E/C.18/2013/CRP.21

Distr.: General
21 October 2013

Original: English

Committee of Experts on International Cooperation in Tax Matters
Ninth session
Geneva, 21-25 October 2013

Proposal to update Article 26 (Exchange of information) of the United Nations Model Double Taxation Convention between Developed and Developing Countries and its Commentary[1]

Summary

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.

In light of the developments in exchange of information for tax purposes since 2008, including the 2012 update by the Organisation for Economic Co-Operation and Development of Article 26 (Exchange of information) of the OECD Model Tax Convention on Income and on Capital and its Commentary (2012 OECD update), it seems timely to proceed with a new update of Article 26 of the UN Model and its Commentary.

This note contains a proposal to update Article 26 of the UN Model and its Commentary following the pattern of updates contained in the 2012 OECD update. .

[1] The present paper was prepared by Mexico; the views and opinions expressed are those of the authors and do not necessarily represent those of the United Nations.

Contents

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 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 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 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.[2] The 2012 OECD update reflects a consensus of the OECD's member countries[3] and the other countries participating in the work of the

[2] 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

[3] 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[4]. 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 authorities of Contracting States to use information received for tax purposes for non-tax purposes if 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 (see also the proposed revisions to paragraph 13.3 of the Commentary and the addition of a new paragraph 13.4). The relevant language was previously included as an optional provision in paragraph 13.3 of the Commentary.

8. The addition of this language to Article 26 itself is consistent with the 2012 OECD update which itself is consistent with the treaty policy of a growing number of countries, and paragraph 4 of Article 22 of the (amended) Multilateral Convention on Mutual Administrative Assistance in Tax Matters which has an ever increasing number of signatories[5]. The proposed amendment would an important contribution to fighting tax crimes and other crimes more effectively by allowing different tax and law enforcement agencies to cooperate more closely as part of a more holistic approach to fighting tax crimes and other crimes.

(b) Expansion of the Commentary to develop the interpretation of the standard of "foreseeable relevance" and to explicitly refer to the term "fishing expeditions" as an element within the determination of foreseeable relevance

9. The term "fishing expeditions" was introduced in the Commentary to Article 26 of the OECD Model as part of its 2005 revisions and had since given rise to much debate over its interpretation. The 2012 OECD update provides useful additional guidance on the interpretation of the term. With the interpretation of the term "fishing expeditions" now clarified, it is proposed that paragraph 7.2 of the Commentary be amended to explicitly refer to this term as an element within the determination of foreseeable relevance. This would not be a substantive change as it was always understood that the requirement of "foreseeable relevance" would rule out "fishing expeditions". The explicit reference to the term would, in

[4] Argentina, India, the People's Republic of China, the Russian Federation and South Africa participate in the work of the CFA. The European Commission also takes part in the work of the OECD.

[5] In just over two years since the entry into force of the amended Convention, almost 60 countries have either become signatories or have stated their intention to do so.

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 request. 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 requested information. At the same time, this does not obligate the requested state to provide information in response to requests that are fishing expeditions — that is, speculative requests that have no apparent connection to an open inquiry or investigation.

(ii) Clarification that the identification of the taxpayer does not always require a name and address

12. The proposed new paragraph 7.3 makes it clear that failure to provide the name or address (or both) of the taxpayer does not necessarily mean that the request fails to meet the standard of foreseeable relevance; however, in such cases, the requesting State should provide other information sufficient to identify the taxpayer. That situation is likely to be rare. One example when the tax authority may not have the name or address of the taxpayer under investigation is new example (g) of paragraph 10.2.

(iii) Clarification that group requests are covered under Article 26

13. The proposed additions in new paragraph 7.4 clarify that the standard of "foreseeable relevance" can be met in the case of one taxpayer or several taxpayers, meaning that a request for information can be made for a group of taxpayers also in cases in which those taxpayers are not individually identified. Group requests, as all other requests, must meet the standard of foreseeable relevance. The Commentary acknowledges that in such cases it will often be more difficult to establish that the request meets the standard because the requesting state cannot specify an ongoing investigation into the affairs of a particular taxpayer when making such a request (which in most cases would by itself dispel the notion of the request being random or speculative). The Commentary goes on to describe, in very general terms and at a conceptual level, the information a requesting State must provide to demonstrate that a group request is foreseeably relevant.

14. The proposed additions in new paragraph 7.4 further recognize that usually, although not necessarily, a third party will have actively contributed to the noncompliance of the taxpayers in the group. This is illustrated by the proposed financial service provider example in paragraph 10.2 (see new example (h)).

15. To illustrate the application of the standard of "foreseeable relevance" in the context of group requests further, paragraph 10.3 contains two examples of requests for information in which no information must be provided by the requesting State assuming no further

information is provided by the requested State. The first example refers to financial service providers and banks and contrasts with example (h) 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 would represent 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

– The proposed language in new paragraph 20.5 articulates more clearly the relationship between paragraph 3 and paragraphs 4 and 5, i.e. that paragraphs 3(a) and (b) do not permit the requested State to decline a request where paragraph 4 or 5 applies. It illustrates the application of this rule in the context of 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.

(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 still 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 ~~strikethrough~~ for deletions and ***bold italics*** for additions.

Article 26

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. ***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.***

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(*a*) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(*b*) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(*c*) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

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 a 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 paragraph 1 shall be made.

Commentary on Article 26

EXCHANGE OF INFORMATION

A. GENERAL CONSIDERATIONS

1. Article 26 embodies rules under which information may be exchanged to the widest possible extent, both to facilitate the proper application of the treaty and to assist the Contracting States in the enforcement of their domestic tax laws. Consequently, the obligation to exchange information under this Article should be interpreted broadly, and the limitations on that obligation should not be extended by analogy beyond their specific meaning. In particular, the Article should be understood to require the Contracting States to promote an effective exchange of information.

1.1 In a global economy, cooperation among nations on fiscal matters has become increasingly important, and the former reluctance of nations to concern themselves with the revenue laws of other countries has mostly disappeared. Article 26 provides a basis for the effective exchange of information between the Contracting States, whereas Article 27 provides for assistance in collection. ***Exchanges of information for the purpose of tax collection are, however governed by Article 26 (see paragraph 5 of the Commentary on Article 27). Similarly, mutual agreement procedures are dealt with in Article 25, but exchanges of information for the purposes of a mutual agreement procedure are governed by Article 26.*** From the perspective of many developing countries, Article 26 is particularly important not only for curtailing cross-border tax evasion and avoidance, but also to curtail the capital flight that is often accomplished through such evasion and avoidance.

1.2 Much of the language of Article 26 is also found in the comparable Article of the OECD Model Convention. Consequently, the OECD Commentary to that Article generally is relevant in interpreting Article 26 of the United Nations Model Convention. It should be understood, nevertheless, that Article 26 is intended to be broader in a number of respects than the comparable provision in the OECD Model Convention.

1.3 Although Article 26 imposes reciprocal obligations on the Contracting States, it does not allow a developed country to refuse to provide information to a developing country on the ground that the developing country does not have an administrative capacity comparable to the developed country. Reciprocity has to be measured by reference to the overall effects of a treaty, not with respect to the effects of a single article.

2. The text of paragraph 1 of Article 26 makes clear that the exchange of information is not restricted by Article 1 (Persons covered) or Article 2 (Taxes covered). Consequently, the information exchanged may relate to persons who are not resident in either Contracting State

and to the administration or enforcement of taxes not mentioned in Article 2. Some countries may object to the extension of paragraph 1 to all taxes, for constitutional reasons or other reasons. Those concerns are addressed in section B below.

3. Following the pattern of the 2005 revisions to the OECD Model Convention, paragraph 1 of Article 26 was broken up into three separate paragraphs, now paragraphs 1, 2 and 6. This paragraphing change was made for clarity and has no substantive significance.

4. Article 26 was modified substantially in 2011, with a view to clarifying certain issues, expanding the scope of the Article, and limiting exceptions to the obligation to exchange information. In some cases, the changes made were not intended to be substantive, but rather were intended to remove doubts as to the proper interpretation of the Article. For example, the term "necessary" in paragraph 1 was changed to "foreseeably relevant" to clarify the intended meaning of the prior language. In contrast, the change in that paragraph providing for an exchange of information with respect to taxes not mentioned in Article 2 was intended to be a substantive change. Another example of substantive change is the addition of paragraph 4, which removes the requirement for a domestic tax interest.

4.1 Article 26 and the Commentary were further modified in [2013] to take into recent developments and to further elaborate on the interpretation of certain provisions of the Article. Following the 2012 update to Article 26 of the OECD Model Convention, paragraph 2 of the Article was amended to allow the competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorizes such use. This was previously included as an optional provision in paragraph 13.3 of the Commentary.

4.2 Further, the Commentary was expanded, amongst others, to develop the interpretation of the standard of "foreseeable relevance" and to explicitly refer to the term "fishing expeditions" as an element within the determination of foreseeable relevance. The latter term was introduced in the Commentary to Article 26 of the OECD Model Convention as part of its 2005 revisions and had since given rise to much debate over its interpretation. The 2012 update to Article 26 of the OECD Model Convention provided additional guidance on the interpretation of the term. The introduction of the term "fishing expedition" into this Commentary was not intended to be a substantive change, but rather was intended to further clarify the interpretation of the standard of "foreseeable relevance". The interpretation of the latter standard and the term "fishing expeditions" was developed through the addition of: general clarifications (see paragraph 7.2), language in respect of the identification of the taxpayer under examination or investigation (see paragraph 7.3), language in respect of requests in relation to a group of taxpayers (see paragraph 7.4) and new examples (see paragraphs 10.2(e), 10.2(g), 10.2(h), 10.2(j) and 10.3). Insofar as group requests were concerned, many countries had always interpreted Article 26 to include such requests. For some countries, however, this represented a new interpretation. Other clarifications were added throughout the Commentary.

4.~~1~~***3*** In some cases, the issue of whether a change made to Article 26 is intended as substantive or interpretative depends on the prior practices of the Contracting States. For example, in some cases, the addition of paragraph 5, which removes, inter alia, domestic bank secrecy laws as a basis for refusing to exchange information, may simply clarify the meaning of the limitations on the exchange of information contained in paragraph 3. In other cases, it may modify that paragraph substantively. The effect of the change depends in part on the

particular prior practices of the Contracting States. The position taken in the OECD Commentary is that paragraph 5 is primarily interpretative with respect to treaties between its member States. This issue may be of particular importance in interpreting treaties that entered into force prior to the adoption of the 2011 ***and 2012*** changes to Article 26.

4.~~2~~***4*** One difference in the wording of Article 26 and the comparable provision of the OECD Model Convention is that Article 26 includes in paragraph 1 the following sentence: "In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes." The phrase "that would be helpful to a Contracting State in preventing avoidance or evasion" was inserted in 2011. That change was thought to be useful by members of the Committee, especially members from developing countries, to make clear in the text of Article 26 a point that already was clear in the Commentary and was implicit in the language of the last sentence of prior paragraph 1, now revised and moved to paragraph 6. The statement of the purposes of information exchanges in the text of Article 26 is intended to provide guidance to the Contracting States on the proper interpretation of the Article.

4.~~3~~***5*** Although tax evasion is illegal and tax avoidance is not, both result in loss of revenue to the government, and, by definition, both defeat the intent of the government in enacting its taxing statutes. Consequently, mutual assistance in combating tax avoidance is an important aspect of mutual cooperation on tax matters. In addition, some forms of aggressive tax avoidance are so close to the line between avoidance and evasion that a Contracting State is unlikely to know for sure whether the information it is requesting deals with avoidance or evasion until after it obtains the requested information. Information on tax avoidance may be extremely useful to a Contracting State in its efforts to close possible loopholes in its taxing statutes.

5. The term "exchange of information" should be understood broadly to include an exchange of documents and an exchange of information unrelated to specific taxpayers and the provision of information by one Contracting State whether or not information is also being provided at that time by the other Contracting State.

5.1 If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State should provide information under Article 26 in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts or writings), to the extent feasible. Under paragraph 3, the requested State may decline to provide the information in the specific form requested if, for instance, the requested form is not known or permitted under its law or administrative practice. A refusal to provide the information in the form requested does not affect the obligation to provide the information.

5.2 Contracting States may wish to use electronic or other communication and information technologies, including appropriate security systems, to improve the timeliness and quality of exchanges of information. Indeed, the Contracting States may be obligated to provide requested information in electronic form if such action is necessary for an effective exchange of information. Contracting States which are required, according to their law, to observe data protection laws may wish to include provisions in their bilateral conventions concerning the protection of personal data exchanged. Data protection concerns the rights and fundamental freedoms of an individual, and in particular, the right to privacy, with regard to automatic processing of personal data. In no event is a Contracting State relieved of its obligation to

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 tax 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 with 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. The inventory is not intended to be exhaustive or to impose any procedural obligations on a Contracting State. Instead, the inventory is a listing of suggestions to be examined by competent authorities in developing procedures for an effective exchange of information.

B. COMMENTARY ON THE PARAGRAPHS OF ARTICLE 26

Paragraph 1

7. The first sentence of paragraph 1 sets forth the basic obligation of the Contracting States concerning the exchange of information. It requires, subject to the limitations of paragraph 3, that the competent authorities exchange such information as is "foreseeably relevant" for the proper application of the Convention or for the administration or enforcement of their domestic tax laws, as long as taxation under those laws is not inconsistent with the Convention.

7.1. Prior to the 2008 changes to article 26, the term "necessary" was used instead of the term "foreseeably relevant". The view of the Committee and the OECD commentary has been that these terms have similar, if not identical, meanings. That is, the term "necessary" is understood to mean "appropriate and helpful", not "essential". In any event, whatever the phrase chosen, the requesting State is not obliged to demonstrate its need for the requested information before the obligation to provide that information arises.

7.2. The standard of "foreseeably relevant" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting

States are not at liberty ***to engage in "fishing expeditions" 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 declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are "fishing expeditions", i.e. speculative requests that have no apparent nexus to an open inquiry or investigation.***

7.3 A request for information does not constitute a fishing expedition solely because it does not provide the name or address (or both) of the taxpayer under examination or investigation. The same holds true where names are spelt differently or information on names and addresses is presented using a different format. However, in cases in which the requesting State does not provide the name or address (or both) of the taxpayer under examination or investigation, the requesting State must include other information sufficient to identify the taxpayer. Similarly, paragraph 1 does not necessarily require the request to include the name and/or address of the person believed to be in possession of the information. In fact, the question of how specific a request has to be with respect to such person is typically an issue falling within the scope of paragraphs 3(a) and 3(b) of Article 26.

7.4 The standard of "foreseeable relevance" can be met both in cases dealing with one taxpayer (whether identified by name or otherwise) or several taxpayers (whether identified by name or otherwise). Where a Contracting State undertakes an investigation into a particular group of taxpayers in accordance with its laws, any request related to the investigation will typically serve "the administration or enforcement" of its domestic tax laws and thus comply with the requirements of paragraph 1, provided it meets the standard of "foreseeable relevance". However, where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition, as the requesting State cannot point to an ongoing investigation into the affairs of a particular taxpayer which in most cases would by itself dispel the notion of the request being random or speculative. In such cases it is therefore necessary that the requesting State provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis. It further requires a showing that the requested information would assist in determining compliance by the taxpayers in the group. As illustrated in example (h) of paragraph 10.2 below, in the

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 Contracting States may agree to an alternative formulation of this standard that is consistent with the scope of the article. For example, they might replace "***is*** foreseeably relevant" with "***is*** necessary" or "***is*** relevant" or "may be relevant" if those terms are understood to require an effective exchange of information. In the interest of conformity with the OECD usage, the Committee decided to adopt the term "foreseeably relevant", although some members of the Committee preferred the term "may be relevant" on the ground that its meaning was clearer.

7.~~3.~~***6*** The information covered by paragraph 1 is not limited to taxpayer-specific information. The competent authorities may also exchange other sensitive information related to tax administration and compliance improvement; for example, they might provide information about risk analysis techniques or tax avoidance or evasion schemes. They may also share information they have obtained about aggressive or abusive tax avoidance schemes, such as those promoted by some international accounting firms. In addition, the competent authorities may exchange information relating to a whole economic sector (e.g., the oil, fishing or pharmaceutical industry, the banking sector, etc.) and not to particular taxpayers.

8. The scope of the obligation to exchange information is not limited by Articles 1 or 2. That is, the obligation applies not only with respect to information relevant to the proper application of the Convention or to the administration or enforcement of domestic taxes mentioned in Article 2, but also to all other domestic taxes, including subnational taxes. In this respect, the United Nations Model Convention and the OECD Model Convention are identical.

8.1 Some members of the Committee expressed concern that sharing of information with respect to all taxes, particularly subnational taxes, might prove burdensome or might raise constitutional and political issues for them. They suggested that the obligation to provide information might be limited to taxes covered by the Convention, plus one or two important taxes, such as the value added tax (VAT). To accomplish that outcome, the following language might be substituted for paragraph 1:

> 1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States *concerning taxes covered by the Convention and [insert specific taxes] of a Contracting State*, in so far as the taxation thereunder is not contrary to the Convention.

8.2 The obligation to provide requested information applies whether or not the person, with respect to whom the information is requested, is a resident of either Contracting State or is engaged in economic activity in either Contracting State. For example, a Contracting State may request information about the bank deposits of an individual who is resident in some third State.

9. The obligation imposed under paragraph 1 is for an *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 taking steps that prevent it from having certain information otherwise subject to exchange under paragraph 1.

10. The examples provided in paragraphs 10.1***,*** ~~and~~ 10.2 ***and 10.3*** below ***seek to*** illustrate the application of paragraph 1 of article 26 of the Convention in particular cases. Some of these examples are drawn from, but are not identical to, the examples provided in paragraphs 6 ~~and~~, 7***, 8 and 8.1*** of the OECD commentary on article 26. In all of the~~se~~ examples ***provided in paragraphs 10.1 and 10.2 below***, the requested State (the Contracting State that has been asked for information) has the obligation under paragraph 1 of article 26 of the Convention to provide the requested information. ***In the examples provided in paragraph 10.3 below and assuming no further information is provided by the requesting State (the Contracting State that has asked for information), the requested State is not obligated to provide information in response to a request for information. The examples are for illustrative purposes only. They should be read in the light of the overarching purpose of article 26 not to restrict the scope of exchange of information but to allow information exchange "to the widest possible extent".***

10.1. Application of the Convention between State A and State B (information must be provided):

[*text omitted*]

10.2. Implementation of domestic laws ***(information must be provided)***:

[*text omitted*]

(*d*) A resident of State A holds a bank account in State B, and the income from that account is exempt from tax under the domestic laws of State B. State A may request that State B provide information on the amount of interest income earned on that account;

(e) The tax authorities of State A conduct a tax investigation into the affairs of Mr. X. Based on this investigation the tax authorities have indications that Mr. X holds one or several undeclared bank accounts with Bank B in State B. However, State A has experienced that, in order to avoid detection, it is not unlikely that the bank accounts may be held in the name of relatives of the beneficial owner. State A therefore requests information on all accounts with Bank B of which Mr. X is the beneficial owner and all accounts held in the names of his spouse E and his children K and L.

(~~e~~***f***) A financial intermediary invests money of its account holders in State A, earning therein dividends and interest. State A requires that the financial intermediary keep records of the beneficial owners of the accounts but does not routinely request those records in enforcing its domestic laws. State B suspects that some of the beneficiaries of the account holders of the financial intermediary are its residents and are properly taxable under its domestic laws. State B may request that State A obtain for it information on identified taxpayers from the financial intermediary;

(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 B 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 within the product. The product requires that an account be opened with B through which the investment is made. State A's tax authorities have issued a taxpayer alert, warning all taxpayers about the product and clarifying that it does not achieve the suggested tax effect and that income generated by the product must be reported. Nevertheless, B continues to market the product on its website, and State A has evidence that it also markets the product through a network of advisors. 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.

(~~f~~***i***) 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 suspect that managers X, Y and Z of Company A directly or indirectly own Company B. If that were the case, the dividends received by Company B from Company A would be taxable in their hands as resident shareholders under country A's controlled foreign company rules. The suspicion is based on information provided to State A's tax authorities by a former employee of Company A. When confronted with the allegations, the three managers of Company A deny having any ownership interest in Company B. The State A tax authorities have exhausted all domestic means of obtaining ownership information on Company B. State A now requests from State B information on whether X, Y and Z are shareholders of Company B. Furthermore, considering that ownership in such cases is often held through, for example, shell companies and nominee shareholders it requests information from State B on whether X, Y and Z indirectly hold an

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 investigations.[6]

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 account with Bank B in State B. The request states that Bank B is known to have a large group of foreign account holders but does not contain any additional information.

(b) Company B is a company established in State B. State A requests the names of all shareholders in Company B resident of State A and information on all dividend payments made to such shareholders. The requesting State A points out that Company B has significant business activity in State A and is therefore likely to have shareholders resident of State A. The request further states that it is well known that taxpayers often fail to disclose foreign source income or assets.

Paragraph 2

11. A Contracting State cannot be expected to provide confidential financial information to another Contracting State unless it has confidence that the information will not be disclosed to unauthorized persons. ***The confidentiality rules of paragraph 2 apply to all types of information received under paragraph 1, including both information provided in a request and information transmitted in response to a request. Hence, the confidentiality rules cover, for instance, competent authority letters, including the letter requesting information. At the same time, it is understood that the requested State can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested State to be able to obtain or provide the requested information to the requesting State, without frustrating the efforts of the requesting State. If, however, court proceedings or the like under the domestic laws of the requested State necessitate the disclosure of the competent authority letter itself, the competent authority of the requested State may disclose such a letter unless the requesting State otherwise specifies.*** To provide the assurance of secrecy required for effective information exchange, paragraph 2 provides that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State. ***In situations in which the requested State determines that the requesting State does not comply with its duties regarding the confidentiality of the information exchanged under this Article, the requested State may suspend assistance under this Article until such time as proper assurance is given by the requesting State that those duties will indeed be respected. If necessary, the competent authorities may enter into specific arrangements or***

[6] ***For cases where State B becomes aware of facts that call into question whether part of the shareholder information is foreseeably relevant, the competent authorities should consult and State B may ask State A to clarify foreseeable relevance in light of those facts, as discussed in paragraph 7.2.***

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 taxes mentioned in paragraph 1. In addition, it is understood that the information may also be communicated to the taxpayer, his proxy or witnesses in a civil or criminal proceeding.

12.1 As stated in paragraph 12, the information obtained can be communicated to the persons and authorities mentioned and, on the basis of the last sentence of paragraph 2 of the Article, can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. But this disclosure to the public does not mean that the persons and authorities mentioned in paragraph 2 are allowed to provide on request additional information received.

12.2 If either or both of the Contracting States object to information obtained under Article 26 being made public by courts, or, once the information has been made public in this way, to the information being used for other purposes, they should state this objection expressly in their Convention.

13. In general, the information received by a Contracting State may be used only for the purposes mentioned in paragraph 1. If the information appears to be of value to the receiving State for purposes other than those referred to in that paragraph, that State may not use the information for such other purposes without the authorization of the competent authority of the supplying State. That authorization should not be unreasonably withheld.

13.1 In some cases, a Contracting State may prosecute a taxpayer for tax evasion and also for an additional crime, such as money-laundering, that arises out of the same set of facts. In such circumstances, the receiving State may want to use the information provided for both purposes.

13.2 Similarly, the information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the Contracting States allowing such disclosure.

13.3 ***Information exchanged for tax purposes may be of value to the receiving State for purposes in addition to those referred to in the first and second sentences of paragraph 2 of Article 26. The last sentence of paragraph 2 therefore allows the Contracting States to share information received for tax purposes provided two conditions are met: first, the information may be used for other purposes under the laws of both States and, second, the competent authority of the supplying State authorizes such use. It allows the sharing of tax information by the tax authorities of the receiving State with other law enforcement agencies and judicial authorities in that State on certain high priority matters (e.g., to combat money laundering, corruption, terrorism financing). When a receiving State desires to use the information for an additional purpose (i.e. non-tax purpose), the receiving State should specify to the supplying State the other purpose for which it wishes to use 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 other 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 available that information to be used for other purposes allowed under the provisions of a mutual legal assistance treaty in force between the Contracting States that allows for the exchange of tax information."***

14. The OECD Model Convention, as amended in 2005, includes a provision that would allow the sharing of information obtained under Article 26 with persons charged with the oversight of the persons allowed to obtain such information. This provision is also included in paragraph 2 of the United Nations Model Convention.

14.1 The disclosure should be limited to information necessary for those bodies to fulfil their oversight duties. Such oversight bodies include authorities that supervise tax administration and enforcement authorities as part of the general administration of the Government of a Contracting State. Such sharing is permitted only if the persons engaged in oversight activities are subject to confidentiality requirements at least as strict as those applicable to tax administration and enforcement officials. The competent authorities may want to agree as to the bodies that constitute an oversight body within the meaning of this paragraph.

Paragraph 3

15. Paragraph 3 of Article 26 contains provisions that limit the obligation of the requested State under paragraph 1. The limitations provided in paragraph 3, however, may be superseded by the provisions contained in paragraphs 4 and 5. The provisions of paragraph 3, read in conjunction with the provisions of paragraphs 4 and 5, should not be read in a way that would prevent an effective exchange of information between the Contracting States. In addition, a Contracting State should disclose to the other Contracting State before it enters into a convention any specific provisions of its laws and administrative practice that it believes entitle it to avoid an obligation otherwise imposed by paragraph 1.

16. Paragraph 3 (*a*), subject to the limitations provided in paragraphs 4 and 5, contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. For example, if a requested State is not permitted under its laws or administrative practice to seize private papers from a taxpayer without court authorization, it is not required to make such a seizure without court authorization on behalf of a requesting State even if the requesting State could make such a seizure without court authorization under its own laws or administrative practice. The purpose of this rule is to prevent Article 26 from creating an unintentional conflict between a Contracting State's obligation under Article 26 and its obligations under domestic law.

16.1 Domestic provisions requiring that information obtained by the tax authorities be kept secret should not be interpreted as constituting an obstacle to the exchange of information under paragraph 3 (*a*) because the tax authorities of the requesting State are obligated under paragraph 2 to observe secrecy with regard to information received under this Article.

16.2 Paragraph 1 obligates a requested State to provide information with respect to all of the taxes of the requesting State, even if the requested State does not have a comparable tax. Paragraph 3 (*a*) does not remove the obligation to provide information relating to taxes that the requested State does not impose. For instance, a requested State cannot avoid its obligation to provide information helpful to the requesting State in the enforcement of its value added tax merely because the requested State does not have a value added tax. Of course, the requested State may avoid the obligation to supply such information if it cannot obtain that information under its normal administrative procedures, within the meaning of paragraph 3 (*b*).

16.3 The purpose of paragraph 3 (*a*) is to avoid traps for the unwary, not to create such traps. A Contracting State that believes that it is not required to obtain certain types of information on behalf of the other Contracting State because of its own laws or administrative practice (including the laws and administrative practice of its subnational governments) should disclose that position in writing prior to entering into a convention containing Article 26. It should also disclose the likely effects of that position on its ability to provide an effective exchange of information. For instance, if a Contracting State believes that one of its laws prevents it from providing the other Contracting State with information as to the beneficial owners of its resident companies or other juridical persons, it should give written notice of that position during the negotiation of the convention, with an explanation of the impact of that law on its obligations in relation to mutual assistance. Depending on the facts and circumstances of the particular case, a failure to disclose may eliminate the right of a Contracting State to invoke paragraph 3 (*a*) to avoid its obligations under paragraph 1.

16.4 A Contracting State that changes its laws or administrative practice after entering into a convention containing paragraph 3 (*a*) must disclose that change to the other Contracting State in timely fashion. Depending on the facts and circumstances of the case, such a change may constitute a material breach of the convention. In any event, a failure to provide timely notice of such a change may eliminate the right of a Contracting State to invoke paragraph 3 (*a*) to avoid its obligations arising under paragraph 1.

16.5 A Contracting State that wishes to expand the scope of the limitation currently provided in paragraph 3 (*a*) might modify that paragraph as follows:

(*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 aspect 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 eliminate 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 obligated to carry out administrative measures on behalf of the requesting State that are not permitted 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 point to 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 or if 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 3 (*b*) allows a requested State to avoid an obligation otherwise imposed by paragraph 1 when it cannot obtain the requested items of 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 include special investigations or special examination of the business accounts kept by the taxpayer or other persons. For instance, if the requested State, as part of its audit policies, obtains information about the appropriateness of the transfer prices used by its taxpayers in dealings with associated companies, it is deemed to be able to obtain similar information about its taxpayers and associated companies on behalf of a requesting State.

20.2 Unless otherwise agreed to by the Contracting States, it should be assumed that the information requested by a Contracting State could be obtained by that State in a similar situation unless that State has informed the other Contracting State to the contrary.

20.3 It is often presumed, when a convention is entered into between a developed country and a developing country, that the developed country will have a greater administrative capacity than the developing country. Such a difference in administrative capacity does not provide a basis under paragraph 3 (*b*) for either Contracting State to avoid an obligation to supply information under paragraph 1. That is, paragraph 3 does not require that each of the Contracting States receive reciprocal benefits under Article 26. In freely adopting a convention, the Contracting States presumably have concluded that the convention, viewed as a whole, provides each of them with reciprocal benefits. There is no necessary presumption that each of the articles, or each paragraph of each article, provides a reciprocal benefit. On the contrary, it is commonplace for a Contracting State to give up some benefit in one article in order to obtain a benefit in another article.

20.4 Although paragraphs 3 (*a*) and 3 (*b*) do not explicitly provide for reciprocity in benefits, the OECD Commentary to Article 26 has taken the position that a reciprocity requirement can be inferred from the language of paragraph 3 (*b*), which, inter alia, limits the obligation of a Contracting State to supply information obtainable in the normal course of administration of that other Contracting State. In effect, the OECD Commentary is reading the term “obtainable” to mean that the other Contracting State has the actual administrative capacity to obtain that information. The alternative reading is that “obtainable” means that the tax administration has the authority to obtain the information, whether or not it has the capacity to exercise that authority. Countries may wish to make clear in their treaty that the Contracting States are obligated to exchange information even if one of the Contracting States has a

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

> (*b*) To supply information that cannot be obtained in the normal course of the administration of that Contracting State or is 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 (*c*), 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 to confidential communications may differ among States, the protection provided under paragraph 3 (*c*) 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 client should be adjudicated exclusively in the Contracting State under the laws 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 3 (*c*) 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 invoking 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 is generally understood to mean information which has considerable economic importance and which can be exploited practically and the unauthorized use of which may lead to serious damage (e.g. may lead to severe financial hardship). The purpose of the secrecy exception is to prevent an exchange of information from imposing unfair hardship on taxpayers by revealing to their competitors or potential competitors valuable secret information and thereby significantly diminishing the commercial value of that information. Secret information that once had substantial commercial value may be disclosed if that information does not have substantial commercial value at the time the information is requested. Information is not secret within the meaning of paragraph 3 (*c*) simply because the disclosure of it would embarrass the taxpayer or a third party or may result in the taxpayer having to pay additional taxes or losing income on account of bad publicity. A Contracting State may decide to supply requested information when it finds that there is no reasonable basis for assuming that the taxpayer involved may suffer adverse consequences incompatible with information exchange.

22.2 Secret information may be disclosed to the requesting State if the requested State determines that the risk of disclosure to the public or to competitors is unlikely due to the confidentiality requirements set forth in paragraph 2. A document that is protected from full disclosure because it contains protected secret information may be disclosed if the secret information is removed.

22.3 Financial information, including books and records, does not by its nature constitute a trade, business or other secret. In certain limited cases, however, the disclosure of financial information might reveal a trade, business or other secret. For instance, a request for information on certain purchase records may raise such an issue if the disclosure of such information would reveal the proprietary formula used in the manufacture of a product. The protection of such information may also extend to information in the possession of third persons. For instance, a bank might hold a pending patent application for safe keeping, or a secret trade process or formula might be described in a loan application or in a contract held by a bank. In such circumstances, details of the trade, business or other secret should be excised from the documents and the remaining financial information exchanged accordingly.

23. Paragraph 3 (*c*) 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 exchange between treaty partners.

24. As discussed above, paragraph 3 may give a requested State the right to refuse to supply information under some circumstances. It is not required, however, to invoke any of the limitations of that paragraph. If the requested State declines to exercise its right under paragraph 3 and supplies the requested information, the information exchanged remains within the framework of Article 26. Consequently, the information is subject to the confidentiality rules of paragraph 2. In addition, the affected taxpayer or other third party has no ground for contending that the tax authorities in the requested State have failed to observe the obligation to secrecy imposed on them by domestic law.

25. Article 26 does not require the existence of criminal activity in either of the Contracting States for the obligation to exchange information to arise. Some treaties, nevertheless, do require such criminal activity. In such treaties, it may be important to provide that criminality in the requesting State is sufficient for the obligation to exchange information to arise. As a cautionary measure, some States that do not limit their exchange of information to criminal matters may wish to state specifically in their treaty that dual criminality is not required. To eliminate the possibility of a dual criminality requirement being read into a treaty, the following paragraph might be added as paragraph 6, with the current paragraph 6 renumbered as paragraph 7.

> 6. The obligation to exchange information arises under paragraph 1 whether or not a person under investigation is suspected of criminal activity. In no case shall the provisions of this Article be construed to permit a Contracting State to decline to supply information solely because the conduct being investigated would not constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State."

Paragraph 4

26. Paragraph 4 was added to the United Nations Model Convention in 2011. It is taken directly from the comparable provision in the OECD Model Convention. As a result, the OECD Commentary to paragraph 4 is fully applicable in interpreting paragraph 4 of Article 26. The position taken in the OECD Commentary is that the addition of this paragraph was intended to assist in the interpretation of Article 26 and does not result in a substantive change in the obligations implicit in the prior version of Article 26.

26.1 According to paragraph 4, a requested State must use its information gathering measures to obtain requested information even though those measures are invoked solely to provide information to the other Contracting State ***and irrespective of whether the information could still be gathered or used for domestic tax purposes in the requested Contracting State. Thus,***

for instance, any restrictions on the ability of a requested Contracting State to obtain information from a person for domestic tax purposes at the time of a request (for example, because of the expiration of a statute of limitations under the requested State's domestic law or the prior completion of an audit) must not restrict its ability to use its information gathering measures for information exchange purposes. The term "information gathering measures" means laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information. That is, a requested State does not need to have a domestic tax interest in obtaining the requested information for the obligation to supply information under paragraph 1 to apply. ***Paragraph 4 does not oblige a requested Contracting State to provide information in circumstances where it has attempted to obtain the requested information but finds that the information no longer exists following the expiration of a domestic record retention period. However, where the requested information is still available notwithstanding the expiration of such retention period, the requested State cannot decline to exchange the information available. Contracting States should ensure that reliable accounting records are kept for five years or more.***

26.2 As stated in the second sentence of paragraph 4, the obligation imposed by that paragraph generally is subject to the limitations contained in paragraph 3. An exception applies, however, that prevents a requested State from avoiding an obligation to supply information due to domestic laws or practices that include a domestic tax interest requirement. Thus, a requested State cannot avoid an obligation to supply information on the ground that its domestic laws or practices only permit it to supply information in which it has an interest for its own tax purposes.

26.3 For many countries, the combination of paragraph 4 and their domestic law provides a sufficient basis for using their information gathering measures to obtain the requested information even in the absence of a domestic tax interest in the information. Other countries, however, may wish to clarify expressly in the Convention that Contracting States must ensure that their competent authorities have the necessary powers to do so. Contracting States wishing to clarify this point may replace paragraph 4 with the following text:

> 4. In order to effectuate the exchange of information as provided in paragraph 1, each Contracting State shall take the necessary measures, including legislation, rulemaking, or administrative arrangements, to ensure that its competent authority has sufficient powers under its domestic law to obtain information for the exchange of information, regardless of whether that Contracting State may need such information for its own tax purposes.

Paragraph 5

[*text omitted*]

Paragraph 6

29. The language of paragraph 6 was taken, with some changes, from the last sentence of paragraph 1 of the United Nations Model Convention before its amendment in 2011. Paragraph 6 specifically grants to the competent authorities the authority to establish procedures for an effective exchange of information. The OECD Model Convention does not contain paragraph 6 or an equivalent. The position taken in the OECD Commentary is that this authority is implicit in Article 26.

29.1 To carry out the exchange of information in accordance with the preceding paragraphs of this Article, paragraph 6 provides that the competent authorities of the Contracting States shall work together to establish procedures for the exchange of information, including routine exchanges, typically in electronic form. Although paragraph 6 does not require them to make such arrangements in advance of the need for particular exchanges of information, this is strongly advisable to achieve an effective exchange of information.

29.2 Some States may wish to make explicit in their treaty that the competent authorities are obligated not only to exchange information on request but also to establish measures for automatic and spontaneous exchanges of information. Those countries may wish to add the following language to the end of paragraph 6:

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

29.3 Some members of the Committee have expressed a concern that information requests from a developed country to a developing country could place excessive burdens on the tax department in the developing country, due to the different capacity of their tax administrations to obtain and provide information. That concern might be alleviated by making the requesting State responsible for material extraordinary costs associated with a request for information. In this context, the question of whether an extraordinary cost of obtaining requested information is material could be determined not by reference to some absolute amount but by reference to the cost relative to the total budget of the tax department being asked to provide information. For example, a small absolute cost might be material for a tax department with very limited resources, whereas a larger absolute cost might not be material for a well-funded department.

29.4 Countries concerned about imposing substantial costs on developing countries might include the following language at the end of paragraph 6:

> Extraordinary costs incurred in providing information shall be borne by the Contracting Party which requests the information. The competent authorities of the Contracting Parties shall consult with each other in advance if the costs of providing information with respect to a specific request are expected to be extraordinary.

29.5. Countries may wish to improve the speediness and timeliness of exchange of information under this Article by agreeing on time limits for the provision of information. Countries may do so by adding the following language at the end of paragraph 6:

> ***The competent authorities of the Contracting States may agree on time limits for the provision of information under this Article. In the absence of such an agreement, the information shall be supplied as quickly as possible and, except where the delay is due to legal impediments, within the following time limits:***
>
> ***(a) Where the tax authorities of the requested Contracting State are already in possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within two months of the receipt of the information request;***

(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 all 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 litigation regarding a taxpayer's challenge to the validity of the request or ongoing litigation regarding a domestic notification procedure of the type described in paragraph 17), it would not be in violation of the time limits.

29.7 The optional language at the end of paragraph 6, referenced in paragraph 29.5, which provides, "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." makes it clear that no objection to the use or admissibility of information exchanged under this Article can be based on the fact that the information was exchanged after the time limits agreed to by the competent authorities or the default time limits provided for in the paragraph.

****