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OECD's work on improving exchange of information *

Summary

At the request of the UN Secretariat, the OECD Secretariat has prepared the present note which sets out the issues that the OECD Member countries have been discussing in the area of exchange of information and also provides one of the products that the OECD has recently completed in this area.

The revision of Article 26 of the OECD Model Tax Convention is the first comprehensive revision since the adoption of the 1977 Model (except for the extension of exchange of information to "taxes of every kind and description" in 2000). The revision is intended to ensure that Article 26 reflects current country practices and also takes into account the work the OECD has undertaken with non OECD Economies to improve access to bank information and in developing the 2002 Model Agreement on Exchange of Information in Tax Matters.

Article 26 of the UN Model Tax Convention is still largely based on the 1977 version of Article 26 of the OECD Model. Section A General considerations of the Commentary of Article 26 of the UN Model states that it reproduces "the substance of all the provisions of Article 26 of the OECD Model Convention". The Committee of Experts on International Co-operation in Tax Matters may therefore wish to consider whether it is timely to update the Article 26 of the UN Model and Commentary to take into account recent developments and current country practices.

* The present paper was prepared by the Secretariat of the Organisation for Economic Co-operation and Development. The views and opinions expressed are those of the OECD Secretariat and do not necessarily represent those of the United Nations.

Contents

I. The importance of information exchange in tax matters

1. The past decades have witnessed an unprecedented liberalisation of national economies. OECD member countries and an increasing number of non OECD economies have removed or limited controls on foreign investment and relaxed or eliminated foreign exchange controls. At the same time progress in information and telecommunication technology has made the world into a smaller place. As a result business has become increasingly global.

2. Countries' tax administration and enforcement activities, however, remain confined by their national borders. The exercise of sovereign powers, including auditing and information gathering powers, is generally limited to persons, information or activities within a jurisdiction's territory. As a result, a tax examiner might only see a small part of the overall activities or investments of a given taxpayer. To close this information gap, countries increasingly rely on exchange of information.

3. Over the last few years, the OECD's Committee on Fiscal Affairs has been working to improve the legal framework and the operational aspects of exchange of information so as to ensure that exchange of information remains an effective tax administration tool. This note highlights some of our recent work in these areas and the OECD Committee on Fiscal Affairs looks forward to work with the UN Committee of Experts on International Co-operation in Tax Matters on these issues.

II. Improving the legal framework for information exchange: New Article 26

4. Provisions modelled on Article 26 of the OECD Model Tax Convention are by far the most frequently used mechanisms for exchanging information. More than 2000 bilateral income tax conventions are based on the OECD Model Tax Convention. Article 26 sets forth the rules under which information may be exchanged between tax authorities. Article 26 of the UN Model Tax Convention no longer reproduces the substance of all the provisions of Article 26 in the 2005 update of the OECD Model Tax Convention.

5. It first establishes the obligation to provide information to a treaty partner and the circumstances under which this obligation exists. It then goes on to describe certain limitations on the obligation to provide information. Finally, it contains rules that ensure that any information provided to a treaty partner is subject to strict confidentiality rules that protect the legitimate privacy rights of any person to whom the information relates.

6. To ensure the continued relevance of Article 26, the Committee undertook a comprehensive review of Article 26. This work has now been completed and the Committee adopted in July 2004 a revised Article 26 which is included in the 2005 update of the Model Convention (see Annex 1 for the text of Article 26 and Commentary in English and French). The revision brings Article 26 in line with current country practices and incorporates the work the Committee on Fiscal Affairs has undertaken with respect to access to bank information and in developing the 2002 OECD Model Agreement on Exchange of Information in Tax Matters (for further information see www.oecd.org/ctp).

7. With the completion of the work on Article 26, the Committee on Fiscal Affairs has now developed up-to-date mechanisms for exchange of information both as stand alone agreements and in the context of comprehensive income tax conventions. In developing these models the Committee focused on providing different models that fit different situations while ensuring that the key standards of exchange are consistent irrespective of which model is used. There has been considerable input from Non OECD Economies in this work and 25 non OECD countries have already endorsed the revised Article 26.

8. The key changes to the previous version of Article 26 can be summarised as follows:

Changes to text of the Article:

- The standard of "necessary" has been changed to "forseeably relevant." Revised Article 26 now provides that Contracting States shall exchange information that is "foreseeably relevant" for carrying out the Convention or for the administration or enforcement of their domestic tax laws. The "foreseeably relevant" standard is also found in the Joint OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters and the 2002 OECD Model Agreement. The Commentary explains that the change was made to achieve consistency across exchange instruments and was not intended to alter the effect of the provision.

- A new paragraph 4 has been added to deal explicitly in the text of the Article with questions of domestic tax interest requirements. A domestic tax interest requirement refers to laws or practices that would prohibit the competent authority of a Contracting State from exchanging information requested by the other Contracting State unless the requested Contracting State had an interest in such information for its own tax purposes. The new paragraph clarifies that Contracting States should obtain and exchange information irrespective of whether they also need the information for their own tax purposes. The same standard was already incorporated in the 2002 OECD Model Agreement and, as described in the 2003 progress report, Improving Access to Bank Information for Tax Purposes, all OECD countries have now addressed the issue (for further information see www.oecd.org/ctp).

- A new paragraph 5 has been added dealing with ownership information and information held by banks, financial institutions, nominees, agents and fiduciaries. New paragraph 5 provides that a Contracting State cannot decline to provide information solely because it is held by such a person or solely because it is ownership information. This is consistent with the practice of the vast majority of OECD countries and reflects the standard also contained in the 2002 Model Agreement. The most important consequence of this change is that domestic bank secrecy rules by themselves can no longer be used as a basis for declining to provide information.

- The confidentiality rules in Article 26 have been changed so as to permit disclosure of information to oversight authorities. This change reflects a growing trend in OECD countries. Oversight authorities are authorities that supervise tax administration and enforcement authorities as part of the general administration of the government of a Contracting State.

Changes to the text of the Commentary:

– Optional language has been included in the Commentary for countries wishing to share information for non-tax purposes (i.e. to counteract money laundering or corruption). It provides that Contracting States may use the information for other purposes provided the information may be used for such purposes under the laws of both countries and the use is authorized by the competent authority of the supplying country.

– Language has been added to clarify a number of terms and concepts used in Article 26. The revised Commentary contains more detailed explanations on (i) the principle of reciprocity, (ii) trade, business and other secrets, (iii) the attorney-client and similar privileges and (iv) the term "public policy/ordre public."

III. Improving the Operational Aspects of Exchange of Information

The New OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes

9. The purpose of this Manual is to provide tax officials dealing with exchange of information for tax purposes with an overview of the operation of exchange of information provisions and some technical and practical guidance to improve the efficiency of such exchanges.

10. In designing the Manual the objective has been to be as practical as possible and as global as possible. Non OECD Economies and regional tax organisations were invited to comment on the earlier drafts of the Manual.

11. The Manual follows a modular approach as some modules may not be relevant to all countries depending on the type of exchange countries are engaged in and as it facilitates updates and additions of new modules. The present modules are the following:

- General module general and legal aspects of exchange of information.
- Module 1 Exchange of information on request.
- Module 2 Spontaneous exchange of information.
- Module 3 Automatic (or routine) exchange of information.
- Module 4 Simultaneous tax examinations.
- Module 5 Tax examinations abroad.
- Module 6 Country profiles regarding information exchange.
- Module 7 Information exchange instruments and models.
- Module 8 Industry-wide exchange of information.

12. CIAT is currently using the OECD Manual as a basis for developing its own manual on exchange which will be more tailored to the CIAT model agreement on exchange of information.

Improving the technical aspects of exchange

13. An increasing number of countries are engaged in automatic exchange of information. Information suitable for automatic exchange is typically bulk information comprising many individual cases of the same type, usually consisting of details of income arising from sources in the supplying state where such

information is available periodically under that state's own system and can be transmitted automatically on a routine basis. Automatic exchange of information requires standardisation of formats to be efficient. The OECD has developed and continues to develop standards for automatic exchange taking into account the latest technological developments. The new format is called the Standard Transmission Format (STF) and is based on extensible markup language (XML), a document markup language widely used in today's information technology for its many advantages.

14. In order to speed up exchange of information on request or spontaneous exchange in appropriate cases, the OECD has also recommended procedures for secure electronic exchange (i.e. the transmission of communications of competent authorities in encrypted files attached to email messages).

Conclusion

15. The Committee of Experts on International Co-operation in Tax Matters may wish to consider whether it is not timely to update the Article 26 of the UN Model and Commentary to take into account recent developments and current country practices. Issues to consider are in particular:

- Replacing information "necessary" by information "forseeably relevant" in paragraph 1 of the Article. This standard of "foreseeable relevance" is intended to provide exchange to the widest possible extent while excluding fishing expeditions.
- Broadening Article 26 to cover taxes of every kind and description imposed on the behalf of the contracting states.
- Adding a new paragraph to state the principle already formerly acknowledged in paragraph 24 d) of the Commentary to Article 26 in the UN Model that the requested 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 (paragraph 4 of Article 26 of the OECD Model)
- Adding a new paragraph stating that the limitations to exchange provided by the Article shall not 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. (paragraph 5 of Article 26 of the OECD Model). The Previous version of Art. 26 already authorised the exchange of bank and other information identified in paragraph 5 but the addition of paragraph 5 reflects current practice of vast majority of OECD member countries and has higher visibility.

16. Another issue the Committee may wish to consider is the possibility to permit the use of information exchanged for non tax purposes (e.g. law enforcement purposes). Paragraph 12.3 of the Commentary to Article 26 in the OECD Model now contains optional language for inclusion in Article 26 to permit the use of information exchanged for tax purposes, for law enforcement purposes if Contracting States so wish provided both States may use tax information for law enforcement purposes under their domestic law and provided the competent authority of the supplying State authorises such use.

ANNEX 1 : Article 26 and Commentary in the 2005 edition of the OECD Model Tax Convention

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 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. 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 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, 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.

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.

COMMENTARY ON ARTICLE 26
CONCERNING THE EXCHANGE OF INFORMATION

I. Preliminary remarks

1. There are good grounds for including in a convention for the avoidance of double taxation provisions concerning co-operation between the tax administrations of the two Contracting States. In the first place it appears to be desirable to give administrative assistance for the purpose of ascertaining facts in relation to which the rules of the convention are to be applied. Moreover, in view of the increasing internationalisation of economic relations, the Contracting States have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the Convention.

2. Therefore the present Article embodies the rules under which information may be exchanged to the widest possible extent, with a view to laying the proper basis for the implementation of the domestic tax laws of the Contracting States and for the application of specific provisions of the Convention. The text of the Article makes it clear that the exchange of information is not restricted by Articles 1 and 2, so that the information may include particulars about non-residents and may relate to the administration or enforcement of taxes not referred to in Article 2.

3. The matter of administrative assistance for the purpose of tax collection is dealt with in Article 27.

4. In 2002, the Committee on Fiscal Affairs undertook a comprehensive review of Article 26 to ensure that it reflects current country practices. That review also took into account recent developments such as the Model Agreement on Exchange of Information on Tax Matters[1] developed by the OECD Global Forum Working Group on Effective Exchange of Information and the ideal standard of access to bank information as described in the report "Improving Access to Bank Information for Tax Purposes".[2] As a result, several changes to both the text of the Article and the Commentary were made in 2005.

4.1 Many of the changes that were then made to the Article were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation. For instance, the change from “necessary” to “foreseeably relevant” and the insertion of the words “to the administration or enforcement” in paragraph 1 were made to achieve consistency with the Model Agreement on Exchange of Information on Tax Matters and were not intended to alter the effect of the provision. New paragraph 4 was added to incorporate into the text of the Article the general understanding previously expressed in the Commentary (cf. paragraph 19.6). New paragraph 5 was added to reflect current practices among the vast majority of OECD member countries (cf. paragraph 19.10). The insertion of the words “or the oversight of the above” into new paragraph 2, on the other hand, constitutes a reversal of the previous rule.

4.2 The Commentary also has been expanded considerably. This expansion in part reflects the addition of new paragraphs 4 and 5 to the Article. Other changes were made to the Commentary to take into account recent developments and current

1. Available on www.oecd.org/taxation.
2. OECD, Paris, 2000. Available on www.oecd.org/taxation.

country practices and more generally to remove doubts as to the proper interpretation of the Article.

II. Commentary on the provisions of the Article

Paragraph 1

5. The main rule concerning the exchange of information is contained in the first sentence of the paragraph. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes of every kind and description imposed in these States even if, in the latter case, a particular Article of the Convention need not be applied. The standard of "foreseeable relevance" 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 that is unlikely to be relevant to the tax affairs of a given taxpayer. Contracting States may agree to an alternative formulation of this standard that is consistent with the scope of the Article (e.g. by replacing, "foreseeably relevant" with "necessary" or "relevant"). 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 they also apply to tax crimes). In order to keep the exchange of information within the framework of the Convention, a limitation to the exchange of information is set so that information should be given only insofar as the taxation under the domestic taxation laws concerned is not contrary to the Convention.

5.1 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 risk analysis techniques or tax avoidance or evasion schemes.

5.2 The possibilities of assistance provided by the Article do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting States which relate to co-operation in tax matters. Since the exchange of information concerning the application of custom duties has a legal basis in other international instruments, the provisions of these more specialised instruments will generally prevail and the exchange of information concerning custom duties will not, in practice, be governed by the Article.

6. The following examples may clarify the principle dealt with in paragraph 5 above. In all such cases information can be exchanged under paragraph 1.

7. Application of the Convention

a) When applying Article 12, State A where the beneficiary is resident asks State B where the payer is resident, for information concerning the amount of royalty transmitted.

b) Conversely, in order to grant the exemption provided for in Article 12, State B asks State A whether the recipient of the amounts paid is in fact a resident of the last-mentioned State and the beneficial owner of the royalties.

c) Similarly, information may be needed with a view to the proper allocation of taxable profits between associated companies in different States or the adjustment of the profits shown in the accounts of a permanent establishment in one State and in the accounts of the head office in the other State (Articles 7, 9, 23 A and 23 B).

d) Information may be needed for the purposes of applying Article 25.

e) When applying Articles 15 and 23 A, State A, where the employee is resident, informs State B, where the employment is exercised for more than 183 days, of the amount exempted from taxation in State A.

8. Implementation of the domestic laws

a) A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods with a view to a correct application of the provisions of its domestic laws.

b) A company in State A sells goods through a company in State C (possibly a low-tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between A and B, State A, with a view to ensuring the correct application of the provisions of its domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods.

c) State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable it to check the prices charged by the company in State A by direct comparison (e.g. prices charged by a company or a group of companies in a dominant position). It should be borne in mind that the exchange of information in this case might be a difficult and delicate matter owing in particular to the provisions of subparagraph c) of paragraph 3 relating to business and other secrets.

d) State A, for the purpose of verifying VAT input tax credits claimed by a company situated in its territory for services performed by a company resident in State B, requests confirmation that the cost of services was properly entered into the books and records of the company in State B.

9. The rule laid down in paragraph 1 allows information to be exchanged in three different ways:

a) on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;

b) automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State (cf. the OECD Council Recommendation C(81)39, dated 5 May 1981, entitled "Recommendation of the Council concerning a standardised form for automatic

exchanges of information under international tax agreements", the OECD Council Recommendation C(92)50, dated 23 July 1992, entitled "Recommendation of the Council concerning a standard magnetic format for automatic exchange of tax information", the OECD Council Recommendation on the use of Tax Identification Numbers in an international context C(97)29/FINAL dated 13 March 1997, the OECD Council Recommendation C(97)30/FINAL dated 10 July 1997 entitled “Recommendation of the Council of the OECD on the Use of the Revised Standard Magnetic Format for Automatic Exchange of Information” and the OECD Council Recommendation on the use of the OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes C(2001)28/FINAL);[3]

c) spontaneously, for example in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State.

9.1 These three forms of exchange (on request, automatic and spontaneous) may also be combined. It should also be stressed that the Article does not restrict the possibilities of exchanging information to these methods and that the Contracting States may use other techniques to obtain information which may be relevant to both Contracting States such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information. These techniques are fully described in the publication "Tax Information Exchange between OECD Member Countries: A Survey of Current Practices"[4] and can be summarised as follows:

— a simultaneous examination is an arrangement between two or more parties to examine simultaneously each in its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest, with a view of exchanging any relevant information which they so obtain (see the OECD Council Recommendation C(92)81, dated 23 July 1992, on an OECD Model agreement for the undertaking of simultaneous examinations);

— a tax examination abroad allows for the possibility to obtain information through the presence of representatives of the competent authority of the requesting Contracting State. To the extent allowed by its domestic law, a Contracting State may permit authorised representatives of the other Contracting State to enter the first Contracting State to interview individuals or examine a person’s books and records — or to be present at such interviews or examinations carried out by the tax authorities of the first Contracting State — in accordance with procedures mutually agreed upon by the competent authorities. Such a request might arise, for example, where the taxpayer in a Contracting State is permitted to keep records in the other Contracting State. This type of assistance is granted on a reciprocal basis. Countries’ laws and practices differ as to the scope of rights granted to foreign tax officials. For instance, there are States where a foreign tax official will be prevented from any active participation in an investigation or examination on the territory of a country; there are also States where such participation is only possible with the taxpayer’s consent. The Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters specifically addresses tax examinations abroad in its Article 9;

3. OECD Recommendations are available on www.oecd.org/taxation.

— an industry-wide exchange of information is the exchange of tax information especially concerning a whole economic sector (e.g. the oil or pharmaceutical industry, the banking sector, etc.) and not taxpayers in particular.

10. The manner in which the exchange of information agreed to in the Convention will finally be effected can be decided upon by the competent authorities of the Contracting States. For example, 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. 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. See, for example, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.[5]

10.1 Before 2000, the paragraph only authorised the exchange of information, and the use of the information exchanged, in relation to the taxes covered by the Convention under the general rules of Article 2. As drafted, the paragraph did not oblige the requested State to comply with a request for information concerning the imposition of a sales tax as such a tax was not covered by the Convention. The paragraph was then amended so as to apply to the exchange of information concerning any tax imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, and to allow the use of the information exchanged for purposes of the application of all such taxes. Some Contracting States may not, however, be in a position to exchange information, or to use the information obtained from a treaty partner, in relation to taxes that are not covered by the Convention under the general rules of Article 2. Such States are free to restrict the scope of paragraph 1 of the Article to the taxes covered by the Convention.

10.2 In some cases, a Contracting State may need to receive information in a particular form to satisfy its evidentiary or other legal requirements. Such forms may include depositions of witnesses and authenticated copies of original records. Contracting States should endeavour as far as possible to accommodate such requests. 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.

10.3 Nothing in the Convention prevents the application of the provisions of the Article 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.

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4. OECD, Paris, 1994.
5. See http://conventions.coe.int.

Paragraph 2

11. Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation. 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. The maintenance of secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 2 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.

12. The information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes with respect to which information may be exchanged according to the first sentence of paragraph 1, or the oversight of the above. This means that the information may also be communicated to the taxpayer, his proxy or to the witnesses. This also means that information can be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities only for the purposes mentioned in paragraph 2. Furthermore, information covered by paragraph 1, whether taxpayer-specific or not, should not be disclosed to persons or authorities not mentioned in paragraph 2, regardless of domestic information disclosure laws such as freedom of information or other legislation that allows greater access to governmental documents.

12.1 Information can also be disclosed to oversight bodies. 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. In their bilateral negotiations, however, Contracting States may depart from this principle and agree to exclude the disclosure of information to such supervisory bodies.

12.2 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.

12.3 Similarly, if the information appears to be of value to the receiving State for other purposes than those referred to in paragraph 12, that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance). However, Contracting States may wish to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g., to combat money laundering, corruption, terrorism financing). 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 authorises such use."

13. 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 does not mean that the persons and authorities mentioned in paragraph 2 are allowed to provide on request additional information received. If either or both of the Contracting States object to the information being made public by courts in this way, or, once the information has been made public in this way, to the information being used for other purposes, because this is not the normal procedure under their domestic laws, they should state this expressly in their convention.

Paragraph 3

14. This paragraph contains certain limitations to the main rule in favour of the requested State. In the first place, the paragraph 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. However, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article.

14.1 Some countries' laws include procedures for notifying the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information. Such notification procedures may be an important aspect of the rights provided under domestic law. They can help prevent mistakes (e.g. in cases of mistaken identity) and facilitate exchange (by allowing taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting State). Notification procedures should not, however, be applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State. In other words, they should not prevent or unduly delay effective exchange of information. For instance, notification procedures should permit exceptions from prior notification, e.g. 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. 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 when a convention is concluded and thereafter whenever the relevant rules are modified.

15. Furthermore, the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that

a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system. Thus, a State may refuse to provide information where the requesting State would be precluded by law from obtaining or providing the information or where the requesting State's administrative practices (e.g., failure to provide sufficient administrative resources) result in a lack of reciprocity. However, it is recognised that too rigorous an application of the principle of reciprocity could frustrate effective exchange of information and that reciprocity should be interpreted in a broad and pragmatic manner. Different countries will necessarily have different mechanisms for obtaining and providing information. Variations in practices and procedures should not be used as a basis for denying a request unless the effect of these variations would be to limit in a significant way the requesting State's overall ability to obtain and provide the information if the requesting State itself received a legitimate request from the requested State.

15.1 The principle of reciprocity has no application where the legal system or administrative practice of only one country provides for a specific procedure. For instance, a country requested to provide information could not point to the absence of a ruling regime in the country requesting information and decline to provide information on a ruling it has granted, based on a reciprocity argument. Of course, where the requested information itself is not obtainable under the laws or in the normal course of the administrative practice of the requesting State, a requested State may decline such a request.

15.2 Most countries recognise 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 may, therefore, decline to provide information if the requesting State would have been precluded by its own self-incrimination rules from obtaining the 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. The overwhelming majority of information requests seek 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.

16. Information is deemed to be obtainable in the normal course of administration if it 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, provided that the tax authorities would make similar investigations or examinations for their own purposes.

17. The requested State is at liberty to refuse to give information in the cases referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement on the exchange of information which is laid down in the Convention; consequently it cannot be objected that this State has failed to observe the obligation to secrecy.

18. If the structure of the information systems of two Contracting States is very different, the conditions under subparagraphs a) and b) of paragraph 3 will lead to

the result that the Contracting States exchange very little information or perhaps none at all. In such a case, the Contracting States may find it appropriate to broaden the scope of the exchange of information.

18.1 Unless otherwise agreed to by the Contracting States, it can be assumed that the requested information could be obtained by the requesting State in a similar situation if that State has not indicated to the contrary.

19. In addition to the limitations referred to above, subparagraph c) of paragraph 3 contains a reservation concerning the disclosure of certain secret information. Secrets mentioned in this subparagraph should not be taken in too wide a sense. Before invoking this provision, a Contracting State should carefully weigh if the interests of the taxpayer really justify its application. Otherwise it is clear that too wide an interpretation would in many cases render ineffective the exchange of information provided for in the Convention. The observations made in paragraph 17 above apply here as well. The requested State in protecting the interests of its taxpayers is given a certain discretion to refuse the requested information, but if it does supply the information deliberately the taxpayer cannot allege an infraction of the rules of secrecy.

19.1 In its deliberations regarding the application of secrecy rules, the Contracting State should also take into account the confidentiality rules of paragraph 2 of the Article. The domestic laws and practices of the requesting State together with the obligations imposed under paragraph 2, may ensure that the information cannot be used for the types of unauthorised purposes against which the trade or other secrecy rules are intended to protect. Thus, a Contracting State may decide to supply the information where it finds that there is no reasonable basis for assuming that a taxpayer involved may suffer any adverse consequences incompatible with information exchange.

19.2 In most cases of information exchange no issue of trade, business or other secret will arise. A trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g. may lead to severe financial hardship). The determination, assessment or collection of taxes as such could not be considered to result in serious damage. 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 revealed 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.

19.3 A requested State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. However, the scope of protection afforded to such 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 typically not protected as a confidential communication. Whilst the scope of protection afforded to confidential communications might differ among states, it should not be overly broad so as to hamper effective exchange of information. Communications between attorneys, solicitors or other admitted legal representatives and their clients are only confidential 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 under a power of attorney to represent a company in its business affairs. An assertion 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 it arises. Thus, it is not intended that the courts of the requested State should adjudicate claims based on the laws of the requesting State.

19.4 Contracting States wishing to refer expressly to the protection afforded to confidential communications between a client and an attorney, solicitor or other admitted legal representative may do so by adding the following text at the end of paragraph 3:

> "d) to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:
> (i) produced for the purposes of seeking or providing legal advice or
> (ii) produced for the purposes of use in existing or contemplated legal proceedings."

19.5 Paragraph 3 also includes a limitation with regard to information which concerns the vital interests of the State itself. To this end, it is stipulated that Contracting States do not have to supply information the disclosure of which would be contrary to public policy (ordre public). However, this limitation should only become relevant 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 where the information constitutes a state secret, for instance sensitive information 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.

Paragraph 4

19.6 Paragraph 4 was added in 2005 to deal explicitly with the obligation to exchange information in situations where the requested information is not needed by the requested State for domestic tax purposes. Prior to the addition of paragraph 4 this obligation was not expressly stated in the Article, but was clearly evidenced by the practices followed by Member countries which showed that, when collecting information requested by a treaty partner, Contracting States often use the special examining or investigative powers provided by their laws for purposes of levying their domestic taxes even though they do not themselves need the information for

these purposes. This principle is also stated in the report "Improving Access to Bank Information for Tax Purposes".[6]

19.7 According to paragraph 4, Contracting States must use their information gathering measures, even though invoked solely to provide information to the other Contracting State. The term “information gathering measures” means laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information.

19.8 The second sentence of paragraph 4 makes clear that the obligation contained in paragraph 4 is subject to the limitations of paragraph 3 but also provides that such limitations cannot be construed to form the basis for declining to supply information where a country’s laws or practices include a domestic tax interest requirement. Thus, whilst a requested State cannot invoke paragraph 3 and argue that under its domestic laws or practices it only supplies information in which it has an interest for its own tax purposes, it may, for instance, decline to supply the information to the extent that the provision of the information would disclose a trade secret.

19.9 For many countries the combination of paragraph 4 and their domestic law provide 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, rule-making, 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

19.10 Paragraph 1 imposes a positive obligation on a Contracting State to exchange all types of information. Paragraph 5 is intended to ensure that the limitations of paragraph 3 cannot be used to prevent the exchange of information held by banks, other financial institutions, nominees, agents and fiduciaries as well as ownership information. Whilst paragraph 5, which was added in 2005, represents a change in the structure of the Article, it should not be interpreted as suggesting that the previous version of the Article did not authorise the exchange of such information. The vast majority of OECD member countries already exchanged such information under the previous version of the Article and the addition of paragraph 5 merely reflects current practice.

19.11 Paragraph 5 stipulates that a Contracting State shall not decline to supply information to a treaty partner solely because the information is held by a bank or other financial institution. Thus, paragraph 5 overrides paragraph 3 to the extent that paragraph 3 would otherwise permit a requested Contracting State to decline to supply information on grounds of bank secrecy. The addition of this paragraph to

6. OECD, Paris, 2000 (at paragraph 21 b).

the Article reflects the international trend in this area as reflected in the Model Agreement on Exchange of Information on Tax Matters[7] and as described in the report "Improving Access to Bank Information for Tax Purposes".[8] In accordance with that report, access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. The procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information.

19.12 Paragraph 5 also provides that a Contracting State shall not decline to supply information solely because the information is held by persons acting in an agency or fiduciary capacity. For instance, if a Contracting State had a law under which all information held by a fiduciary was treated as a "professional secret" merely because it was held by a fiduciary, such State could not use such law as a basis for declining to provide the information to the other Contracting State. A person is generally said to act in a "fiduciary capacity" when the business which the person transacts, or the money or property which the person handles, is not its own or for its own benefit, but for the benefit of another person as to whom the fiduciary stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part, such as a trustee. The term "agency" is very broad and includes all forms of corporate service providers (e.g. company formation agents, trust companies, registered agents, lawyers).

19.13 Finally, paragraph 5 states that a Contracting State shall not decline to supply information solely because it relates to an ownership interest in a person, including companies and partnerships, foundations or similar organisational structures. Information requests cannot be declined merely because domestic laws or practices may treat ownership information as a trade or other secret.

19.14 Paragraph 5 does not preclude a Contracting State from invoking paragraph 3 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or information relating to ownership interests. However, such refusal must be based on reasons unrelated to the person's status as a bank, financial institution, agent, fiduciary or nominee, or the fact that the information relates to ownership interests. For instance, a legal representative acting for a client may be acting in an agency capacity but for any information protected as a confidential communication between attorneys, solicitors or other admitted legal representatives and their clients, paragraph 3 continues to provide a possible basis for declining to supply the information.

19.15 The following examples illustrate the application of paragraph 5:

a) Company X owns a majority of the stock in a subsidiary company Y, and both companies are incorporated under the laws of State A. State B is conducting a tax examination of business operations of company Y in State B. In the course of this examination the question of both direct and indirect ownership in company Y becomes relevant and State B makes a request to State A for ownership information of any person in company Y's chain of ownership. In its reply State A should provide to State B ownership information for both company X and Y.

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7. Available on www.oecd.org/taxation
8. OECD, Paris, 2000.

b) An individual subject to tax in State A maintains a bank account with Bank B in State B. State A is examining the income tax return of the individual and makes a request to State B for all bank account income and asset information held by Bank B in order to determine whether there were deposits of untaxed earned income. State B should provide the requested bank information to State A.

Observations on the Commentary

20. *Japan* wishes to indicate that with respect to paragraph 11 above, it would be difficult for Japan, in view of its strict domestic laws and administrative practice as to the procedure to make public the information obtained under the domestic laws, to provide information requested unless a requesting State has comparable domestic laws and administrative practice as to this procedure.

21. In connection with paragraph 15.1, *Greece* wishes to clarify that according to Article 28 of the Greek Constitution international tax treaties are applied under the terms of reciprocity.

22. [Deleted]

Reservations on the Article

23. *Austria* reserves the right not to include paragraph 5 in its conventions. However, Austria is authorised to exchange information held by a bank or other financial institution where such information is requested within the framework of a criminal investigation which is carried on in the requesting State concerning the commitment of tax fraud.

24. *Switzerland* reserves its position on paragraphs 1 and 5. It will propose to limit the scope of this Article to information necessary for carrying out the provisions of the Convention. This reservation shall not apply in cases involving acts of fraud subject to imprisonment according to the laws of both Contracting States.

25. *Belgium* and *Luxembourg* reserve the right not to include paragraph 5 in their conventions.

NON-MEMBER COUNTRIES' POSITIONS ON ARTICLE 26 AND ITS COMMENTARY

Positions on the Article

1. *Brazil* reserves the right not to include the word “public” in the last sentence of paragraph 2 in its conventions.

2. [Deleted]

2.1 *Morocco* and *Thailand* reserve the right not to include the words "The exchange of information is not restricted by Articles 1 and 2" in paragraph 1.

2.2 *Malaysia* and *Thailand* reserve the right not to include paragraph 4 in their conventions.

2.3 *Brazil, Malaysia, Romania, Serbia and Montenegro* and *Thailand* reserve the right not to include paragraph 5 in their conventions.

Positions on the Commentary

3. [Deleted]

4. *Malaysia* wishes to indicate that with respect to paragraph 11 of the Commentary, it would be difficult for it, in view of its strict domestic laws and administrative practice as to the procedure to make public certain information obtained under the domestic laws, to provide information requested.