries on it.

In the case of the Country-by-Country Reporting there is no problem surrounding the legal effect of the commentaries and their interpretation since the appropriate commentaries have not yet been developed. As stated above, unlike the Common Reporting Standard, BEPS Action 13 provides model legislation related to Country-by-Country Reporting (not a general requirement) and we assume that it is implemented in the EU close to the original text of the Standard.

The implementation of BEPS Action 13 in the EU is achieved through DAC 4. But, unlike the Common Reporting Standard, BEPS Action 13 is not incorporated in the



EU DAC word-for-word. Moreover, the method of incorporation is quite complicated because one part of the provisions is located in the Annex (Annex III to the original EU DAC) while the other is dispersed in the main part of DAC 4. The Annex itself is also worth mentioning because it contains the model template of the Country-by-Country Report with general and specific instructions which come from Annex III to Chapter V “Transfer Pricing Documentation – Country-by-Country Report,” BEPS Action 13.

We have made a correlation between the articles of the Standard and DAC 4 and now we would like to show the differences between them. In general, the Standard is incorporated in DAC 4 almost in its entirety except for paragraph 2 of Article 6 “Use and Confidentiality of Country-by-Country Report Information.”

This paragraph is not about use but about the confidentiality of Country-by-Country Report information:

The [Country Tax Administration] shall preserve the confidentiality of the information contained in the Country-by-Country Report at least to the same extent that would apply if such information were provided to it under the provisions of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

As far as we can see, paragraph 2 of Article 6 was not incorporated in DAC 4 because it was originally present in the EU DAC as Article 16. Actually paragraph 2 of Article 6 represents a reference to Article 22 of the Convention on Mutual Administrative Assistance in Tax Matters that establishes an international standard of secrecy. If we compare this standard with the standard of secrecy provided in Article 16 of the DAC, we will see little difference.

However, this standard of secrecy is not enough. In the doctrine there is an opinion that

a minimum standard of tax secrecy has to be elaborated within the European Union. In relation to third countries, taxpayer data should only be submitted if the non-EU Member State guarantees safeguarding this minimum standard of tax secrecy.<sup>29</sup>

From our point view, this minimum standard of tax secrecy is going to be elaborated by the ECJ in its decisions. For example, in the recent *Schrems II* case it was stated that:

The appropriate safeguards, enforceable rights and effective legal remedies ... must ensure that data subjects whose personal data are transferred

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<sup>29</sup> *Tax Transparency* 38 (Funda Başaran Yavaşlar & Johanna Hey eds., 2019).



to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter of Fundamental Rights of the European Union.<sup>30</sup>

By “the regulation” the General Data Protection Regulation (GDPR)<sup>31</sup> is meant.

Such a legal position is rational but it may lead to a potential problem one day. If, for instance, Russian data protection laws are below the minimum standard formulated in EU law, there will be no reciprocal automatic exchange of information between the EU Member States and Russia. As the UK did in 2019, the EU Member States will exclude Russia from a sort of list of “Reportable Jurisdictions for the 2019 reporting year, in respect of 2018 reportable accounts.”<sup>32</sup> Then Russia may either enhance its national data protection standards or stop automatic exchange of information with the EU Member States. However, Russia is only one example which may be followed by the other countries with data protection laws below the EU’s minimum standard. In this case it will be the end of the global system of automatic exchange of information.

By this, we do not deny the existence of a minimum standard of tax secrecy but we would like to stress that it should be really minimal. It should not look like pressure on third states to change their national laws if they want to continue automatic exchange of information. Really, a minimum standard of tax secrecy will be enough since, according to the ECJ’s decision in the *Schrems I* case, even if “the European Commission finds that a third country ensures an adequate level of protection,” it will not preclude a person whose personal data was transferred from an EU Member State to a third country from claiming that “the law and practices in force in the third country do not ensure an adequate level of protection.”<sup>33</sup> In other words, a taxpayer will be able to protect his or her rights even if the standard of secrecy will be really minimal.

It is obvious that the problem of secrecy is closely connected with the problem of protecting taxpayers’ rights which is one of the most important in the context of

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<sup>30</sup> *Data Protection Commissioner v. Facebook Ireland Limited and Maximilian Schrems*, Case C-311/18, Judgment of the Court (Grand Chamber), 16 July 2020.

<sup>31</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Nov. 11, 2020), available at <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

<sup>32</sup> List of reportable jurisdictions for the 2019 reporting year, in respect of 2018 reportable accounts, UK Government (Nov. 11, 2020), available at <https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim402340>.

<sup>33</sup> *Maximilian Schrems v. Data Protection Commissioner*, Case C-362/14, Judgment of the Court (Grand Chamber), 6 October 2015.



automatic exchange of information, but we have intentionally omitted it since it is a complex matter requiring separate research.

The conclusion that we reached earlier is that DAC 4 almost fully incorporated the Standard. Nevertheless, the provisions of DAC 4 are formulated more widely than analogous provisions of Country-by-Country Reporting. For example, paragraph 1 of Article 6 of the Standard is extended in DAC 4 by the following:

There is no prohibition on using the information communicated between Member States pursuant to Article 8aa as a basis for making further enquiries into the MNE Group's transfer-pricing arrangements or into other tax matters in the course of a tax audit, and, as a result, appropriate adjustments to the taxable income of a Constituent Entity may be made (paragraph 3 of Article 1).

There are some additional rules in DAC 4 as well. For instance, in the list of the defined terms contained in the Annex there is a definition of the term "enterprise" (paragraph 2 of Section I of Annex III). Then one of the general reporting requirements stipulated in the same Annex is that "the Country-by-Country Report shall specify the currency of the amounts referred to in the report" (paragraph 5 of Section II of Annex III).

But the most important addition, from our point of view, appears in the present Annex and reads as follows:

A Constituent Entity resident in a Member State as defined in the first paragraph of this point shall request its Ultimate Parent Entity to provide it with all information required to enable it to meet its obligations to file a country-by-country report, in accordance with Article 8aa(3). If despite that, that Constituent Entity has not obtained or acquired all the required information to report for the MNE Group, this Constituent Entity shall file a Country-by-Country Report containing all information in its possession, obtained or acquired, and notify the Member State of its residence that the Ultimate Parent Entity has refused to make the necessary information available. This shall be without prejudice to the right of the Member State concerned to apply penalties provided for in its national legislation and this Member State shall inform all Member States of this refusal (paragraph 1 of Section II of Annex III).

This addition is important because a constituent entity is not relieved from liability when it cannot obtain from its ultimate parent company the information needed for a country-by-country report. We suppose that this is justifiable because any MNE Group is a single unit with enterprises that are interconnected. In the end it remains in the interests of any MNE Group to supply its reporting entities with all the necessary information. Otherwise, there is a high risk of penalties.



## **2.2. Implementation of International Standards Developed by the OECD in Russia**

In Russia both the Common Reporting Standard and Country-by-Country Reporting have been implemented by Federal Law of 27 November 2017 No. 340-FZ “On Amendments to Part One of the Tax Code of the Russian Federation in the Light of the Implementation of International Automatic Exchange of Information and Documentation on Multinational Enterprise Groups.”<sup>34</sup> However, only general provisions of the Common Reporting Standard were transferred by Federal Law of 27 November 2017 No. 340-FZ, which is the primary legislation for the Standard. The detailed provisions were implemented later by Regulation No. 693 of the Government of the Russian Federation of 16 June 2018 “On the Implementation of International Automatic Exchange of Financial Information with Competent Authorities of Foreign Countries (Territories).”<sup>35</sup> This document represents the secondary legislation for the Standard.

These two terms “primary legislation” and “secondary legislation” come from the OECD’s official website where a special table devoted to the Common Reporting Standard’s implementation in different countries is published.<sup>36</sup> One of the columns in this table is headed “List of Low-Risk Non-reporting FIs and Excluded Accounts.” Though this is not the object of the current analysis, this list is connected with the operation of the Common Reporting Standard. This column of the table as to the Russian Federation contains no information but in reality such information exists and is present in the aforementioned Regulation No. 693 of the Government of the Russian Federation of 16 June 2018.

Another interesting column of this table is “Domestic Reporting Format.” As to the EU Member States this part of the table states that the domestic reporting format is “CRS.” In the context of the Russian Federation it is stated that that the domestic

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<sup>34</sup> Федеральный закон от 27 ноября 2017 г. № 340-ФЗ «О внесении изменений в часть первую Налогового кодекса Российской Федерации в связи с реализацией международного автоматического обмена информацией и документацией по международным группам компаний» // СПС «КонсультантПлюс» [Federal Law No. 340-FZ of 27 November 2017. On Amendments to Part One of the Tax Code of the Russian Federation in the Light of the Implementation of International Automatic Exchange of Information and Documentation on Multinational Enterprise Group transparency, SPS “ConsultantPlus”] (Nov. 11, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_283498/](http://www.consultant.ru/document/cons_doc_LAW_283498/).

<sup>35</sup> Постановление Правительства Российской Федерации от 16 июня 2018 г. № 693 «О реализации международного автоматического обмена финансовой информацией с компетентными органами иностранных государств (территорий)» // СПС «КонсультантПлюс» [Regulation of the Government of the Russian Federation No. 693 of 16 June 2018. On the Implementation of International Automatic Exchange of Financial Information with Competent Authorities of Foreign Countries (Territories), SPS “ConsultantPlus”] (Nov. 11, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_300424/](http://www.consultant.ru/document/cons_doc_LAW_300424/).

<sup>36</sup> CRS by jurisdiction 2018, OECD (Nov. 11, 2020), available at <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/crs-by-jurisdiction-2018.htm>.



reporting format is “present.” This is true because, unlike the EU, the Common Reporting Standard was not implemented in the Russian Federation word-for-word. The reason is that the Common Reporting Standard contains such legal concepts as trusts that are unfamiliar to the legal system of the Russian Federation.

The last column of the table that we will refer to within the analysis is headed “Wider Approach.” In the context of the EU we have proved that the approach presented in DAC 2 is wider than that contained in the Standard. Speaking about the Russian Federation, the approach is wider too. However, if we make a comparison with the EU, we will see that it is wider in different aspects. Below, we will analyze specific aspects of the Russian legislation implementing the Common Reporting Standard and will try to highlight the most important of them.

The general provisions of the Common Reporting Standard were implemented in Title VII “The Enforcement of the Treaties of the Russian Federation on the Matters of Taxation and Mutual Administrative Assistance in Tax Matters” of Part One of the Tax Code of the Russian Federation as Chapter 20.1 “Automatic Exchange of Financial Information with Foreign Countries (Territories).”

These general provisions include terminology (Art. 142.1), basic reporting obligations of financial institutions (Art. 142.2), powers of tax authorities (Art. 142.3), rights and obligations of financial institutions and their clients (Art. 142.4). All of these matters are consequent upon international automatic exchange of financial information.

The most interesting thing about terminology is that in the Russian Federation “financial accounts” are called “financial services contracts.” This does not change the legal nature because all financial accounts are based on contracts between financial institutions and their clients and they are connected with the provision of financial services such as the custody, management and investment of financial assets.

“Financial assets” is another term that has caught our attention. According to the Common Reporting Standard, this term “does not include a non-debt, direct interest in real property” (subsection A(7) of Section VIII). In addition, in Russian legislation, “financial assets” do not cover precious metals (except for impersonal metal accounts). This means that precious metals may become attractive for those who wish to hide their assets from tax authorities.

The next issue that we would like to address is the secrecy regime. In accordance with point 2 of Article 142.2, “where a financial institution provides the tax authority with the information under this chapter, there is no violation of banking secrecy.” Then, in accordance with point 1(4) of Article 102:

Tax secrecy does not cover information that is reported to tax (customs) or law enforcement authorities of other countries in accordance with treaties (agreements) of the Russian Federation concluded on mutual assistance between or among tax (customs) or law enforcement authorities (to the



extent of the information transferred to these authorities) that includes international automatic exchange of information.

Here we can see that data that is subject to banking secrecy also becomes data that is subject to tax confidentiality on the national level. Then the regime of tax secrecy is unilaterally waived and the data is again subject to banking secrecy only. However, paragraph 6 of Article 26 of those tax treaties that are based on the OECD Model<sup>37</sup> provides that

in no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution.<sup>38</sup>

This global trend has been characterized as the end of banking secrecy since it “does not constitute an obstacle for international exchange of information.”<sup>39</sup>

An issue that is absent in the Common Reporting Standard but is present in Country-by-Country Reporting is penalties. Nevertheless, in Russian legislation there is tax liability for tax offences committed in the context of automatic exchange of financial information. Thus, according to point 1 of Article 129.7, “where a financial institution fails to report the information necessary under Chapter 20.1 of the Code, it is liable to pay a fine in the sum of 500 000 rubles.” Then, in accordance with point 2 of the same article,

where a financial institution fails to include the information on its client, a beneficial owner or controlling person as provided for by Chapter 20.1 of the Code, it is liable to pay 50 000 rubles for each fact of such offence.

The last offence is a failure by a financial institution to apply measures that are necessary to detect the tax residency of its client, a beneficial owner or controlling person. The fine is 50 000 rubles for each person (Art. 129.8).

However, according to point 6 of Article 2 of Federal Law of 27 November 2017 No. 340-FZ, “there are no penalties for the tax offences under the articles analyzed above if they were detected in 2017, 2018 and 2019.” As far as we can see, these three years were granted to financial institutions because they needed to become used

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<sup>37</sup> OECD, OECD Model Tax Convention on Income and on Capital: Condensed Version (2017) (Nov. 11, 2020), available at [https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017\\_mtc\\_cond-2017-en](https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en).

<sup>38</sup> Similar provisions are prescribed in paragraph 5 of Article 26 of the U.N. Model (2017), United Nations (Nov. 11, 2020), available at [https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT\\_2017.pdf](https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf).

<sup>39</sup> 98b *Cahiers de droit fiscal international. Exchange of Information and Cross-Border Cooperation Between Tax Authorities* 48 (Xavier Oberson ed., 2013).





to the new reporting and due diligence requirements. But in 2021, when financial institutions will be reporting for 2020, they may be found liable for these offences.

As stated above, the detailed provisions of the Common Reporting Standard were implemented later by the Regulation No. 693 of the Government of the Russian Federation of 16 June 2018. This Regulation comprises the Rules and two lists that were previously mentioned: (1) the List of low risk non-reporting financial institutions and (2) the List of excluded financial services contracts. The Rules refer to different aspects of automatic exchange of financial information and consist of five titles and two annexes. The five titles are: (1) general provisions; (2) the contents of financial information on clients, beneficial owners and controlling persons and the conditions, method and time frames for financial institutions to provide it to the tax authority; (3) rules concerning pre-existing financial services contracts; (4) rules concerning new financial services contracts; and (5) rules applicable to Titles III and IV.

Summing up, we can say that these Rules and the provisions of Chapter 20.1 of Part One of the Tax Code of the Russian Federation reflect the Common Reporting Standard on the whole but with some additions and adjustments. Some of these additions are presented in two annexes to the Rules containing: (1) indicators showing that clients (except for natural persons) are active; and (2) the indicators demonstrating affiliation with a foreign country for the purposes of the tax residency of a client, beneficial owner or controlling person.

But the most important addition, from our point of view, that has been introduced by the Rules is “dormant financial services contracts,” which comes from the Commentaries on the Common Reporting Standard. Thus, in point 21 of the Rules it is stated that

a financial institution assigns the status of a dormant contract to a pre-existing financial services contract if as a result of the application of the measures under Title III of the Rules at least one of the indicators has been detected demonstrating affiliation with a foreign country and the following conditions were met.

One of these conditions is formulated as follows:

The client has not initiated any operations under a pre-existing or any other financial services contract with the financial institution for three years preceding reporting period.

Once again, why the policy and decision makers have chosen only some of the provisions of the Commentaries to the Common Reporting Standard is a matter for separate discussion. As in the EU, in Russia the nature of the Commentaries is ambiguous and this leads to the same problem of interpretation. As we can see, only



a small part of the Commentaries has been implemented in the Russian Federation and only this part is a source of law that may be referred to by the Russian national courts. The other provisions of the Commentaries remain merely a source of information.

As stated above, Country-by-Country Reporting was implemented in the Russian Federation in Part One of the Tax Code. Thus, the first five articles of the Standard were transferred to Title V.1 “Associated Enterprises and MNE Groups. General Provisions on Prices and Taxation. Tax Audit of Transactions Between Associated Enterprises. Transfer Pricing Agreements. Documentation Concerning MNE Groups” as Chapter 14.4-1 “The Provision of Documentation Concerning MNE Groups.” Article 6 of Country-by-Country Reporting was implemented in Title VII “The Enforcement of the Treaties of the Russian Federation on the Matters of Taxation and Mutual Administrative Assistance in Tax Matters” as Chapter 20.2 “International Automatic Exchange of Country-by-Country Reports in Accordance with the Treaties of the Russian Federation.” The rest of the Standard was then transferred to other articles of Part One of the Tax Code of the Russian Federation.

Like the EU, the Russian Federation used the model legislation to implement Country-by-Country Reporting. However, there are also some additions and adjustments to the Standard in the Russian legislation. Thus, the terms “Group” and “MNE Group” are united as a single term “MNE Group.” Then there is no division of parent entities into “Ultimate Parent Entities” and “Surrogate Parent Entities.” At first glance, there are no such concepts as “Excluded MNE Group” and “Systemic Failure” in the Russian legislation but actually they are present in Article 105.16-3. This article is of great importance and there are a number of reasons why.

First, point 6(3) of Article 105.16-3 provides an extended concept of “Excluded MNE Group.” In Country-by-Country Reporting this concept is formulated as

a Group having total consolidated group revenue of less than 750 million euro during the fiscal year immediately preceding the reporting fiscal year as reflected in its consolidated financial statements for such preceding fiscal year.

This concept is the same for parent entities that are residents and non-residents for tax purposes. However, in Russian legislation such a distinction is made.

Thus, according to the aforementioned provision, an MNE Group is excluded for the purposes of Country-by-Country Reporting in two cases: (1) if its parent entity is a tax resident of the Russian Federation and the total consolidated group revenue is less than 50 billion rubles during the fiscal year immediately preceding the reporting fiscal year; and (2) if its parent entity is a tax resident of a foreign country (territory) and the total consolidated group revenue is less than the amount prescribed by the legislation of that foreign country (territory). It is interesting that, in accordance with the Standard, the amount in local currency should be approximately equivalent to 750 million euro. When Country-by-Country Reporting was implemented, 50 billion rubles was approximately equivalent to 750 million euro but now, owing to currency



fluctuations, 70 billion rubles is equal to the sum in question. If such a trend persists, there will be fewer MNE Groups with a parent entity that is a tax resident of the Russian Federation that are eligible for exclusion (unless they reduce their total consolidated group revenue).

Before we move on, we would like to point out that in the Russian Federation the Central Bank, state and local government bodies are never considered constituent entities of an MNE Group (p. 3 of Art. 105.16-1).

Second, point 5 of Article 105.16-3 specifies that a Country-by-Country Report containing information that is a state secret or information that directly or indirectly concerns military and technical cooperation with foreign countries is transferred to the extent that such information is not included. Moreover, if a Country-by-Country Report contains information about constituent entities that are included in the government's list of entities that have strategic importance for the Russian state and the subsidiaries of such entities, information about their activities may be transferred only after the competent authority that is designated by the Government of the Russian Federation has approved the transfer.

As far as the penalties are concerned for offences committed in the context of international automatic exchange of Country-by-Country Reports, these are stated in Articles 129.9 and 129.10 of Part One of the Tax Code of the Russian Federation. Thus, where an entity does not notify the tax authority or provides it with false information about its participation in an MNE Group, the entity is liable to pay 50 000 rubles. Then a penalty in the sum of 100 000 rubles is imposed where a Country-by-Country Report is not provided or contains false statements.

However, just as with liability in the context of automatic exchange of financial information, "there are no penalties for the tax offences under the articles analyzed above if they were detected in 2017, 2018 and 2019" (p. 7 of Art. 2 of Federal Law of 27 November 2017 No. 340-FZ). Again these three years were granted to reporting entities of MNE Groups because they need to become acquainted with the new rules. But in 2021, when these entities will be reporting for 2020, they may be found liable for these offences.

### ***2.3. Comparative Analysis of the Scope of the Implementation of International Standards Developed by the OECD in the EU and Russia***

Previously we have analyzed the scope of the implementation of the Common Reporting Standard and Country-by-Country Reporting in the EU and in the Russian Federation. We have discovered that these international standards developed by the OECD have been implemented almost in their entirety both in the EU and in the Russian Federation. Nevertheless, certain particular aspects have been detected in connection with the implementation of the OECD international standards.

Thus, the Common Reporting Standard was implemented both in the EU and in the Russian Federation with additions. In both cases these additions come from the Commentaries on the Common Reporting Standard. However, the jurisdictions



implemented different provisions of the Commentaries. This makes the scope of the implementation of the Common Reporting Standard different in the EU and in the Russian Federation. This then leads to an unequal volume of financial information being automatically exchanged between the jurisdictions.

In our opinion, the solution to this problem is to develop a unified approach to the Commentaries on the Common Reporting Standard. If they are binding on countries, then it does not matter which provisions of the Commentaries they have implemented. In DAC 2 (and in DAC 4 as well) it is said that the Commentaries should be referred to for interpretation but this is a unilateral approach since in the Russian legislation there is no such direction. To make the scope of implementation of the Common Reporting Standard and the volume of information automatically exchanged equal, countries should make the Commentaries binding for the purposes of interpretation.

Country-by-Country Reporting has fewer problems in the light of its implementation thanks to the model legislation adopted both by the EU and the Russian Federation. Nevertheless, there are again particular features because of the additions that the jurisdictions have made. If we take into account these additions, we will see that the situation with the scope of the implementation of the Country-by-Country Reporting is even more complicated. There are no commentaries on the Standard which could have been the source of these additions. All the additions were developed by the jurisdictions unilaterally.

From our point of view, in order to solve the problem of the unequal volume of the information being automatically exchanged in the context of Country-by-Country Reporting, the EU should adopt the additions similar to those already adopted by the Russian Federation and vice versa. However, this is highly unlikely and for this reason the scope of the implementation of Country-by-Country Reporting will inevitably differ in the respective jurisdictions.

### **3. The Problem of Choosing an Appropriate Legal Basis for Automatic Exchange of Information Between the EU and Russia**

As we have already mentioned, the system of automatic exchange of information under the Common Reporting Standard includes four elements: (1) the Common Reporting Standard; (2) an agreement between competent authorities; (3) an appropriate legal basis; and (4) the consent of competent authorities to exchange information. The similarity between the second and the third elements of the system is obvious and leads to the problem of choosing an appropriate legal basis.

Country-by-Country Reporting was adopted later and its system was based on the system of automatic exchange of information under the Common Reporting Standard. However, the system of Country-by-Country Reporting has some differences and is structured as follows: (1) Country-by-Country Reporting based on model legislation; (2) an agreement between competent authorities; (3) an



appropriate legal basis such as the Convention on Mutual Administrative Assistance in Tax Matters, bilateral tax conventions and tax information exchange agreements; and (4) the consent of competent authorities to exchange information.

If we compare the two systems, we will see that both international standards require to be implemented in national legislation. This matter was studied earlier. Then both the Common Reporting Standard and Country-by-Country Reporting demand that there should be an agreement between competent authorities. It is remarkable that both international standards provide three models for such agreements: (1) bilateral reciprocal; (2) bilateral non-reciprocal; and (3) multilateral.

And now we arrive at the difference. Thus, the Common Reporting Standard does not draw an obvious line between a competent authorities agreement and an appropriate legal basis while this line is apparent in the case of Country-by-Country Reporting. In our opinion, this difference is artificial. In fact, the former as well as the latter considers the Convention on Mutual Administrative Assistance in Tax Matters, bilateral tax conventions and tax information exchange agreements to be the only appropriate legal basis. An agreement between competent authorities is just a legal instrument that is based on a particular tax treaty.

The problem of choosing an appropriate legal basis for automatic exchange of information is important and there is an explanation as to why. Imagine that two countries have a bilateral tax treaty concluded with each another and both are parties to the Convention on Mutual Administrative Assistance in Tax Matters. They exchange information automatically but suddenly something goes wrong and one of the countries does not provide the information. And here we have two questions: (1) what are the rights and obligations of the countries; and (2) what kind of liability follows? To answer these questions the parties should have a uniform understanding of the appropriate legal basis. Otherwise, one country will make a reference to the Convention on Mutual Administrative Assistance in Tax Matters, while the other – will refer to the bilateral tax treaty. As a result, both will be right but the problem will not be solved.

For example, both Russia and Portugal are parties to the CRS Multilateral Competent Authority Agreement of 2014.<sup>40</sup> Both have signed and ratified the Convention on Mutual Administrative Assistance in Tax Matters and there exists the Convention between the Government of the Russian Federation and the Government of the Portuguese Republic of 29 May 2000 “On the Avoidance of Double Taxation and the Prevention of Tax Evasion in Respect of Income Taxes.”<sup>41</sup> In theory, the CRS Multilateral

<sup>40</sup> OECD, CRS Multilateral Competent Authority Agreement of 2014 (Nov. 11, 2020), available at <https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/multilateral-competent-authority-agreement.pdf>; OECD, List of Signatories (Nov. 11, 2020), available at <https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/crs-mcaa-signatories.pdf>.

<sup>41</sup> Конвенция между Правительством Российской Федерации и Правительством Португальской Республики от 29 мая 2000 г. «Об избежании двойного налогообложения и предотвращении уклонения от уплаты налогов в отношении налогов на доходы» // СПС «КонсультантПлюс» [Convention between the Government of the Russian Federation and the Government of the Portuguese Republic of 29 May 2000 “On the Avoidance of Double Taxation and the Prevention of



Competent Authority Agreement of 2014 may be based either on the former or on the latter document and in each case the legal consequences will be different.

Thus, the Convention on Mutual Administrative Assistance in Tax Matters contains paragraph 4 of Article 21, which reads as follows:

In no case shall the provisions of this Convention, including in particular those of paragraphs 1 and 2, be construed to permit a requested State to decline to supply information 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.

No similar provision is present in the bilateral tax treaty between Portugal and Russia. However, it is vital for the automatic exchange of information on financial accounts. If Portugal needs information about ultimate financial account holders, Russia may decline since to do so is not prohibited under the bilateral tax treaty between the countries. Portugal may object, citing paragraph 4 of Article 21 of the Convention on Mutual Administrative Assistance in Tax Matters and will also be correct. To avoid such a situation there should be a uniform understanding between the countries of the appropriate legal basis for automatic exchange of information.

Logically we have proved that a competent authority agreement is not an appropriate legal basis for automatic exchange of information either in the light of the Common Reporting Standard, or in the context of Country-by-Country Reporting: (1) in both international standards they are presented as two separate requirements; and (2) by its nature a competent authority agreement is a legal instrument that is based on a tax treaty. The conclusion is that a tax treaty is the only appropriate legal basis for automatic exchange of information.

This speculation is appropriate in the field of international tax law because in European tax law the situation is different. Since we are seeking an appropriate legal basis for automatic exchange of information between the EU and Russia, we need international tax law but not European tax law. However, we would like to say a couple of words about the specific features of European tax law concerning the choice of an appropriate legal basis for automatic exchange of information.

In fact, the appropriate legal basis in the EU is the Directive on Administrative Cooperation. That is the only case where the three elements of the system both in the context of the Common Reporting Standard and in the light of Country-by-Country Reporting are implemented via one and the same legal instrument. The legal nature of the directive allows it to be an instrument of implementation, a substitute for a competent authorities agreement and an appropriate legal basis for automatic exchange of financial information and documentation concerning MNE Groups.

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Tax Evasion in Respect of Income Taxes," SPS "ConsultantPlus"] (Nov. 11, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_41080/](http://www.consultant.ru/document/cons_doc_LAW_41080/).



In saying this we do not mean that the Directive on Administrative Cooperation is the only appropriate legal basis for automatic exchange of information between EU Member States – there is at least the Convention on Mutual Administrative Assistance in Tax Matters that serves the same function.

As stated above, there are three types of tax treaties: (1) the Convention on Mutual Administrative Assistance in Tax Matters; (2) a bilateral tax convention; and (3) a tax information exchange agreement. In the context of automatic exchange of information between the EU and Russia only the first two types will be analyzed. Tax information exchange agreements (TIEAs) are usually concluded with those jurisdictions that do not have income tax and for them there is no such a problem as double taxation, which is the subject matter of bilateral tax conventions. Neither Russia nor the EU Member States fall within the class of such jurisdictions.

In general, as David S. Kerzner and David W. Chodikoff write,

existing legal platforms that permit exchange of information include bilateral tax treaties with a provision based on Article 26 of the Model Tax Treaty and the Convention on Mutual Administrative Assistance in Tax Matters.<sup>42</sup>

We agree that theoretically both bilateral tax conventions and the Convention on Mutual Administrative Assistance in Tax Matters may be an appropriate legal basis for automatic exchange of information between the EU and Russia. However, in practice the following question arises: do all of these tax treaties contain provisions on automatic exchange of information?

We have analyzed 26 bilateral tax conventions<sup>43</sup> between the EU Member States and the Russian Federation and arrived at the following conclusion: none of these tax conventions provides for automatic exchange of information though there is an article “Exchange of Information.” The reason is that all of them are based on the existing Models (OECD or U.N.). But even the latest version of Article 26 of these Models does not mention automatic exchange of information. Only the Commentaries contain such information.

Once again we face the problem of interpreting a source of law with the help of the Commentaries on it. In the theory of international tax law there are two approaches to the interpretation of tax treaties based on the Models: ambulatory and static. Thus, Carlo Garbarino writes that

under the static interpretation, the ordinary meaning of a rule of treaty is attributed when the treaty is concluded. By contrast, the ambulatory interpretation approach adopts the current meaning of terms used in the treaty.<sup>44</sup>


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<sup>42</sup> David S. Kerzner & David W. Chodikoff, *International tax Evasion in the Global Information Age* 294 (2016).

<sup>43</sup> There is still no bilateral tax convention between the Russian Federation and Estonia (it was signed in 2002 but has not been ratified so far).

<sup>44</sup> Carlo Garbarino, *Judicial Interpretation of Tax Treaties: The Use of the OECD Commentary* 23 (2016).





In our opinion, the static interpretation prevails because the parties are obliged to follow the rules that they negotiated.

Moreover, there is a legal position that any tax treaty should be interpreted only in the context of the provisions contained in it and not with the help of the Commentaries. The Commentaries should remain a source of information. This legal position follows from the Vienna Convention on the Law of Treaties of 1969,<sup>45</sup> which states in paragraph 1 of Article 31 (“General Rule of Interpretation”):

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>46</sup>

In Russia the legal position expressed is supported by Plenary Ruling No. 5 of the Supreme Court of the Russian Federation of 10 October 2003 (as amended on 5 March 2013) “On the Application by the Courts of General Jurisdiction of Universally Recognized Principles and Norms of International Law and Treaties of the Russian Federation.” In paragraph 10 it is stated that:

The construction of a treaty shall be in compliance with the Vienna Convention on the Law of Treaties of 23 May 1969 (title III; Articles 31–33).<sup>47</sup>

Speaking about the legal force of the OECD Model and the Commentaries on it in Russia, the latest judicial and administrative practice show that they are not binding on either courts or tax authorities but they follow these documents as recommendations. For instance, in Letter No. SA-4-7-/8448@ of the Federal Tax Service of 6 May 2019 it is pointed out that:

According to Article 32 of the Vienna Convention on the Law of Treaties of 23 May 1969 one of the ways to construe a double tax treaty based on the OECD Model is to refer to the Commentaries that represent a document of an international organization.<sup>48</sup>

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<sup>45</sup> It is neither signed nor ratified by two EU Member States – Romania and France.

<sup>46</sup> Vienna Convention on the Law of Treaties of 1969 (Nov. 11, 2020), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

<sup>47</sup> Постановление Пленума Верховного Суда Российской Федерации от 10 октября 2003 г. № 5 «О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации» // СПС «КонсультантПлюс» [Plenary Ruling of the Supreme Court of the Russian Federation No. 5 of 10 October 2003. On the Application by Courts of General Jurisdiction of Universally Recognized Principles and Norms of International Law and Treaties of the Russian Federation, SPS “ConsultantPlus”] (Nov. 11, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_44722/](http://www.consultant.ru/document/cons_doc_LAW_44722/).

<sup>48</sup> Письмо ФНС России от 6 мая 2019 г. № СА-4-7/8448@ // СПС «КонсультантПлюс» [Letter of the Federal Tax Service of the Russian Federation of 6 May 2019 No. SA-4-7-/8448@, SPS “ConsultantPlus”] (Nov. 11, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_325224/](http://www.consultant.ru/document/cons_doc_LAW_325224/).





Originally this legal position comes from Ruling No. 8654/11 of the Presidium of the Supreme Commercial (“Arbitration”) Court of the Russian Federation of 15 November 2011.<sup>49</sup> However, in practice, it is at the courts’ discretion whether or not to follow the Commentaries to construe a double tax treaty based on the OECD Model.

In the EU there is a legal opinion that the Commentaries may be considered recommendations of the OECD. According to Edwin van der Bruggen, a systematic failure to follow the recommendations of an international organization by its members may be considered a breach of the good faith principle.<sup>50</sup> Moreover, in the *Grimaldi* case the ECJ stated that:

National courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.<sup>51</sup>

In other words, since the EU Member States are OECD members as well, they should follow the Commentaries on the OECD Model. Russia is not an OECD member and its international tax treaties are construed in compliance with the Vienna Convention on the Law of Treaties of 1969. Thus, in the process of the construction of a double tax treaty between Russia and an EU Member State, one should use static interpretation. Since that is static interpretation, none of 26 bilateral tax conventions between the Russian Federation and the EU Member States may be considered an appropriate legal basis for automatic exchange of information.

Speaking about the Convention on Mutual Administrative Assistance in Tax Matters, 141 jurisdictions have signed or ratified it to date.<sup>52</sup> Article 6 (“Automatic Exchange of Information”) of this tax treaty provides:

With respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, two or more Parties shall automatically exchange the information referred to in Article 4.

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<sup>49</sup> Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 15 ноября 2011 г. № 8654/11 // Картоoteca арбитражных дел [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of 15 November 2011 No. 8654/11, Card File of Arbitration Cases] (Nov. 11, 2020), available at [http://www.arbitr.ru/bras.net/f.aspx?id\\_casedoc=1\\_1\\_8fb6828f-7e79-45f6-9652-2b9f002eede7](http://www.arbitr.ru/bras.net/f.aspx?id_casedoc=1_1_8fb6828f-7e79-45f6-9652-2b9f002eede7).

<sup>50</sup> Edwin van der Bruggen, *The Power of Persuasion: Notes on the Sources of International Law and the OECD Commentary*, 31(8/9) *Intertax* 259, 262 (2003).

<sup>51</sup> *Salvatore Grimaldi v. Fonds des maladies professionnelles*, Case C-322/88, Judgment of the Court (Second Chamber), 13 December 1989.

<sup>52</sup> OECD, *Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters* (19 February 2020) (Nov. 11, 2020), available at [https://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf).



This means that the Convention is certainly an appropriate legal basis for automatic exchange of information between the EU and Russia.

Another provision of the Convention that has attracted our attention is paragraph 1 of Article 27 (“Other International Agreements or Arrangements”):

The possibilities of assistance provided by this Convention do not limit, nor are they limited by, those contained in existing or future international agreements or other arrangements between the Parties concerned or other instruments which relate to co-operation in tax matters.

Since, unlike bilateral tax conventions, the Convention provides the possibility of automatic exchange of information, it prevails over them to this extent. Therefore, the Convention on Mutual Administrative Assistance in Tax Matters is the only appropriate legal basis for automatic exchange of financial information and documentation concerning MNE Groups.

Previously we have stated that competent authorities agreements are not an appropriate legal basis. That is true but it does not underestimate the importance of such agreements. In fact, they develop the general provision prescribed in Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters. Thus, both the EU Member States and the Russian Federation participate in the CRS Multilateral Competent Authority Agreement of 2014 and in the CbC Multilateral Competent Authority Agreement of 2016.<sup>53</sup> However, these legal instruments are operative only where the competent authorities have consented to exchange information.

We have analyzed the information from the OECD’s official website where the information on “activated exchange relationships” is published<sup>54</sup> and discovered that all the EU Member States agreed to send information automatically to Russia. Nevertheless, according to the OECD’s official website, Russia has not agreed to send information to Bulgaria and Romania either in the context of the Common Reporting Standard, or in the light of Country-by-Country Reporting. This is strange because, in compliance with Order No. MMB-7-17/582@ of the Federal Tax Service of the Russian Federation of 21 November 2019,<sup>55</sup> both Bulgaria and Romania feature in the List

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<sup>53</sup> OECD, CbC Multilateral Competent Authority Agreement of 2016 (Nov. 11, 2020), available at <https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf>; OECD, List of Signatories (Nov. 11, 2020), available at <https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf>.

<sup>54</sup> Activated exchange relationships for CRS information, OECD (Nov. 11, 2020), available at <https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/>.

<sup>55</sup> Приказ ФНС России от 21 ноября 2019 г. № ММВ-7-17/582@ // СПС «КонсультантПлюс» [Order of the Federal Tax Service of the Russian Federation of 21 November 2019 No. MMB-7-17/582@, SPS “ConsultantPlus”] (Nov. 11, 2020), available at [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_341393/](http://www.consultant.ru/document/cons_doc_LAW_341393/).



of countries (territories) that Russia has approved for the purposes of automatic exchange of financial information.

Summing up, we can say that the Convention on Mutual Administrative Assistance in Tax Matters is the only appropriate legal basis for automatic exchange of information between the EU and Russia. All the rights and obligations as well as the liability of the parties follow from this tax treaty. The CRS Multilateral Competent Authority Agreement of 2014 and the CbC Multilateral Competent Authority Agreement of 2016 are legal instruments that develop the provisions of Article 6 of the Convention. As for the exchange relationships between the EU Member States and Russia, they are activated since all the EU Member States and Russia have consented to send information to each other.

### **Conclusion**

Within this article we have tried to detect the roots of material and procedural legal problems arising during automatic exchange of information in tax matters between the EU and Russia.

First, we have made a quick overview of the international standards of automatic exchange of information developed by the OECD and have shown the following: (1) there are only two internationally accepted standards of automatic exchange of information; (2) the Common Reporting Standard deals with individuals and their financial accounts while Country-by-Country Reporting is aimed at companies and transfer-pricing within multinational enterprises; (3) the Common Reporting Standard is a separate initiative by the OECD while Country-by-Country Reporting is a part of BEPS; and (4) both standards provide mechanisms for their implementation that are quite similar but only Country-by-Country Reporting includes model legislation. For the Common Reporting Standard the situation is different because there is only a general requirement for countries to implement the reporting and due diligence procedures stated in the Standard.

Second, we have analyzed the scope of the implementation of the Common Reporting Standard and Country-by-Country Reporting in the EU and in the Russian Federation. We have discovered that these international standards developed by the OECD have been implemented almost in their entirety both in the EU and in the Russian Federation. Nevertheless, certain specific aspects have been detected in connection with the implementation of the OECD international standards.

Thus, the Common Reporting Standard has been implemented both in the EU and in the Russian Federation with additions. In both cases these additions come from the Commentaries on the Common Reporting Standard. However, the jurisdictions have implemented different provisions of the Commentaries. This makes the scope of the implementation of the Common Reporting Standard different in the EU and in the Russian Federation. That leads to an unequal volume of financial information being automatically exchanged between the jurisdictions.



In our opinion, the solution to this problem is to develop a unified approach to the Commentaries on the Common Reporting Standard. If they are binding on countries, then it does not matter which provisions of the Commentaries they have implemented. In DAC 2 (and in DAC 4 as well) it is said that the Commentaries should be referred to for interpretation but this is a unilateral approach since in the Russian legislation there is no such direction. To make the scope of the implementation of the Common Reporting Standard and the volume of information automatically exchanged equal, countries should make the Commentaries binding for the purposes of interpretation.

Country-by-Country Reporting has fewer problems in the light of its implementation thanks to the model legislation adopted both by the EU and the Russian Federation. Nevertheless, there are peculiar features again because of the additions made by the jurisdictions. And if we take into account these additions, we will see that the situation with the scope of the implementation of Country-by-Country Reporting is even more complicated. There are no commentaries on the Standard which could have been the source of these additions. All the additions were developed by the jurisdictions unilaterally.

From our point of view, in order to solve the problem of an unequal volume of information being automatically exchanged in the context of Country-by-Country Reporting the EU should adopt additions similar to those already adopted by the Russian Federation and vice versa. However, this is highly unlikely and for that reason the scope of the implementation of Country-by-Country Reporting will inevitably differ in the respective jurisdictions.

Third, we have concluded that the Convention on Mutual Administrative Assistance in Tax Matters of 1988 is the only appropriate legal basis for automatic exchange of information between the EU and Russia. All the rights and obligations as well as the liability of the parties follow from this tax treaty. The CRS Multilateral Competent Authority Agreement of 2014 and the CbC Multilateral Competent Authority Agreement of 2016 are the legal instruments that develop the provisions of article 6 of the Convention. As far as the exchange relationships between the EU Member States and Russia are concerned, they have been activated since all the EU Member States and Russia have consented to send information to each other.

Finally, we can say that in order to make automatic exchange of information between the EU and Russia more comfortable at the governmental level the problems mentioned above should be solved. It will help to concentrate on such an important issue as the protection of taxpayers' rights, primarily the right to confidentiality, which is very important in the light of the enhancement of global tax transparency. Moreover, a smooth automatic exchange of information will stimulate trade and investments between the EU and Russia and will increase the efficiency of the prevention of tax offences.



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