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European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements

Internationalization has increased the number of tax-relevant cross-border transactions. This is a challenge for national tax regimes and demands efficient international tax cooperation. In this article, the authors consider the legal basis, practice, burden of proof, legal protection and requirements with regard to European and international tax cooperation.

1. Introduction

Currently, at both the European and the international level, many measures are adopted, on the one hand, to deal with tax havens and, on the other, to make mutual assistance more effective. In February 2009, the Commission presented a "Proposal for a Council Directive on administrative cooperation in the field of taxation" (the "Proposal")[1] to amend the Mutual Assistance Directive for the Exchange of Information (the "Mutual Assistance Directive 1977").[2] In this regard, the Commission had doubts as to whether or not the Mutual Assistance Directive 1977 was still the appropriate tool for mutual assistance in the field of taxation in the European Union in a globalized era. The Proposal is intended to provide for efficient cooperation at an international level that would help to overcome the negative effects on the Internal Market of ever-increasing globalization.

In 2009, the Commission reported to the Council and the European Parliament on the use of the provisions on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures in the period 2005-2008 (the "Report").[3] The Report set out various reasons as to why renewal of the Mutual Assistance Directive 1977 was necessary. In the Report, the Commission also stated that it considered the existing Mutual Assistance Directive for the Recovery of Claims (the "Mutual Assistance Directive 2008")[4] to be insufficient to meet the requirements of the Internal Market and that it wished to ensure swift, efficient and uniform recovery assistance procedures with the help of the proposed new directive. In March 2010, due to the constantly increasing need for administrative assistance regarding the recovery of claims, the Directive Concerning Mutual Assistance for the Recovery of Claims Relating to Taxes, Duties and Other Measures (the "Mutual Assistance Directive 2010")[5] was enacted to replace the Mutual Assistance Directive 2008.

In addition to these activities by the Commission, the Member States and the United States have significantly raised pressure on tax havens. Consequently, tax havens worldwide have concluded a significant number of bilateral tax information exchange agreements (TIEAs) on the basis of the 2002 OECD Model Agreement on Exchange of Information in Tax Matters (the "OECD TIEA Model"). The relevance of these TIEAs only became fully clear in the second half of 2009, when the number of TIEAs signed in 2009 exceeded the number of TIEAs signed between 2002, when the OECD TIEA Model was published, and 2008. These developments clearly indicate the success of long-running activity to strengthen the cooperation between tax authorities and to counter tax fraud at an EU and international level, i.e. by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (the "OECD Global Forum"). As a result, countries, such as Liechtenstein, which in 2005 had refused to conclude TIEAs based on the OECD TIEA Model, now, as a matter of course, conclude TIEAs.[6] This constitutes a significant paradigm change in the tax policy of many tax havens.

2. Legal Basis for the International Exchange of Information in Tax Matters

2.1. Introductory remarks

The need for the effective exchange of information and, therefore, for legal bases regulating the international exchange of information in tax matters arises from the discrepancy between material universality and formal territoriality. On the one hand, the principle of formal territoriality that applies in international law prohibits states from carrying out field audits or other investigations in other states, as national tax authorities cannot carry out sovereign acts on foreign national territory. On the other hand, no principle of material territoriality exists that prohibits connecting the legal consequences of national law with foreign facts and circumstances.[7] In this respect, most industrial countries adopt the taxation

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1. COM [2009] 29.
2. Council Directive 77/799/EEC of 19 December 1977.
3. COM (2009) 451, p. 6 et seq.
4. Council Directive 2008/55/EC of 26 May 2008.
5. Council Directive 2010/24/EU of 16 March 2010.
6. For details regarding TIEAs, see 2.4.3.
7. K. Vogel, in K. Vogel and M. Lehner (eds.), *Doppelbesteuerungsabkommen, Kommentar* (Munich: Verlag C.H. Beck, 2008), Introduction, Para. 11.

of worldwide income in their universal tax systems.[8] The conflict between material universality and formal territoriality gives rise to a deficit in executing a national law's ability to tax worldwide income.[9] In order to overcome this divergence, numerous legal bases regarding mutual assistance have been created. Consequently, even for experts, the current network of international, European and national law is presumed to be a "legal huddle" that should be clarified.

2.2. EU law

At an EU level, the exchange of information is governed by the Mutual Assistance Directive 1977 and the Mutual Assistance Directive 2010, the latter replacing the Mutual Assistance Directive 2008 from 1 January 2012 onwards. VAT and special consumption taxes are governed by Regulation 2073/04 of 16November 2004 and Council Regulation (EU) 904/2010 of 7 October 2010 on Administrative Cooperation and Combating Tax Fraud in the Field of Value Added Tax. Council Regulation (EU) 904/2010 replaces Council Regulation (EC) 1798/2003 of 7 October 2003 on Administrative Cooperation in the Field of Value Added Tax from January 2012 onwards. The new Council Regulation is intended to improve and supplement the instruments to counter fraud in relation to VAT. As Council Regulations are directly enforceable law, national legislators have no power in this regard. The taxing interest is governed by the Savings Directive.[10]

With regard to indirect taxes, the Member States adopt regulations in terms of Art. 288(2) of the Treaty on the Functioning of the European Union (TFEU) so as to standardize the cross-border execution of tax. Consequently, there is a high standard of cooperation between the Member States with regard to indirect taxes. Nevertheless, in this field, there is still a significant amount of tax fraud and tax evasion. In this regard, the International VAT Association quotes estimated losses for VAT ranging from more than EUR 60 billion to EUR 100 billion a year in the European Union.[11] In the United Kingdom alone, Her Majesty's Revenue & Customs (HMRC) estimate that VAT revenue losses amounted to GBP 14.4 billion in the tax year 2008/09.[12] These figures reveal the further need for cooperation. It also is clear that there is a significant economic relevance in effectively countering tax fraud and tax evasion by way of the exchange of information.

With regard to direct taxes, the Member States adopt directives in terms of Art. 288(3) of the TFEU. These directives set out minimum standards and limits, which the Member States must respect and implement in national law. Except for the Mutual Assistance Directive 2010, these measures have been implemented in all of the Member States.[13] It can, however, be stated that, currently, the directives offer the requesting state only "passive administrative aid", as the decision as to if and when the tax authorities of the Member States answer requests is not a question for the national law of the applying Member State, but, rather, for the national law of the requested Member State.[14] This means that national tax authorities do not have the same possibilities to clarify a fact abroad to the same degree as national facts.[15] The exchange of information can also be classified as passive from the perspective of taxpayers, as they cannot compel the tax authorities to use the directives and the means for the exchange of information thereby provided for.

However, at an EU level, remarkable changes may arise if the Proposal is adopted. Compared to the Mutual Assistance Directive 1977, the Proposal is, inter alia, intended to increase the efficiency of administrative assistance and to expedite mutual assistance. The Commission considers that the Mutual Assistance Directive 1977 cannot meet the present requirements of administrative cooperation.[16] Under the Proposal, a new directive would empower the Member States to cooperate efficiently at an international level so as to overcome the negative effects of the ever-increasing globalization of the Internal Market and protect effectively the financial interests of the Member States. Such action is also required to avoid distorting competition in the Internal Market.[17] In this regard, it should be noted that the measures in the Proposal would entail a remarkable increase and facilitation in respect of the exchange of information in the European Union.

2.3. Multilateral legal sources

Apart from the legal bases noted in 2.2. that are based on the TFEU, there are other multilateral agreements that are not well known. These include the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (the "Joint Convention") signed in Strasbourg on 25 January 1988.[18] The objective of the Joint Convention is to enable each party to counter international tax evasion and to better enforce its national laws, whilst, at the same time, respecting the rights of the taxpayers. The contracting parties are, amongst the Member countries of the Council of Europe, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Poland, Sweden and the United Kingdom (all also Member States of the European Union) and, amongst non-Member countries of the Council of Europe, Australia, Canada, Japan, Korea

8. Id., Para. 12.
9. R. Seer, "Introduction and general remarks", *International Tax Law Review*, The mutual assistance in tax matters, Situation and perspectives in the EU Member States, reports of the meeting of 26 January 2009, Sapienza Università di Roma, p. 8.
10. Council Directive 2003/48/EC of 3 June 2003.
11. International VAT Association, "Combating VAT fraud in the EU – the way forward" (March 2007).
12. HMRC, "Measuring Tax Gaps" (2009), p. 11.
13. "National Reports" in R. Seer and I. Gabert (eds.), *Mutual Assistance and Information Exchange* (Amsterdam: EATLP, 2010).
14. R. Seer, "Steuerverfahrensrechtliche Bewältigung grenzüberschreitender Sachverhalte", in W. Spindler, K. Tipke and T. Rödder (eds.), *Festschrift für Schaumburg* (Cologne: Verlag Dr. Otto Schmidt, 2009), p. 151 et seq.
15. R. Seer and I. Gabert, "Der internationale Auskunftsverkehr in Steuersachen", *Steuer und Wirtschaft* (1/2010), p. 8.
16. COM (2009) 29, Explanatory Memorandum, Context of the proposal, General context.
17. COM (2009) 29, Explanatory Memorandum, Context of the proposal.
18. SEV No. 127.

(Rep.), Mexico, New Zealand and the United States. Accordingly, on the one hand, the Joint Convention is relevant with regard to those countries that are not subject to the scope of the Mutual Assistance Directive 1977, such as Australia, Canada, Japan and the United States, and makes cross-border cooperation with these countries easier. On the other hand, administrative assistance under the Joint Convention also deals with all forms of compulsory payments made to governments (for example, to social security agencies)[19] which the Mutual Assistance Directive 1977 does not cover.[20] The relevance of the Joint Convention may also increase once it has been updated. In this regard, the amending protocol of 27 May 2010 would align the Joint Convention with the recent internationally agreed standard on the exchange of information for tax purposes – for example, by abolishing bank secrecy for tax purposes in the amended Art. 21(4). This is clearly a further sign that bank secrecy is no longer acceptable internationally. In addition, the amending protocol provides for opening up the Joint Convention to non-Council of Europe and non-OECD countries. In this respect, the OECD hopes that the updated Joint Convention will become a powerful instrument in countering offshore tax evasion.

The European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (the "Criminal Matters Convention")[21] is relevant with regard to criminal matters and prosecution. The Criminal Matters Convention has been ratified by all of the Member countries of the Council of Europe and, in total, by 48 countries.[22] It does not affect cooperation between tax authorities relating to administrative tasks, but, rather, the activities of courts with regard to prosecution. It should, however, be noted that, within the European Union, the Council Act of 29 May 2000, which established in accordance with Art. 34 of the EU Treaty, the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union,[23] is of greater relevance than the Criminal Matters Convention.

2.4. Bilateral legal sources

2.4.1. Initial comments

Bilateral legal sources for the exchange of information include international tax treaties and special bilateral treaties regarding mutual assistance. Particularly with regard to the increasing number of bilateral treaties signed on the basis of the OECD TIEA Model, there is a clear paradigm policy change in respect of countries (previously) classified as tax havens. This also reflects how successful the work of the OECD has been regarding the acceptance of internationally agreed tax standards. Specifically, in the latest version of the progress report of 10 December 2010, all of the jurisdictions surveyed by the OECD Global Forum have committed to internationally agreed tax standards.[24]

2.4.2. Tax treaties

The OECD recognized early on the need for a model tax treaty to avoid double taxation and to clarify, standardize and guarantee the fiscal situation of taxpayers in each OECD Member country. The first attempts at such a model tax treaty caused much controversy and even resentment,[25] but the OECD standard can now be categorized as "generally accepted". In this respect, with regard to international tax cooperation, Arts. 26 and 27 of the 2010 OECD Model Tax Convention (the "OECD Model") are relevant.

Narrow and broad provisions can generally be distinguished with regard to the exchange articles in tax treaties. Narrow information provisions only allow the exchange of information that is required for the implementation of the tax treaty. Broad information provisions go further and are useful in the implementation of the national tax law of the states signing the tax treaty. From the perspective of the German Finance Ministry, negotiations for new tax treaties are always based on the current version of Art. 26 of the OECD Model. Accordingly, it can be said that narrow provisions have mostly been used in old tax treaties. The same is true of the United Kingdom.[26] Finally, all of the countries represented in the research project of the European Association of Tax Law Professors (EATLP) adhere to the OECD Model in treaty negotiations.[27] In this respect, it should be noted that narrow provisions did not form part of the original 1963 OECD Model, in that Art. 26 already included broad information provisions. However, this information provision may be classified as a limited broad information provision that applied to the taxes affected by the tax treaty only and was additionally limited by the circumstances of the inhabitants of the contracting states. Limitations such as these can still be found in recent tax treaties – for example, in the 2005 Belarus–Germany and 2006 Croatia–Germany tax treaties. Narrow information provisions can also often be found in tax treaties with developing countries. It should, however, be noted that it is not always possible to clearly and definitely categorize information provisions as narrow or broad.[28] Broad information provisions and the Mutual Assistance Directive 1977 exist substantially to realize the principle of the taxation of the worldwide income in the state of residence. In 2005, Art. 26(4) and

19. Joint Convention, p. 23.
20. K.-D. Drüen and I. Gabert, "National Report Germany", in Seer and Gabert, supra note 13, pp. 249-290.
21. SEV No. 30.
22. For the current status of the Criminal Matters Convention, see http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=030&CM=&DF=&CL=ENG.
23. Official Journal of the European Communities (C 197/1).
24. OECD, "A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard" (Paris: 10 December 2010).
25. P. Musgrave, "The OECD Model Tax Treaty: Problems and Prospects", *Columbia Journal of World Business* (Summer 1975), p. 29 et seq.
26. D. Salter, "National Report The United Kingdom", in Seer and Gabert, supra note 13, pp. 547-568.
27. R. Seer and I. Gabert, "General Report", in Seer and Gabert, supra note 13, pp. 23-54.
28. For example, with regard to Polish tax treaties, see A. Biegalski and A. Zalasiński, "National Report Poland", in Seer and Gabert, supra note 13, pp. 445-467. With regard to German tax treaties, see R. Seer, in K. Tipke and H.W. Kruse (eds.), *Abgabenordnung/Finanzgerichtsordnung, Kommentar*, § 117 AO, Sec. 21 (Cologne, Verlag Dr. Otto Schmidt, July 2008).

(5) of the OECD Model were amended. Art. 26(4) states that the other state should use its information-gathering measures to obtain requested information, even though that other state may not need such information for its tax purposes. Art. 26(5) adds that a contracting party cannot 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. By way of this formula, the OECD Model and the Proposal distinguish between bank secrecy and business secrecy, which is understandable. Whereas business secrecy is necessary to maintain fair competition in the market, bank secrecy potentially endangers competition. Guaranteeing that some information cannot be obtained because it is held by a bank may stimulate tax evasion, which may negatively influence competition.

In 2003, Art. 27 of the OECD Model was amended with regard to administrative assistance for the recovery of taxes. The reasons why the amendment was necessary are the same that make mutual assistance in tax affairs necessary in general. On the one hand, globalization hampers the tax authorities in accurately determining the correct tax liabilities of taxpayers. On the other hand, globalization makes the collection of tax more difficult. Taxpayers may have assets scattered throughout the world, but the tax authorities cannot, in general, operate beyond national boundaries in collecting taxes, which is caused by the principle of formal territoriality. The adoption of Art. 27 of the OECD Model in tax treaties has not yet progressed far, as the provision is new.[29] In this respect, mutual assistance on the basis of Art. 27 of the OECD Model commits the treaty partners, on the one hand, to collect the tax claims of the treaty partner (Art. 27(3)) and, on the other, to institute measures to secure these claims (Art. 27(4)).

2.4.3. Bilateral treaties regarding mutual assistance

2.4.3.1. Background

Apart from general tax treaties, there are bilateral treaties that specifically regulate the exchange of information in tax matters. Some of these treaties had already been concluded before the Mutual Assistance Directive 1977 was in force. Germany, for example, concluded such bilateral treaties with Sweden in 1935, with Finland in 1936, Italy in 1939 and Austria in 1955. Although concluded early on, these treaties contain extensive information provisions and, in some cases, the scope of the treaties goes beyond that in tax treaties. In 2002, the OECD TIEA Model was issued, which is intended to promote international cooperation on tax matters through the exchange of information. Especially from the second half of 2009 onwards, the number of TIEAs concluded on basis of the OECD TIEA Model increased considerably.

2.4.3.2. The OECD TIEA Model

The OECD TIEA Model was developed by the OECD Global Forum Working Group on Effective Exchange of Information. It grew out of the work undertaken by the OECD to address harmful tax practices. The lack of the effective exchange of information is one of the key criteria in determining harmful tax practices. The OECD TIEA Model is not a binding instrument, but, rather, may form the basis for multilateral and bilateral treaties. In the introduction to the OECD TIEA Model, it is stated that a multilateral instrument is not a "multilateral" agreement in the traditional sense, but, instead, provides the basis for an integrated bundle of bilateral treaties. Accordingly, this is an extension of already existing means regarding the exchange of information.

The introduction to the OECD TIEA Model notes that it is important for financial centres throughout the world to meet the standard of the exchange of tax information set out in the OECD TIEA Model. Consequently, many of the definitions in Art. 4 of the OECD TIEA Model deal with financial expressions and technical terms. This is probably a hint regarding the proposed scope of the OECD TIEA Model. The instrument for the exchange of information is, according to Art. 5 of the OECD TIEA Model, the exchange of information on request. Automatic and spontaneous exchanges of information are not covered by Art. 5(1) of the OECD TIEA Model, but can, according to the Commentary on the OECD TIEA Model, be covered by a TIEA if the contracting parties wish to expand cooperation in matters of the exchange of information for tax purposes. Art. 5 of the OECD TIEA Model includes a list as to what details a request for information should contain. With regard to content, the exchange of information on request, according to the OECD TIEA Model, corresponds to Art. 26 of the OECD Model. Art. 6 of the OECD TIEA Model permits tax examinations to be undertaken abroad. Art. 7 of the OECD TIEA Model deals with the possibility to decline a request. It is in this article that the common customary provisions relating to the exchange of information can be found, such as the possibility to decline a request when the disclosure of the requested information would be contrary to public order (*ordre public*) or when the applicant party could not obtain the requested information under its own law. Business secrecy is also protected by the OECD TIEA Model. In contrast, according to Art. 5(4) of the OECD TIEA Model, the contracting parties should ensure that information held by banks or other financial institutions must be obtained and provided. This is a useful provision, as it is the purpose of TIEAs to reduce the effects of tax havens.[30] After all, as with the OECD Model and the Proposal, the OECD TIEA Model distinguishes between business secrets and bank secrets. This reveals that a different treatment between these kinds of secrecy appears now to be commonly accepted. The Commentary on Art. 3 of the OECD TIEA Model states with regard to the taxes covered that bilateral agreements should cover, at a minimum, the same four categories of direct taxes, i.e. (1) taxes on income or

29. Seer and Gabert, supra note 27.
30. T. Anamourlis and L. Nethercott, "An Overview of Tax Information Exchange Agreements and Bank Secrecy", *Bulletin for International Taxation* 12 (2009), p. 618.

profits; (2) taxes on capital; (3) taxes on net wealth; and (4) estate, inheritance or gift taxes, unless both contracting parties agree not to cover one or more of these.

Art. 5(5)(a) to (g) of the OECD TIEA Model contains the provisions as to what information a request should contain. This includes, inter alia, the identity of the person under examination or investigation, the purpose for which the information is sought and the grounds for believing that the information requested is held by the requested party or is in the possession or control of a person within the jurisdiction of the requested party. The applicant party must also state that all of the means to obtain the information available in its own territory have been exhausted, except those that would give rise to disproportionate difficulties. It is here that the common principle of subsidiarity customary to the exchange of information can be found. All of the other aspects stated in Art. 5(5)(a) to (g) of the OECD TIEA Model clarify that the requesting state must provide concrete reasons for the request of the information. The list of information required when making a request means that the requesting state must pose its request in a detailed and specific way and, consequently, must consider the request carefully. The Mutual Assistance Directive 1977 does not contain a comparable list as to what information is required when making a request. In this respect, Art. 2(1), sentence 2 of the Mutual Assistance Directive 1977 only refers to the principle of subsidiarity.

Art. 5(6) of the OECD TIEA Model contains provisions to ensure a prompt response in the exchange of information. Art. 5(6), sentence 1 of the OECD TIEA Model requires that the competent authority of the requested party should forward the requested information "as promptly as possible". This is reminiscent of Art. 5 of the Mutual Assistance Directive 1977, which requires that the information is transmitted "as swiftly as possible". However, Art. 5(6)(a) and (b) of the OECD TIEA Model provide, in contrast to Mutual Assistance Directive 1977, concrete means to ensure administrative assistance. According to Art. 5(6)(a) of the OECD TIEA Model, the competent authority of the requested party should confirm receipt of a request in writing to the competent authority of the applicant party and should notify the competent authority of the applicant party of any deficiencies within 60 days of the receipt of the request. If the requested party cannot obtain and provide the information within 90 days of receipt of the request, the competent authority of the requested party should, under Art. 5(6)(b) of the OECD TIEA Model, immediately inform the applicant party explaining the reasons for non-compliance. Such a provision indirectly sets the requested party a target of 90 days in which to answer an incoming request. This is reminiscent of Art. 7(6) of the Proposal. It is also stated that the requested competent authority should inform the requesting authority immediately of the reasons for the failure or the refusal to respond within one month of receipt of the request.

2.4.3.3. TIEAs in practice

TIEAs are intended to counter tax havens and guarantee the comprehensive exchange of information in relation to tax affairs, thereby expanding the means available to improve international tax cooperation at an OECD level. If there is no tax treaty between two states that guarantees the extensive exchange of information as in Art. 26 of the OECD Model, the conclusion of a TIEA is important. Both Art. 26 of the OECD Model and the OECD TIEA Model contain the standards of transparency and exchange of information that have been developed by the OECD.[31] In 2002, when the OECD TIEA Model was published, not many TIEAs had been concluded. According to the OECD, only six such treaties worldwide were concluded in 2002.[32] Until the G-20-summit in Washington of November 2008, only 44 TIEAs had been signed. A significant rise in the number of TIEAs signed can be seen from the second half of 2009 onwards. All in all, 199 TIEAs were concluded in 2009. Since January 2010, 147 TIEAs have been signed. Accordingly, the number of TIEAs signed from 2009 onwards by far exceeds the number of TIEAs concluded in the previous years. This trend reflects the increasing pressure on previously uncooperative tax havens, as often at least one of the contracting parties is a state that has been classified as a tax haven. The willingness of tax havens to conclude TIEAs can be interpreted as a paradigm change in tax policy. In this context, it should be noted that recently TIEAs have also been signed by contract parties that, at the time of the signing, can both be classified as tax havens. For example, Liechtenstein concluded a TIEA with Andorra on 18 September 2009 and with St. Vincent and the Grenadines on 2 October 2009. From 2008 onwards, the number of tax treaties signed also increased.[33] This also reflects the success of the long-term ambitions at an EU and international level to strengthen cooperation between tax authorities in the European Union and worldwide to counter tax evasion. Though the OECD TIEA Model exists, in practice, TIEAs can differ widely.[34] However, from a German perspective, it can be stated that the TIEAs that have been concluded to date have to a large extent followed the OECD TIEA Model, even though differing in certain respects.

The large number of TIEAs concluded is to some extent – particularly with regard to some small non-OECD jurisdictions – the result of three pilot projects through which a new approach to negotiating TIEAs has been implemented, involving multilateral negotiations and thereby resulting in the conclusion of bilateral TIEAs. These projects are the Southern Caribbean Project coordinated by the Netherlands, the Northern Caribbean Project coordinated by the United Kingdom and the

31. OECD, "Promoting Transparency and Exchange of Information for Tax Purposes – A Background Information Brief" (Paris: 10 December 2010), p. 6.
32. See www.oecd.org/document/7/0,3343,en_2649_33767_38312839_1_1_1_1,00.html.
33. OECD, supra note 31, p. 14.
34. Anamourlis and Nethercott, supra note 30, p. 620.

Pacific Project coordinated by the OECD. According to the OECD, more than 100 TIEAs have been or will be signed as a result of this initiative. Consequently, a number of the participating non-OECD jurisdictions (for example, Anguilla, St. Kitts and Nevis, St. Vincent and the Grenadines, and Samoa) are now classified as jurisdictions that have substantially implemented internationally agreed tax standards.[35]

2.5. Unilateral legal sources

At a fourth level, unilateral rules regulate administrative assistance in tax matters. It is in this way that administrative assistance in tax affairs is unilaterally integrated into national law. Such legislation must be distinguished from national laws that transfer EU directives into national law. For instance, having concluded a number of tax treaties and TIEAs, Liechtenstein introduced at the beginning of 2010 a bill to govern the enforcement of international tax cooperation. This legislation should apply to both tax treaties and TIEAs. In this regard, it should be noted that, in part, legislation regulating tax cooperation with a given treaty partner already exists in Liechtenstein – for example, the legislation governing the enforcement of the TIEA with the United States.

2.6. OECD peer review

The OECD notes that signing agreements is only the first necessary step towards the full implementation of the OECD standard on the exchange of information. However, it is also necessary that the agreements enter into force and are effectively implemented. In order to monitor and give rise to the effective exchange of information, the OECD Global Forum established a Peer Review Group. This has a three-year mandate in which to peer review all the OECD Member countries and other jurisdictions that may require special attention.[36] The objective is to provide recognition of progress that has been made, identify areas of weakness and recommend remedial actions so that jurisdictions can improve their legal and regulatory frameworks as well as their exchange of information practices and to identify jurisdictions that are not implementing the standards.[37] The review process is divided into two phases. Phase 1 assesses each jurisdiction's legal and administrative framework. The report produced in connection with Phase 1 includes a detailed description of the elements of the legal and administrative framework of the jurisdiction in respect of transparency and the exchange of information. It focuses on the following three primary aspects: (1) availability of information; (2) access to information; and (3) exchanging information. The report identifies and describes any shortcomings that exist and provides recommendations for improvement in respect of the three main aspects.[38] Phase 2 evaluates the implementation of the standards in practice and, therefore, focuses on the effectiveness of the exchange of information. The reviews also assess the quality of the exchange of information. The report on Phase 2 follows the same structure as Phase 1. This means that it is also divided into the three areas of availability, access and exchange of information.[39]

Phase 1 of the review process started in the first half of 2010 and should be completed by the first half of 2012. Phase 2 will start in the second half of 2012 and will be completed by the first half of 2014.[40] In some cases, where jurisdictions have a long-standing commitment to the OECD Global Forum standards, an adequate treaty network and a history of the exchange of information with other jurisdictions, a combined Phase 1 and 2 review has been scheduled.[41]

2.7. Concurrences

The variety of legal sources regulating international cooperation raises the question of concurrences between these legal sources. EU law is superior to national legislation – for example, Council Regulation 904/2010 is superior to bilateral and multilateral legal sources with regard to VAT. EU law is also superior to the exchange of information articles in tax treaties. Accordingly, the Member States are bound by the principles of the Mutual Assistance Directive 1977, as implemented into national law. This can lead to concurrences in relation to the exchange of information articles in tax treaties, especially if a tax treaty only contains narrow information provisions that are not up to the standard of the Mutual Assistance Directive 1977. In these cases, the Mutual Assistance Directive 1977 displaces the narrow information provisions. For the relevant tax treaties, this derives, on the one hand, from the *lex posterior* rule and, on the other, from the primacy in the application of secondary EU law. Only if the obligation in a tax treaty to provide information goes further than that according to the Mutual Assistance Directive 1977 do the provisions of the tax treaty apply. In this respect, the Mutual Assistance Directive 1977 provides a minimum standard for the purpose of realizing the harmonized exchange of information between the Member States.[42]

There are no concurrences in relation to TIEAs because, even if one of the contracting parties is a Member State, the Mutual Assistance Directive 1977 is not relevant to other contract partners, which are generally tax havens and never Member States to which the Directive could apply.

With regard to the relationship between Art. 27 of the OECD Model and the Directives regarding the recovery of claims, neither the Mutual Assistance Directive 2008, which will apply up to 31 December 2011, nor the new

35. OECD, supra note 24.
36. OECD, supra note 31, p. 3.
37. OECD, "Launch of a Peer Review Process – Note on Assessment Criteria" (Paris: 2010), p. 1.
38. OECD, "Launch of a Peer Review Process – Terms of Reference" (Paris: 2010), p. 10.
39. Id., p. 10 et seq.
40. See OECD, "Launch of a Peer Review Process – A Schedule of Reviews" (Paris: 2010), p. 2 for when a given jurisdiction is to be reviewed.
41. See id., p. 1 for when a given jurisdiction is to be reviewed.
42. Seer and Gabert, supra note 15, p. 12.

Mutual Assistance Directive 2010, which will be applied from 1 January 2012 onwards, casts a light on the relationship and hierarchy of the two provisions. Accordingly, the two Directives are at the same level. However, national Ministries of Finance may issue advice as to the use of the two Directives. For instance, the German Ministry of Finance prefers, in relation to Member States, to use the Mutual Assistance Directive 2008.[43]

3. International Tax Cooperation in Practice

3.1. Introductory remarks

International tax cooperation has three different instruments for exchange information: (1) the exchange of information on request (see 3.2.); (2) the spontaneous exchange of information (see 3.3.); and (3) the automatic exchange of information (see 3.4.). All three kinds of exchange of information are relevant to the Mutual Assistance Directive 1977, Council Regulation 904/2010 and Council Regulation 515/97 on Customs Matters. In addition, with regard to VAT, the Member States may directly request information in accordance with Art. 17 et seq. of Council Regulation 904/2010 in two stages via an electronic database. Art. 23 of Council Regulation 515/97 also establishes an automated information system (the "Customs Information System") as a further means to exchange information.

In contrast, Art. 26 of the OECD Model does not differentiate between the three kinds of instruments to exchange information, but Para. 9 of the Commentary on Art. 26 notes that the rule in Art. 26(1) allows for the exchange of information in these three ways. Art. 5 of the OECD TIEA Model only explicitly provides for exchange of information on request. However, according to the Commentary on Art. 5 of the OECD TIEA Model, the contracting parties may expand cooperation by way of automatic and spontaneous exchanges of information.[44]

In 2006, the OECD's Committee on Fiscal Affairs approved a new manual on the exchange of information. This provides practical assistance to officials dealing with the exchange of information for tax purposes and, inter alia, covers all three ways in which to exchange information.[45]

3.2. Exchange of information on request

The exchange of information on request describes a situation in which the competent authority of one state asks for particular information from the competent authority of another state with a special case in mind. The information requested typically relates to an examination, inquiry or investigation of the liability of a taxpayer for specified tax years.[46] The requested authority clarifies the relevant facts and transmits the requested information to the requesting state. Art. 2(2) of the Mutual Assistance Directive 1977 and Art. 26(4) of the OECD Model state that the requested authority should use its information-gathering measures to obtain the requested information, even though that state may not require such information for its own tax purposes. This can be classified as the passive exchange of information, because the requesting state has no control or influence over the actions of the requested state. This method of exchange of information is also passive for the taxpayer, as the taxpayer cannot require the state of residence to use the mutual assistance procedure. It is a general principle of tax cooperation that a contracting party should use all means in its own territory to obtain the information before sending a request, except where this would give rise to disproportionate difficulties. This principle is to be found in Art. 2(1), sentence 2 of the Mutual Assistance Directive 1977 and in the OECD "Manual on the Implementation of Exchange of Information Provisions for Tax Purposes" (the "OECD Manual").[47] The OECD Manual also provides advice on preparing and sending a request (for example, a checklist of what to include in a request), for receiving and checking a request, gathering information, replying to a request (for example, of what to include in a response) and, finally, for giving feedback to improve future exchanges of information.[48] Examples of a request for information and of a response to a request are included in the manual.[49]

3.3. Spontaneous exchange of information

The spontaneous exchange of information is the provision of information in a singular case to another contracting party that is foreseeably relevant to that other party and that has not been previously requested. Art. 4(1)(a) to (e) of the Mutual Assistance Directive 1977 sets out the circumstances in which the spontaneous exchange of information should occur. The European Court of Justice (ECJ) has held that there is an obligation to exchange information spontaneously from the word "shall" in Art. 4(1), sentence 1 of the Mutual Assistance Directive 1977.[50] According to the OECD, the spontaneous exchange of information relies on the active participation and cooperation of local tax officials.[51] In addition, identifying the existence of one of the circumstances set out in Art. 4 of the Mutual Assistance Directive 1977 requires significant cross-border thinking by tax officials, acting without being requested to do so. However, where information is exchanged spontaneously, this is a very effective means to counter tax evasion and tax fraud, as it relates to facts and information that another Member State could only very seldom detect itself.

43. *BMF-Merkblatt* (19 January 2004) – IV B 4 – S 1320-1/04, recital 1.2.5.
44. OECD TIEA Model, marginal number 39.
45. The OECD Manual, Modules 1 to 3.
46. Id., Module 1, p. 2.
47. Id., Module 1, p. 2 et seq.
48. Id., Module 1, p. 1 et seq.
49. Id., Module 1, p. 9 et seq.
50. Case C-420/98, *W.N.* (13 April 2000), Para. 13. A detailed consideration of the ECJ's references to the Mutual Assistance Directive is provided by S. Hemels, "References to the Mutual Assistance Directive in the Case Law of the ECJ: A Systematic Approach", *European Taxation* 12 (2009), p. 583 et seq.
51. OECD Manual, Module 2, p. 3.

The Proposal for a new directive does not adhere to the spontaneous exchange of information in defined circumstances. Specifically, Art. 9 of the Proposal states that the competent authorities of the Member States may in any case, through spontaneous exchange of information, forward to each other any information referred to in Art. 1. However, the circumstances set out in Art. 4(1) of the Mutual Assistance Directive 1977 will remain the primary areas of application, as Art. 4(1) is intended to counter tax evasion and tax fraud, which is also the main objective of the Proposal.[52] Examples of where spontaneous exchange of information should be considered are also set out in the OECD Manual,[53] as is a checklist of what to include when providing information spontaneously.[54]

3.4. Automatic exchange of information

The automatic exchange of information involves the systematic and periodic transmission of "bulk" taxpayer information by the source state to the residence state regarding various categories of income without a formal request being made.[55] This, therefore, represents the continuous exchange of information between Member States. In contrast to the spontaneous exchange of information, the automatic exchange of information is not based on a singular case, but, rather, information is transmitted in respect of defined case groups automatically by a certain state. Under Art. 3 of the Mutual Assistance Directive 1977, these categories of cases are determined by following the consultation process set out in Art. 9. In contrast to this abstract rule, Art. 8(3) of the Proposal sets out, in detail, those cases in which information should be forwarded automatically. The automatic exchange of information can be classified as a means of cross-border risk management, as it offers a Member State the possibility to match the information transmitted with the information contained in a tax declaration or return. The most cost-effective way to process the information is to receive the foreign-source information on magnetic media or in digital form so that it can be inputted into the recipient's tax database and automatically matched against the income reported by taxpayers.[56] Providing the automatically exchanged information on magnetic media also makes it possible to effectively and efficiently distribute the information to local tax offices, if necessary.[57]

3.5. Hierarchy

As a recent survey at the EU level reveals, there is no clear tendency to use a certain instrument in preference to any other, or any hierarchy in the way that the instruments are used. Rather, the use depends on the case in question and the nature of the information required.[58] It is the combination of all three instruments that makes international tax cooperation effective and helps to realize the objectives of mutual assistance. The different means all have a given area of application, as the description of the three instruments in 3.2., 3.3. and 3.4. clarifies. The exchange of information on request and the spontaneous exchange of information are intended to reduce specific risks and are, therefore, used individually. In contrast, the automatic exchange of information is intended to reduce abstract risks and, therefore, has a wider scope.

If it is considered desirable to adopt a pan-EU perspective, intended to surpass individual and national interests, different stages of development can be identified. The exchange of information on request always starts at the initiative of a state that is interested in securing its taxation, which, therefore, requests the assistance of another state that has not examined that case until the request is made. In this regard, the spontaneous and automatic exchange of information are further stages of development. From the start, both instruments require activity by the Member State that transmits the information at its own initiative. It is here that the states transmitting information decide what kind of information may be relevant to another Member State. International tax cooperation progresses to another dimension when states are proactive and transmit to other states useful information in this way. In general, TIEAs do not provide for the automatic sharing of tax information[59] – for example, all of the TIEAs concluded by Germany only provide for the exchange of information on request. By not taking the opportunity to provide for other than the exchange of information on request, recent TIEAs have not taken a step towards that further stage of proactive tax cooperation.

4. Burden of Proof

No provisions dealing with the burden of proof are found in the legal bases for the international exchange of information considered in 2. Rather, this is the subject of national procedural law. Consequently, provisions concerning the burden of proof vary greatly from country to country. A survey of the Member States demonstrates that, in general, there are three ways to allocate the burden of proof between taxpayers and tax authorities.[60] In some legislations, the tax authority generally has the burden of proof. However, the burden of proof can be transferred to taxpayers if they do not deliver the requested information. For instance, Belgian tax legislation allocates the burden of proof in this way.[61] Other legislations (for example, in Finland, Germany and the Netherlands) allocate the burden of proof according to a "theory of sphere". Here, the party that has the easiest access to the information required and has the most practical possibilities to adduce evidence bears the burden of proof. In part, this allocation of the burden of proof is effected by provisions stating that the tax authorities must provide

52. I. Gabert, *Internationale Wirtschafts-Briefe* (Herne: Verlag Neue Wirtschafts-Briefe 2009), group 2, compartment 11, p. 1018.
53. OECD Manual, Module 2, p. 3.
54. Id., Module 2, p. 4.
55. Id., Module 3, p. 3.
56. Id.
57. Id.
58. Seer and Gabert, supra note 27.
59. Anamourlis and Nethercott, supra note 30, p. 620.
60. Seer and Gabert, supra note 27.
61. Id.

evidence regarding facts that give rise to the tax liability and that taxpayers must provide evidence regarding facts that reduce the tax liability.[62] The duties in respect of cooperation in some legislations, such as in Germany or Italy, can be deemed to be a result of the theory of sphere and its allocation of the burden of proof.[63] The third alternative is that the party that invokes a fact or wants to enforce a law bears the burden of proof. The Spanish and the Portuguese legislations operate in this way.[64] In this respect, the existence of different provisions regarding the burden of proof in the European Union has been criticized, and there have been calls for the introduction of harmonized provisions.[65]

5. Legal Protection

5.1. Introductory remarks

With regard to the legal protection of taxpayers, it is possible to distinguish between legal protection and incoming requests (see 5.2.), and legal protection and making requests (see 5.3.).

5.2. Legal protection and incoming requests

With regard to the legal protection of the taxpayer in respect of incoming requests, there is a strict relationship between notification rights, consultation rights and intervention rights. Legislations in the European Union differ greatly in this respect. In addition, some Member States with no notification rights, such as Belgium, Finland, Spain and the United Kingdom, do not have consultation rights. Consequently, if taxpayers are not aware of a request, they cannot intervene. In Member States without notification rights, taxpayers may only intervene when they "exceptionally" become aware of the request – for example, when the tax authorities are not in the possession of the necessary information and have to request it. The right to intervene more or less depends on random events. Overall, it can be said that the level of taxpayer rights at this stage of the process of the exchange of information depends on notification rights. However, taxpayer rights are just effective with regard to the legal protection of taxpayers if they are informed of the request before the information is transmitted to the other Member State. In other circumstances, taxpayers have no possibility of appeal.

In the OECD's opinion, national law can help to prevent mistakes and facilitate the exchange of information.[66] However, notification rights should, of course, not give rise to delays in the exchange of information or make it ineffective. It is the task of the national law, on the one hand, to protect its taxpayers and, on the other, to create rules that permit the effective and swift exchange of information between states.

With regard to consultation rights, opinions have been voiced in the German literature that hearings may not have a positive effect on the result of the investigation in all cases because, if taxpayers are warned in advance, they may be able to defeat the objective of the request by adopting counteractive measures.[67] This is often the case for tax fraud investigations. Consequently, it is advocated that, in urgent situations, no hearing should take place, as this could endanger the exchange of information. Generally, extensive legal protection may block the exchange of information. As a result, the public interest of an practicable exchange of information must be balanced against the individual's rights to legal protection. Accordingly, taxpayers must provide convincing evidence to that violation of their individual rights is at hand (for example, with regard to business secrets). If there is no evidence that the tax authorities could use business secrets for purposes other than lawful taxation, the information should be exchanged without delay.

A highly developed instrument for legal protection is the preliminary injunction used by a court before a final judgement that prohibits the delivery of cross-border information. However, in most states, there are only less effective legal protection instruments, which, at least, provide for claims in respect of the damage that a taxpayer has suffered as a result of the divulgence of commercial, business, professional or other secrets.

5.3. Legal protection and making requests

Where the taxpayer's Member State of residence intends to request information from another Member State regarding the taxpayer's tax situation in that Member State, the EU-wide legal position of the taxpayer is weaker than in the case of incoming requests. Only a few Member States provide for notification rights in this situation. Accordingly, taxpayers are usually not informed of any requests made, and have very few rights that prevent a Member State of residence from requesting information from another Member State. Fortunately, however, some Member States first cooperate with taxpayers and try to obtain the required information from them before sending a request to another Member State. In many cases, this can result in effective and satisfying resolutions of any issues.[68]

6. Requirements for Exchange of Information

Weaknesses remain regarding the effectiveness of the exchange of information, even though the importance of exchange of information is internationally acknowledged, as is evident from the great number of TIEAs that have been concluded recently.

Currently, language problems are resolved by using internal or external translation services. This, however, delays the exchange of information and gives rise to additional costs. A solution to this problem may be

62. Id.
63. Seer and Gabert, supra note 15, p. 17.
64. Seer and Gabert, supra note 27. See also the various national reports in Seer and Gabert, supra note 13.
65. P. Herrera, "Mutual Assistance in Tax Affairs and the Burden of Proof regarding Tax Authorities", in Seer and Gabert, supra note 13, pp. 91-102.
66. Para. 14.1 of the Commentary on Art. 26 of the OECD Model.
67. D. Carl and J. Klos, *Leitfaden zur internationalen Amts- und Rechtshilfe ind Steuersachen* (Herne: Verlag Neue Wirtschafts-Briefe, 1995), p. 125.
68. Seer and Gabert, supra note 27.

offered by Art. 20 of the Proposal, which would permit two Member States that cooperate to agree on one language. Such a provision may avoid discussion if, from the outset, English would become the language of the exchange of information. In any event, standard forms should be used as widely as possible to reduce language problems.

The use of the Common Communication Network, which is already successfully employed with regard to VAT, could also increase the efficiency of the exchange of information with regard to direct taxation. In this respect, it would be helpful to implement special training programmes for the staff of the tax authorities, because a lack of knowledge regarding mutual assistance can be a barrier to the exchange of information itself. The Commission has recognized this and offers suitable training courses via the "Fiscalis" programme.[69]

A deficiency in the current exchange of information in the European Union is that there are no time limits within which a request for information must be answered. If using the exchange of information process is time-consuming and cumbersome, it is unattractive for the tax authorities. Accordingly, introducing such time limits, as is proposed in Art. 7 of the Proposal, would be desirable.

This should be accompanied by a "transnational administrative culture", which must be created to overcome the currently conservative attitude to international tax cooperation. To this end, it would be necessary that the relevance and the mutuality of the exchange of information are recognized by all. The reservation of the tax authorities regarding mutual assistance is not surprising, considering the current situation. On the one hand, the tax authorities must work on cases and sometimes even investigate ones that have no relevance for them. Accordingly, the tax authorities may be unwilling to accept the additional work posed by tax cases of a foreign tax authority. On the other hand, the tax authorities requesting information cannot take action against the requested tax authority in respect of any delayed or deferred treatment of the request.

However, the changes in the Proposal reveal that the Commission has recognized the need for effective exchange of information and responded accordingly. All the relevant areas regarding the exchange of information would be affected by major changes, which should help to improve the exchange of information.

7. Conclusions

The authors' (ten) conclusions in respect of the discussion in this article are as follows:

(1) In order to overcome the conflict between material universality and formal territoriality, it is necessary to expand the scope of the exchange of information with regard to tax matters.

(2) The fact that various legal instruments have been implemented makes it difficult for the tax authorities and taxpayers to obtain an accurate overview. The Mutual Assistance Directives 1976[70] and 1977 and the Savings Directive have been implemented in every Member State. The Joint Council is less relevant in an EU context, but more so in relationships with third countries. The national laws that have been implemented on the basis of the Directives override the treaty provisions that are based on Arts. 26 and 27 of the OECD Model. Only if the duty to provide information deriving from a tax treaty goes further than the duty under the Directives do the provisions of the tax treaty have precedence. The same is true if the legal protection in respect of the individual rights of taxpayers in tax treaties goes further than in the Directives. In this regard, the Directives define a minimum standard of mutual assistance amongst the Member States, including legal protection in respect of the individual rights of taxpayers.

(3) The following three kinds of mutual-assistance instrument exist: (a) the exchange of information on request; (b) the spontaneous exchange of information; and (c) the automatic exchange of information. There is no clear tendency to use a given instrument in preference to any other or any hierarchy in their use. Each instrument has a different scope, which depends on the case in question and the nature of the information required. A request for information is an appropriate instrument in certain individual cases when uncertainty following a national investigation remains regarding facts within the territorial sphere of another state. Accordingly, the number of requests is not very large and varies from state to state. In contrast, the automatic exchange of information is increasing in importance or, at any rate, in numbers. The automatic exchange of information has a more preventive function, whereas the spontaneous exchange of information is based on specific tax risks in individual cases. Simultaneous tax investigations are still rare. In this regard, the scope of simultaneous tax investigations is limited to transfer pricing issues within international groups of companies and VAT business-to-business transactions.

(4) Spontaneous and automatic exchange of information is a step away from passive exchange of information towards more active exchange of information. Simultaneous controls also allow for active exchange of information if they permit the staff of foreign tax authorities not only to attend a tax audit, but also give such staff the right to investigate.

(5) In order to comply with the request of another Member State, it is not always sufficient to answer by only reporting readily available information. Accordingly, it may also be necessary to examine the

69. For the "Fiscalis 2013" training courses, see Art. 10 of Decision No. 1482/2007/EC of the European Parliament and of the Council of 11 December 2007, which established a Community programme to improve the operation of taxation systems in the Internal Market, thereby repealing Decision No. 2235/2002/EC.
70. Council Directive 76/308/EEC of 15 March 1976.

facts as established by tax audits, thereby obtaining information and documents from taxpayers, third persons or other investigations. The primary difference in the activities of the tax authorities arises from the different treatment of bank secrecy in national laws. In this regard, the Proposal distinguishes between bank and business secrets. Business secrecy protects enterprises and innovations or investments to stimulate economic competitiveness. In contrast, bank secrecy can prevent the tax authorities from obtaining information in respect of all of the relevant income of taxpayers and may lead to tax fraud and tax evasion. Accordingly, maintaining national bank secrecy is an obstacle to functional mutual assistance between tax authorities.

(6) The intensity of mutual assistance depends on the practical cooperation between the tax authorities of the Member States. Most Member States generally request information from their neighbouring Member States more often than from other Member States. The willingness of the Member States to conclude mutual agreements within the meaning of Art. 9(2) of the Mutual Assistance Directive 1977 is also much greater between neighbouring Member States. Important preconditions for effective mutual assistance are language skills, standardized electronic forms, clear competences, a non-bureaucratic approach of the competent authorities, a fast response and a genuine practice of reciprocity. These preconditions are, nevertheless, not always fulfilled. The authors have noted deficiencies in language and knowledge, a distrust of other tax authorities and an "anti-mutual-assistance mentality", caused by the limited resources of tax authorities. The tax authorities should invest in language training and the education of their staff, as well as in electronic data systems so as to change the purely domestic national tax attitude to a more international and EU-oriented perspective. The time in which to answer requests should also be reduced to an average of less than six months.

(7) Some states have expanded taxpayer duties to cooperate with the national tax authorities with regard to cross-border activities. This leads to a smaller number of information requests regarding direct taxes from these states, as the tax authorities can use the expanded duties to obtain the information directly from taxpayers. In this context, expanded duties can even shift the burden of proof to taxpayers. The authors have identified three different general models as to how the burden of proof is allocated:

   (a) Only one party bears the burden of proof – either taxpayers or the tax authorities. There are legislations in which the tax authorities generally bear the burden of proof, but this can be transferred to taxpayers if they do not provide the tax authorities with the required information.

   (b) The burden of proof is allocated by means of a sphere theory. Consequently, the burden of proof is borne by the party that can most easily obtain access to the required information and has the most practical possibilities to provide evidence. In part, this form of the allocation of the burden of proof is effected by provisions stating that the tax authorities must provide evidence regarding facts that increase tax liabilities and that the taxpayer must provide evidence regarding facts that reduce the tax liabilities. These cases overlap with the model described in (c).

   (c) The burden of proof lies with the party that claims a fact or wants to make a right effective.

(8) With regard to the legal protection of taxpayers, a distinction must be made between incoming requests and making requests. In respect of incoming requests, the authors have found a strict relationship between the notification duties of the tax authorities, and consultation and intervention rights. The notification right is part of the legal protection against delivery of information that could divulge the business or professional secrets of taxpayers. The range of legal protection is wide in many states. A highly developed instrument of legal protection is the preliminary injunction used by a court before a final judgement prohibits the cross-border delivery of information. However, in most states, the authors only found less effective forms of legal protection, which, at least, provide for claims for the damages that taxpayers have sustained as a result of divulgence of business, professional or other secrets. Compared to the legal protection regarding incoming requests, the legal protection against making requests is weaker. In these circumstances, most states do not provide for notification rights.

(9) The interests of taxpayers in legal protection must be balanced against the valid public interests of states in providing mutual assistance to other states and in exchanging tax-relevant information. Legal protection should not be misused so as to hamper the exchange of information and requests.

(10) Finally, acceptance of the exchange of information has recently increasedgreatly. The OECD and the European Union have made remarkable efforts to expand the exchange of information and to raise its standards. Constant surveillance by the OECD has resulted in tax havens concluding more TIEAs, giving rise to a paradigm change in their tax policy. The increasing willingness of tax havens to cooperate may ultimately result in the abolition of bank secrecy. Recently, in order to monitor and promote effective exchange of information, the OECD Global Forum has established a Peer Review Group, which has a three-year mandate in which to peer review all of the OECD Member countries and other jurisdictions that may require special attention. This is yet another important step in making the exchange of information in tax matters more effective.

