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## I. Introduction

1. High standards of transparency and the fight against international tax evasion and tax avoidance have been high on the global political agenda since 2008. Tax avoidance and tax evasion threaten government revenues throughout the world. In many developed countries the sums run into billions of Euros and developing countries lose vital revenue through tax evasion and tax avoidance. This translates into fewer resources for infrastructure and affects the standard of living for all of us in both developed and developing economies.
2. Globalization generates opportunities to ~~ease~~ increase global wealth but also results in increased risks. The increases in cross-border flows that come with a global financial system require more effective tax cooperation. 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. Better transparency and information exchange for tax purposes are ~~crucial~~ not only for the purposes of curtailing cross-border tax evasion and avoidance, but also to curtail the capital flight that is often accomplished through such evasion and avoidance. International tax cooperation and information exchange are more important than ever at a time of extreme pressure on government budgets.
3. To ensure effective tax cooperation and ~~information~~ information exchange, it is important that the underlying legal bases for such cooperation and information exchange are updated on a regular basis to take into account recent ~~developments~~ developments and country practices and to provide further clarifications as needed. The last update to Article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Model) and its Commentary was finalized in 2008 and included in the 2011 update of the UN Model. It therefore seems timely to proceed with a ~~new~~ update of Article 26 of the UN Model and its Commentary.
4. Much of the language in Article 26 ~~of the~~ UN Model has been modelled on Article 26 of the OECD Model Tax Convention on Income and Capital (OECD Model), although in a number of respects Article 26 of the UN Model is intended to be broader than the OECD version. On 17 July 2012, the OECD Council approved an update of Article 26 of the OECD Model and its Commentary (2012 OECD update) which takes into account recent developments and country practices and ~~further~~ elaborates on the interpretation of certain provisions of Article 26 of the OECD Model. The 2012 OECD update reflects a consensus of the OECD's member countries<sup>2</sup> and the other countries participating in the work of the

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<sup>2</sup> The text of the 2012 OECD Update and Questions and Answers related thereto are available via the following link:  
<http://www.oecd.org/newsroom/taxoecdupdatesoecdmodeltaxconventiontoextendinformationrequeststogroups.htm>

<sup>3</sup> Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. The European Commission also takes part in the work of the OECD.

OECD's Committee on Fiscal Affairs<sup>4</sup>No country made a reservation or observation in relation thereto.

5. It is proposed that Article 26 of the UN Model and its Commentary be updated to take into account recent developments and country practices and further elaborations on the interpretation of certain provisions of Article 26 of the OECD Model, as reflected in the 2012 OECD update.

## II. Summary of the main proposed changes to Article 26 and its Commentary

6. Following the pattern of updates in the 2012 OECD update, it is proposed that Article 26 of the UN Model and its Commentary be amended as follows:

(a) Amendment of the text of paragraph 2 of Article 26 to expressly provide for the possibility of sharing information by tax authorities with other law enforcement agencies and judicial authorities if certain conditions are met

7. It is proposed that the text of Article 26 be amended to allow the competent

other words, merely further clarify the interpretation of the standard of “foreseeable relevance”. The introductory new paragraph 4.2 of the Commentary would explain this.

10. It is proposed that the interpretation of the standard of foreseeable relevance and the term “fishing expeditions” be developed through the following additions to the Commentary.

(i) General clarifications on the meaning of “foreseeable relevance” and “fishing expeditions”

11. The proposed clarifications elaborate on the meaning of “foreseeable relevance” in the context of a request for information on ~~resu~~ The clarifications acknowledge that given the complexity of taxation laws and taxpayer investigations and examinations, it is the requesting country, with full knowledge of its taxation laws and its investigation or examination, that is in the best position to determine the foreseeable relevance of the

information is provided by the requested State. The first example refers to financial service providers and banks and contrasts with example (b) in paragraph 10.2. The second example concerns shareholder information and illustrates that the rules are general and equally apply when the relevant information is held by others than financial service providers or banks.

16. The proposed language as regards group requests represents an important step forward towards more transparency which benefits both developed and developing countries. The integration of global capital markets has increased the ease with which nationals of both developed and developing countries can move and hide their assets overseas. The ability to make group requests would be an important tool in the fight against tax cross-border tax evasion and avoidance and the capital flight that is often accomplished through such evasion and avoidance.

17. Many countries had interpreted Article 26 of the UN Model and other information exchange instruments, including the OECD Model, to provide for group requests; for others, the proposed interpretation may be new. The introductory new paragraph 4.2 of the Commentary would explain this.

(iv) Addition of further examples illustrating when information must be exchanged under Article 26

18. It is proposed that, in addition to the new examples already mentioned above (i.e. the new examples in paragraph 10.2(h) and 10.3), further examples be added to illustrate when information must be exchanged (see the new examples proposed in paragraph 10.2(e), (g), and (j)). New example (e) illustrates the point that a request may cover information relating to persons that are not themselves under examination or investigation (at least at the time the request is made). New example (g) illustrates the case in which a taxpayer is individually identified by means other than his name or address. New example (j) illustrates a case in which information can be exchanged on the direct and indirect shareholders of Company B and contrasts with the example in new paragraph 10.3(b).

(c) Clarifications in respect of the identification of the person believed to be in possession of requested information

19. A number of clarifications are proposed in respect of the identification of the person believed to be in possession of the requested information:

The proposed language in new paragraph 7.3 concerns situations in which the requesting State is not in a position to provide the name and/or address of the person believed to be in possession of the information. The language clarifies that this does not necessarily mean that the request fails to meet the standard of foreseeable relevance and that, in fact, this is more a question of practicability or feasibility within the scope of paragraph 3(a) and (b); and

State's inability to obtain the information was specifically related to the fact that the requested information was believed to be held by a bank or other financial institution.

- (d) Include optional language in the Commentary for Contracting States wishing to improve the speediness and timeliness of exchange of information under Article 26

20. Timeliness of exchanging information is one of the most important factors in effective exchange of information. The issue of timeliness has come under the spotlight as a result of the peer review work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, with many country reports noting that the timeliness of responses should be improved. Including such a provision in a treaty may help to improve timeliness, and in particular it is likely to facilitate reaching a competent authority agreement on timeliness.

21. The proposed language inserted in new paragraphs 29.5 and 29.6 of the Commentary provides for a framework for improving the speediness and timeliness of exchange of information and sets a default standard of time limits within which the information is required to be provided unless a different agreement for shorter or longer time limits has been made by the competent authorities.

- (e) Addition of language to the Commentary to clarify a number of terms and concepts used in Article 26

22. It is proposed that the following clarifications of a number of terms and concepts used in Article 26 are incorporated into the Commentary:

Clarification that Article 26 applies to information exchanges for the purposes of tax collection (Article 27) or a mutual agreement procedure (Article 25) (see paragraph 1.1 of the Commentary);

Clarification that the confidentiality rules in paragraph 2 of Article 26 also apply to the competent authority letter requesting the information (see paragraph 11 of the Commentary);

Clarification that in the case of breach of tax confidentiality by the requesting State the requested State may suspend assistance under Article 26 until such time as proper assurance is given by the requesting State that the confidentiality rules will indeed be respected (see paragraph 11 of the Commentary); and

Clarification that Contracting States must use their information gathering measures, even though invoked solely to provide information to the other Contracting State and irrespective of whether the information could be gathered or used for domestic tax purposes in the requested Contracting State (see paragraph 26.1 of the Commentary).

23. New paragraphs 4.1 and 4.2 were added to highlight key changes in the proposed update and to specify whether those changes are intended to be substantive or interpretative.

III. Proposed changes to the existing ~~text~~ of Article 26 of the UN Model and its Commentary

24. The proposed changes to the existing text of Article 26 of the UN Model and its Commentary appear ~~in strike-through~~ deletions and



5. 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, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person.

6. The competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under





exchange information simply because its domestic laws do not allow it to provide the information in the form requested.

5.3 The scope of exchange of information covers all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. Exchange of information for criminal matters can also be based on bilateral or multilateral treaties on mutual legal assistance (to the extent that they also apply to tax crimes).

5.4 Article 26 provides in paragraph 6 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”. This language authorizes the competent authorities to exchange information in at least three modes: exchange by specific request, automatic exchange, and other exchanges, understood to include spontaneous exchanges.

5.5 Nothing in the United Nations Model Convention prevents the application of the provisions of Article 26 to the exchange of information that existed prior to the entry into force of the Convention, as long as the assistance in respect to this information is provided after the Convention has entered into force and the provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such information, in particular when the provisions of that Convention will have effect with respect to taxes arising or levied from a certain time.

6. The Committee of Experts has suggested some guidelines for arrangements regarding the implementation of appropriate exchanges of information (see paragraph 30 below). Those guidelines are in the form of an inventory of options available to the competent authorities.

States are not at liberty to engage in “fishing expeditions” or to request information about a particular taxpayer that is highly unlikely to be relevant to the tax affairs of that taxpayer. In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be decl

case of a group request a third party will usually, although not necessarily, have actively contributed to the non-compliance of the taxpayers in the group, in which case such circumstance should also be described in the request. Furthermore, and as illustrated in example (a) of paragraph 10.3 below, a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance.

7.5

9. The obligation imposed under paragraph 1 is for ~~effective~~ *effective* exchange of information. A Contracting State may not avoid its obligations under paragraph 1 through unreasonable time delays, by imposing unreasonable or burdensome procedural barriers, or by intentionally

(g) State A has obtained information on all transactions involving foreign credit cards carried out in its territory in a certain year. State A has processed the data and launched an investigation that identified all credit card numbers where the frequency and pattern of transactions and the type of use over the course of that year suggest that the cardholders were tax residents of State A. State A cannot obtain the names by using regular sources of information available under its internal taxation procedure, as the pertinent information is not in the possession or control of persons within its jurisdiction. The credit card numbers identify an issuer of such cards to be Bank in State B. Based on an open inquiry or investigation, State A sends a request for information to State B, asking for the name, address and date of birth of the holders of the particular cards identified during its investigation and any other person that has signatory authority over those cards. State A supplies the relevant individual credit card numbers and further provides the above information to demonstrate the foreseeable relevance of the requested information to its investigation and more generally to the administration and enforcement of its tax law.

(h) Financial service provider B is established in State B. The tax authorities of State A have discovered that B is marketing a financial product to State A residents using misleading information suggesting that the product eliminates the State A income tax liability on the income accumulated with the product. The product requires that an account be opened with B through which the investment is made. State A's tax authorities have issued a taxpayer alert, warning all taxpayers about the product and clarifying that it does not achieve the suggested tax effect and the income generated by the product must be reported. Nevertheless, B continues to market the product on its website, and State A has evidence that it also markets the product through a network of advisors. State A has already discovered several resident taxpayers that have invested in the product, all of whom had failed to report the income generated by their investments. State A has exhausted its domestic means of obtaining information on the identity of its residents that have invested in the product. State A requests information from the competent authority of State B on all State A residents that (i) have an account with B and (ii) have invested in the financial product. In the request, State A provides the above information, including details of the financial product and the status of its investigation.

(fi) A corporation resident in State A has companies located in State B and State C. State B believes that the company doing business in its territory has been skimming profits into the company located in State C. State B may request that State A provide it with information about the profits and expenses of the company located in State C. Domestic law of State A obliges the parent company to keep records of transactions of its foreign subsidiaries.

(j) Company A, resident of State A, is owned by foreign unlisted Company B, resident of State B. The tax authorities of State A su



ownership interest in Company B. If State B is unable to determine whether X, Y or Z holds such an indirect interest, information is requested on the shareholder(s) so that it can continue its investigation.

10.3. Implementation of domestic laws (no information must be provided by the requested State assuming no further information is provided by the requesting State)

(a) Bank B is a bank established in State B. State A taxes its residents on the basis of their worldwide income. The competent authority of State A requests that the competent authority of State B provide the names, date and place of birth, and account balances (including information on any financial assets held in such accounts) of residents of State A that have an account with, hold signatory authority over, or a beneficial interest in an

memoranda of understanding regarding the confidentiality of the information exchanged under this Article.

12. Of course, the information received under Article 26 would be useless, or nearly so, to the requesting State (the Contracting State requesting the information) if the prohibition against disclosure were absolute. Paragraph 2 provides that information received under Article 26 can be disclosed to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the

information and confirm that the receiving State can use the information for such other purpose under its laws. Where the supplying State is in a position to do so, having regard to, amongst others, international agreements or other arrangements between the Contracting States relating to mutual assistance between law enforcement agencies and judicial authorities, the competent authority of the supplying State would generally be expected to authorize such use for other purposes if the information can be used for similar purposes in the supplying State. Law enforcement agencies and judicial authorities receiving information under the last sentence of paragraph 2 must treat that information as confidential consistent with the principles of paragraph 2. ~~Contracting States wishing to broaden the purposes for which they may use information exchanged under this Article may do so by adding the following text to the end of paragraph 2:~~

~~Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.~~

13.4 It is recognized that Contracting States may wish to achieve the overall objective inherent in the last sentence of paragraph 2 in other ways and they may do so by replacing the last sentence of paragraph 2 with the following text:

“The competent authority of the Contracting State that receives information under the provisions of this Article may, with the written consent of the Contracting State that provided the information, also make avail



(a) To carry out administrative measures at variance with the laws and administrative practice of that Contracting State or of the other Contracting State even if that Contracting State knows and fails to disclose that specific provisions of its laws or administrative practice are likely to prevent an effective exchange of information;

17. Some countries are required by law to notify the person supplying information and/or the taxpayer subject to an enquiry prior to the release of that information to another country. Such notification procedures may be an important part of the rights provided under domestic law. In some cases, notification should help prevent mistakes (e.g. in cases of mistaken identity) and should facilitate exchange (by allowing taxpayers who are notified to cooperate voluntarily with the tax authorities in the requesting State). Notification procedures may not be applied, however, in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State to prevent avoidance or evasion of taxes. That is, they should not prevent or unduly delay an effective exchange of information. For instance, notification procedures should permit exceptions from prior notification in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting State.

17.1 A Contracting State that under its domestic law is required to notify the person who provided the information and/or the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance. Such information should be provided to the other Contracting State before a convention is concluded and thereafter whenever the relevant rules are modified. Depending on the facts and circumstances of the particular case, a failure to disclose may violate the right of a Contracting State to invoke paragraph 3(a) to avoid its obligations under paragraph 1.

18. In general, the requested State is not obliged to carry out administrative measures on behalf of the requesting State that are not provided under the laws or administrative practice of the requesting State. The purpose of this rule is to prevent a requesting State from using the administrative measures of the requested State to avoid limitations imposed on the requesting State by its own government.

18.1 Different countries will necessarily have different mechanisms for obtaining and providing information. Variations in laws and administrative practice may not be used as a basis for the requested State to deny a request for information unless the effect of these variations would be to limit in a significant way the requesting State's legal authority to obtain and provide the information if the requesting State itself received a legitimate request from the requested State.

18.2 The general rule of paragraph 18 has no application when the legal system or administrative practice of only one country provides for a specific procedure. For instance, a Contracting State requested to provide information about an administrative ruling or advance pricing agreement (APA) it has granted cannot, in the absence of a ruling or APA regime in the requesting State, to avoid its obligation under paragraph 1 to provide such information.

19. Most countries recognize under their domestic laws that information cannot be obtained from a person to the extent that such person can claim the privilege against self-incrimination. A requested State, therefore, may decline to provide information if its self-incrimination rules preclude it from obtaining that information in the self-incrimination rules of the requesting

State would preclude it from obtaining such information under similar circumstances. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. In the overwhelming majority of information requests, the objective is to obtain information from third parties such as banks, intermediaries, or the other party to a contract, and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

20. Paragraph 3b) allows a requested State to avoid an obligation otherwise imposed by paragraph 1 when it cannot obtain the requested information in the normal course of its administration or when the other Contracting State could not have obtained that information in the normal course of its administration. The purpose of this rule is to prevent the requesting State from imposing unreasonable burdens on the requested State.

20.1 Information is deemed to be obtainable in the normal course of administration if the information is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may

significantly less advanced capacity for obtaining information about taxpayers. To achieve that result, they might amend paragraph 4 to read as follows:

(b) To supply information that cannot be obtained in the normal course of the administration of that Contracting State or not obtainable under the laws of that Contracting State or of the other Contracting State;

20.5 Paragraphs 3 (a) and (b) do not permit the requested State to decline a request where paragraph 4 or 5 applies. Paragraph 5 would apply, for instance, in situations in which the requested State's inability to obtain the information was specifically related to the fact that the requested information was believed to be held by a bank or other financial institution. Thus, the application of paragraph 5 includes situations in which the tax authorities' information gathering powers with respect to information held by banks and other financial institutions are subject to different requirements than those that are generally applicable with respect to information held by persons other than banks or other financial institutions. This would, for example, be the case where the tax authorities can only exercise their information gathering powers with respect to information held by banks and other financial institutions in instances where specific information on the taxpayer under examination or investigation is available. This would also be the case where, for example, the use of information gathering measures with respect to information held by banks and other financial institutions requires a higher probability that the information requested is held by the person believed to be in possession of the requested information than the degree of probability required for the use of information gathering measures with respect to information believed to be held by persons other than banks or financial institutions.

21. In general, a requested State may decline, under paragraph 3(d), to disclose information that constitutes a confidential communication between an attorney, solicitor, or other admitted legal representative in his role as such and his client to the extent that the communication is protected from disclosure under domestic law.

21.1 The scope of protected confidential communications should be narrowly defined. Such protection does not attach to documents or records delivered to an attorney, solicitor, or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law. Also, information on the identity of a person such as a director or beneficial owner of a company is not protected from disclosure. Although the scope of protection afforded under domestic law for confidential communications may differ among States, the protection provided under paragraph 3(d) does not extend so broadly so as to hamper the effective exchange of information.

21.2 Notwithstanding the provisions of domestic law in the requested State, that State may decline to supply requested communications between attorneys, solicitors or other admitted legal representatives and their clients only if, and to the extent that, such representatives act in their capacity as attorneys, solicitors or other admitted legal representatives and not in a different capacity, such as nominee shareholders, trustees, settlors, company directors, or accountants, or under a power of attorney to represent a company in its business affairs. More specifically, the communication must have been produced in good faith for the purpose of seeking or providing legal advice or for use in existing or contemplated legal proceedings.

21.3 In no event may a requested State decline to disclose communications between attorneys, solicitors or other admitted legal representatives and their clients if those persons have themselves participated with their clients in a plan to commit tax evasion or avoidance.

21.4 A claim that information is protected as a confidential communication between an attorney, solicitor or other admitted legal representative and its clients should be adjudicated exclusively in the Contracting State under the law of which the claim arises. Thus, it is not intended that the courts of the requested State should adjudicate claims based on the laws of the requesting State.

22. Paragraph 3c) also permits a requested State to decline to provide information if the disclosure of that information would reveal any trade, business, industrial, commercial or professional secret or trade process. Before making this provision, a Contracting State should carefully weigh if the interests of the taxpayer really justify its application. Secrets mentioned in this paragraph should not be taken in too wide a sense. A wide interpretation of the provision in many cases would be inconsistent with the purpose of Article 26 because it would render ineffective the exchange of information provided for in that Article.

22.1 A trade or business secret or trade process



23. Paragraph 3c) includes a limitation with regard to information that concerns the vital interests of the State itself. Under that limitation Contracting States do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*). This limitation should become relevant only in extreme cases. For instance, such a case could arise if a tax investigation in the requesting State were motivated by political, racial or religious persecution. The limitation may also be invoked when the information constitutes a State secret. For instance, there is no disclosure requirement when sensitive information is held by secret services, the disclosure of which would be contrary to the vital interests of the requested State. Thus, issues of public policy (*ordre public*) rarely arise in the context of information





- (b) Where the tax authorities of the requested Contracting State are not already in the possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within six months of the receipt of the information request.

Provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits.

29.6 The provisions (a) and (b) in the optional language at the end of paragraph 6, referenced in paragraph 29.5, set a default standard for time limits that would apply where the competent authorities have not made a different agreement on longer or shorter time limits. The default standard time limits are two months from the receipt of the information request if the requested information is already in the possession of the tax authorities of the requested Contracting State and six months in other cases. Notwithstanding the default standard time limits or time limits otherwise agreed, competent authorities may come to different agreements on a case-by-case basis, for example, when they both agree more time is appropriate. This may arise where the request is complex in nature. In such a case, the competent authority of a requesting Contracting State should not unreasonably deny a request by the competent authority of a requested Contracting State for more time. If a requested Contracting State is unable to supply the requested information within the prescribed time limit because of legal impediments (for example, because of ongoing

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