UK NATIONAL REPORT: EATLP ISTANBUL CONGRESS 2014

Exchange of Information

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In his 2013 addresses to both the G8 and the Open Government Partnership (OGP), UK Prime Minister David Cameron stated that tax transparency is a priority for the UK.[1] In his G8 address, Cameron outlined three areas in which tax transparency could be enhanced: automatic exchange of information (EOI), clear information relating to company reporting of profits and taxes paid and to which jurisdiction, and a central register of company ownership and beneficial ownership. The UK has recently enacted laws that provide for automatic EOI and significant steps have been made in the direction of a freely and publicly available central register of the beneficial ownership of companies in the UK.[2] Other milestones in the UK's steps toward tax transparency are: the establishment of Her Majesty's Commissioners for Revenue and Customs (HMRC) Tax Transparency Sector Board; HMRC having transparency and open data as key principles; and London hosting the OGP summit. It is evident the UK wishes to lead the way in Open Data.

Collection of Information

HMRC collects information from: taxpayer data (i.e., self-assessment returns, disclosure facility data, data obtained through investigations and enquiries, and VAT and other returns such as excise); cross government data (mostly 'cash seizure reports', which record instances where the amount of cash is over £1000 and unlawful conduct is suspected,[3] and 'suspicious activity reports', which are reported to the National Crime Agency (NCA), under the anti-money laundering (AML) legislation); other jurisdiction data;[4] and third party data (HMRC information notices,[5] voluntary disclosures on

[1] G8 Open for Growth, 15 June 2013, www.gov.uk/government/announcements, accessed 12 Sept. 2013; and OGP, 31 Oct. 2013, www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013, accessed 6 Nov. 2013.
[2] In his OGP address, Cameron announced making the register of company beneficial ownership public.
[3] The Proceeds of Crime Act (c.29), s.289 *et seq*.
[4] Consists of data received (i) annually as a result of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (the European Savings Directive) and (ii) on request or spontaneously under bilateral and multilateral EOI agreements.
[5] See FA 2008, Sch. 36, Pt.1, particularly paras. 2 and 5. A 'third party notice' requires a third party to provide information about a person whose identity is known to HMRC. The third party notice must name the person to whom it relates, unless the First-tier Tribunal disapplies this requirement. Where the identity of the person or class of persons is unknown to HMRC but there is information from which their identity can be ascertained, HMRC can issue an identification notice. Previously, this type of notice only related to information relating to UK tax and therefore was not applicable in cases of EOI. However, due to pressure from the Global forum,

another's tax position; credit reference agency data,[6] whistle-blower data like the 'evasion hotline'; and Merchant Acquirers Data under Finance Act (FA) 2013.[7]

Schedule 36 to FA 2008 grants HMRC the right to check a person's tax position[8] by obtaining documents from the person to whom the information relates or a third party, as well as inspecting business premises.[9] The powers extend to all major taxes other than excise duties, which have their own powers,[10] and 'relevant foreign tax', which includes tax of an EU Member State subject to an EU Directive on EOI as well as any tax subject to international tax enforcement arrangements.[11] Only documentation that is in the possession or power of a person can be inspected or required to be produced.[12] HMRC may only use these powers if reasonably required for checking a person's tax position.[13] HMRC considers that 'reasonably required' signifies a balance between "the burden put on someone to provide information or face an inspection" and its importance "in deciding on the correct tax position".[14] A similar balance is to be found in Article 8(2) of the European Convention on Human Rights.[15] Certain documentation is exempt from the 'reasonably required' test (e.g. old documents, appeal material, personal records and legally privileged documentation).[16]

HMRC now has the power to require a third party to provide 'relevant information' (i.e. name, last known address and, where relevant, date of birth, based on the identifying information provided by HMRC) about another person, provided certain conditions are met: (i) the information is reasonably required; (ii) the person's identity is not known but HMRC holds other information from which the identity can be ascertained; (iii) HMRC has reason to believe that the person will be able to ascertain the person's identity from the information held by HMRC and the person obtained the relevant information in the course of carrying on a business; (iv) the person's identity cannot readily be ascertained by other means from the information held by HMRC.

[6] As part of the Cross-Government Counter Fraud Task Force, HMRC has used data from credit reference agencies to identify undisclosed partners for tax credit eligibility.

[7] HMRC will shortly have access to bulk data about business taxpayers from merchant acquirers (who process debit and credit cards on behalf of retailer and merchants). The information includes the retailer's: bank account details; name and address; VAT number; and monthly totals of debit and credit card sales. Purchaser details will not be revealed. Relying upon credit and debit card data without analysing alternative forms of online payment may result in HMRC still not having the full picture of revenue receipts. Furthermore, the data volume means HMRC will need sophisticated analytical tools to spot inconsistencies with other data. See T. Buckingham, *HMRC Harness Turnover Data in Battle against Tax Evasion*, LexisNexis PSL, 13 September 2013.

[8] Tax position is very widely defined. See FA 2008, Sch.36, para. 64(1).

[9] FA 2008, Sch.36, paras. 1, 2 and 10. Wider powers are available when fraud is suspected.

[10] Schedule 36 FA 2008 para. 63, 64(2) and 84. See also HMRC, CH20000.

[11] FA 2008, Sch. 36, para. 63(4).

[12] FA 2008, Sch.36, para. 18. HMRC states 'in the possession' means that the person has physical control over the document and whom the document belongs to is not relevant and 'in the power' means the person has the ability to get the document, or a copy of it, from whoever holds it: HMRC CH22120. For application under the Taxes Management Act 1970, s.20, see *Parissis and Others v CRC* [2011] UKFTT 218 (TC) (documents are deemed to be in a person's power if they can obtain them by influence or otherwise, and without great expense, from another person even where that person has the legal right to refuse to produce them).

[13] FA 2008, Sch.36, paras. 1(1)(b) and 2(1)(b).

[14] HMRC CH21620. See also *N J Cowan v Revenue & Customs* [2013] UKFTT 604 (TC) (there must be a reasonable basis for contending the possibility that tax has been under-declared or an incorrect claim made).

[15] For UK implementing legislation, see Human Rights Act 1998, s.1(3). See *Amann v Switzerland* (16/2/2000) ECHR 27798/95 (that 'private information' should be interpreted broadly). See also HMRC CH21380 (interference with the right to privacy is proportionate where it is the minimum necessary to achieve the aim).

[16] HMRC CH22100.

In addition to tax law powers, HMRC are granted powers by the Police and Criminal Evidence Act 1984 (PACE); the Serious Organised Crime and Police Act 2005 (SOCPA), the Proceeds of Crime Act 2002 (POCA) and the Criminal Justice and Police Act 2001 (CJPA), whereby HMRC may enter and search premises, require the production of documentation, seize items or require relevant material to be handed over, and arrest persons.[17] HMRC can publish the details of acts of deliberate evasion that occur on or after 1 April 2010 or relate to a tax period beginning on or after this date.

Once HMRC has the data, it feeds it into one of its analytical tools, such as CONNECT, which contains over a billion taxpayer and third party records and brings together data from many different sources and cross-matches it to uncover hidden relationships between people, organisations and other previously unidentifiable data. With this information, HMRC is able to produce target profiles and models to risk assess transactions and generate campaigns and cases for investigation. The Global Forum states that HMRC has such extensive information holdings (including access to many registers) that approximately half of responses to international information requests are provided by HMRC without the need to exercise information gathering powers.[18] For instance, in 56% of Schedule 36 requests, HMRC has access to sufficient information on file or though Companies House.

Evolution of the Current System

April 2005. Commissioners for Revenue and Customs Act 2005 receives Royal Assent. Merging of Inland Revenue and Customs and Excise (to form HMRC on 18 April 2005) is *inter alia* justified on the basis of closing the tax gap and ensuring compliance across the taxation system.

November 2007. HMRC has criminal investigation powers under FA 2007, ss. 82-84 (England, Wales and Northern Ireland). HMRC has powers to obtain orders for the production of documents, to search premises and copy or remove documents and other material and to make arrests under the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence Order (Northern Ireland) 1989.

2008. FA 2008, Schedule 36, gives HMRC powers to gather information and examine documents, or inspect business premises and the business assets and business documents on those premises. These powers apply to income tax, capital gains tax, corporation tax and VAT. They also apply to employers' obligations to deduct and account for pay as you earn (PAYE) & national insurance contributions (NIC), and deductions under the Construction Industry Scheme.

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[17] See, for example, PACE, ss.8, 17, 19, 24 and Sch.1; POCA, s.389; and CJPA 2001, ss.1 and 50. Warrants to enter and search premises must provide sufficient information about the relevance and value of the evidence sought: *R (Redknapp and Another) v Commissioner of The City of London Police* [2009] 1 WLR; *R (Redknapp and Another) v Commissioner of The City of London Police* [2009] 1 WLR; and *R (on the application of Anand) v HMRC and Crawley Magistrates Court*, 9 Oct. 2012 (unreported).

[18] OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Review Report Combined: Phase 1 and Phase 2, incorporating Phase 2 Ratings: United Kingdom*, Nov. 2013, p.8.

1 April 2010. HMRC information gathering powers extended to insurance premium tax, inheritance tax, stamp duty land tax, stamp duty reserve tax, petroleum revenue tax, aggregates levy, climate change levy and landfill tax (and bank payroll tax from 31 August 2010). Inspection powers under FA 2008, Schedule 36, do not apply to excise checks on revenue traders.

1 April 2012. HMRC has the power to ask a third party to provide the unknown name of a taxpayer when it can be deduced by the third party from other details relating to that taxpayer. Once the taxpayers name is known, HMRC can then request the relevant information from a third party.[19]

Criminal Tax Prosecutions

The Revenue and Customs Division of the Crown Prosecution Service (specialist division of the Criminal Prosecutor) and the Revenue and Customs Prosecutions Office of HMRC (division of the tax authority) merged in 2010, forming the Central Fraud Group (CFG). The CFG prosecutes all cases passed to it by HMRC following an investigation. HMRC's Criminal Investigation Directorate conducts criminal tax investigations. Both investigator and prosecutor are subject to the data protection rules. HMRC has its own civil regime for recovering tax liabilities.

The CFG provides specialist national prosecution and advisory services for complex, sensitive and high value fraud and corruption cases throughout England and Wales, and for all revenue fraud cases investigated by HMRC. HMRC may become actively involved in a case of fraud prior to a prosecution by providing guidance during the investigation (e.g. types of evidence required or offences that may have been committed).

Money Laundering Regulations 2007

The UK is one of 34 member countries of the Financial Action Task Force (FATF), an inter-governmental body that sets global standards on tackling money laundering and terrorist finance. HM Treasury (HMT) is the leading AML authority and is responsible for implementing the Money Laundering Directives. HMT is the UK's FATF representative: it sanctions industry guidelines on compliance and appoints supervisors. For example, HMRC supervises: Money Service Businesses; High Value Dealers; Trust or Company Service Providers and Accountancy Service Providers. Supervised entities must carry out "customer due diligence", which includes checking identification and in some cases the nature of transactions, the origin of funds etc. Suspicious behaviour must be reported to the NCA, which then authorizes the transaction, or not. Over 200,000 suspicious activity reports are received annually. POCA criminalizes all forms of money laundering and creates offences

[19] FA 2012, s.224, amending FA 2008, Sch.36.

concerning failures to report suspicion of money laundering.[20] HMRC can use financial information collected under the AML rules.

Centralised Data Bank

There is no UK centralized financial data bank but the UK is working towards meeting the OGP's Grand Challenges by: opening up government data; fighting corruption and strengthening democracy through transparent government; promoting fiscal transparency by helping citizens follow the money; transforming the relationship between citizens and governments; and ensuring natural resources and extractive revenue are used for the public benefit.[21] As part of this program, the UK has implemented an Open Data Strategy. There is a Transparency Team at the Cabinet Office.

Those seeking to access personal data about themselves, including financial information, may do so by exercising their rights under the Data Protection Act 1998 (DPA).[22] All UK companies have to be registered with Companies House (CH).[23] Overseas companies must register if they have some degree of UK physical presence through which they do business.[24] CH collects information, including financial information, about registered companies. *CREST* is the UK's settlement and clearing system. The register of legal title to shares of UK companies, which are issued in dematerialized form, is constituted by the entry in the CREST system. On 31 October 2013, Cameron announced that the UK would make publicly available a central register of beneficial ownership.[25] CH will publish information on individuals with an interest of more than 25% of a company's shares or voting rights or who otherwise control the way it is run.

The UK Corporate and Individual Tax and Financial Transparency Bill 2013-14 received its second reading on 6 September 2013.[26] It calls for disclosure of large company financial information, beneficial ownership, and the identity of certain companies holding bank accounts, as well as the publication of tax returns for high-income individuals and the largest 250 UK companies.

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[20] POCA, ss.327-9.
[21] Cabinet Office, *Open Government Partnership UK National Action Plan 2013 to 2015*, Oct. 2013, p.4.
[22] The right is referred to as 'subject access': DPA, ss.7-9A.
[23] Companies Act 2006, Pt. 8, Ch.2.
[24] Overseas Companies Regulations 2009.
[25] See OGP (2013), fn.1 above.
[26] UK Parliament Website, *Latest News on United Kingdom Corporate and Individual Tax and Financial Transparency Bill 2013-14*, services.parliament.uk/bills/2013-14/unitedkingdomcorporateandindividualtaxandfinancialtransparency.html, accessed 6 November 2013.

Confidentiality

In the UK, the right to collect information for tax purposes is restricted to varying extents by: legal professional privilege; banks' common law duty of confidentiality; safeguards arising from tax law; and the implementation of the Data Protection Directive (95/46/EC of 24/10/95).

Legal Professional Privilege. UK legal professional privilege encompasses communication between a client and a lawyer related to legal proceedings or advice.[27] Some were of the view that that it extended to tax law advice by an auditor or a tax adviser, but the legal advice privilege extends *only* to lawyers.[28] It is generally accepted that there is a substantial public interest in maintaining the privilege. Only in circumstances with evidence of "equally strong countervailing considerations" can it be circumvented.[29]

Banks. Banks owe a duty of confidentiality under both legal and equitable principles.[30] There is an implied confidentiality contract term between banks and their customers. The common law duty sets out the nature of the duty and four circumstances under which a bank can legally disclose information about its customer: where disclosure is under compulsion by law (e.g. reporting suspicious activities under the AML rules);[31] where there is a public duty to disclose; where the bank's interests require disclosure; and where the customer expressly or impliedly consents to disclosure.[32] Banks also owe an equitable duty of confidentiality in cases where there may be no contract (e.g. prospective bank customers who expect information supplied by them is subject to legal protection).[33]

Safeguards Arising from Tax Law. HMRC is not permitted to require a person to provide information or produce a document where it relates to legal professional privilege; the conduct of a

[27] Freedom of Information Act 2000, s.42, protects the confidential relationship between client and lawyer.
[28] *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax* [2013] UKSC 1.
[29] *Bellamy v Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 Apr. 2006); *John Pugh v Information Commissioner and Ministry of Defence* (EA/2007/0055, 17 Dec. 2007); *Department of Business and Regulatory Reform v O'Brien* [2009] EWHC 164 (QB); Ministry of Justice, *Freedom of Information Guidance: Exemptions Guidance*. *Section 42: Legal Professional Privilege*, 20 June 2008, www.justice.gov.uk/downloads/information-access-rights/foi/foi-exemption-section42.pdf, accessed 11 Sept. 2013.
[30] Cf the Swiss position, which imposes criminal sanctions on unauthorized disclosure of banking information. D. Chaikin, "Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime", *Sydney Law Review*, Vol.33, p.265 at 266.
[31] Another example is where foreign courts obtain evidence in the UK in relation to a "civil or commercial matter" as per the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970, which requires UK courts to assist courts in other jurisdictions to take evidence from, *inter alia*, banks or obtain bank documents. For requests made within the EU (except Denmark), see Council Regulation 1206/2001 on the Co-operation between Member States in the Taking of Evidence in Civil or Commercial Matters.
[32] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.
[33] See D. Chaikin, fn.30 above, at p.268; *A-G (UK) v Guardian Newspapers Ltd (No 2)* [1988] 3 WLR 776, 806 (Goff LJ); and *Coco v AN (both fines and imprisonment) Clark (Engineers) Ltd* [1969] RPC 41, 46 (Megarry J).

pending tax appeal; personal records; journalistic material; auditors' papers; and tax advisers' papers.[34] The Powers Oversight Forum is the main check on the way HMRC uses its wide-ranging powers under Schedule 36 of FA 2008. As noted above, the 'reasonably required' criterion includes an objective element: there needs to be some factual foundation to support a claim that the information/ documentation is reasonably required in the particular circumstances as opposed to permitting fishing expeditions.[35]

Data Protection. The DPA requires organisations that process personal data to meet eight data protection principles.[36] It regulates the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information and grants individuals the legal right to: know whether information about them is held on computer records or in clerical records; to be supplied with that data; receive compensation if they are damaged by inaccurate data or by the loss or unauthorised destruction or disclosure of personal data; have inaccurate data erased or corrected and complain to the Data Protection Registrar about any breach of the Act. HMRC is a data controller per the DPA and so must comply with it.[37]

The DPA applies to the UK-US Agreement to Improve International Tax Compliance and Implement FATCA (the UK-US IGA), which concerns accounts held by individuals. As well as HMRC, the financial institutions that fall within the UK-US IGA are DPA data controllers. Under the UK-US IGA, financial institutions reporting accounts to HMRC must notify customers whose accounts have been reported. The first information exchange will take place in 2015 but will refer to accounts held in 2013 and 2014.[38]

The DPA also applies to several tax transparency initiatives in HMRCs Open Data Strategy (ODS):

- Datalab where independent institutions can access, free of charge, anonymised taxpayer and customs data, for research and analysis purposes. Data is accessible by certain identifiable approved groups, such as approved academic researchers. No information can be taken until HMRC has ensured that such information only consists of aggregate data.[39]

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[34] FA 2008, Sch.36, paras. 19, 24 and 25. See HMRC CH22300 and CH22340. See also *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax* [2013] UKSC 1 (delineation between legal and tax adviser privilege).
[35] J. Fisher, *Tax Journal*, Issue 1127, 15 June 2012, p.8. Accessed on 4 August 2013: www.aileenbarrytax.co.uk/pdfs/Tax%20Journal%20issue%201127%20HMRC%20powers.pdf.
[36] DPA, Sch.1.
[37] Commissioners for Revenue and Customs Act 2005, s.22.
[38] HMRC, *Implementation of the UK-US Agreement to Improve International Tax Compliance and to Implement FATCA: Data Protection FAQs*, 2012, www.hmrc.gov.uk/budget-updates/march2012/draft-dpa-fatca-faqs.pdf, accessed 11 Oct. 2013.
[39] HMRC Tax Transparency Sector Board, *The HMRC Datalab* (Briefing Document, Aug. 2013), www.gov.uk/government/uploads/system/uploads/attachment_data/file/254566/HMRC_Tax_Transparency_Sector_Board_Datalab_briefing_Aug_13.pdf, accessed 10 Sept. 2013.

- A dedicated transparency site that allows the general public to access certain data.
- Publication of an inventory of databases.[40]

Collection of Cross Border Financial Information

Whilst it was once accurate to distinguish between the collection of financial information for tax purposes for UK and non-UK taxpayers, this distinction no longer holds. As a member of the EU, the UK is required to ensure that it makes provision for EOI as part of the EU's assistance in collection of taxes initiatives. Note also the new Mutual Assistance Directive adopted by the European Council that came into force on 1 January 2013.

Exchange of Information

HMRC shares information with other government departments (e.g. the police), including other FATF supervisors via the AML Supervisors Forum. FATF supervisors can also share information via affinity groups (government supervisors, legal profession and accountancy, taxation, book-keeping and insolvency professions).[41] In addition to the FATF, the UK is a member of the Egmont Group (EG), where each member country is represented by their Financial Intelligence Units (FIUs).[42] The EG provides that FIUs should not prohibit or place unreasonable or unduly restrictive conditions on exchanging information or providing assistance. Relevantly, FIUs should not refuse a request for assistance on the grounds that it involves fiscal matters or the law requires financial institutions or designated non-financial businesses and professions (except where legal privilege or legal professional secrecy applies) to maintain secrecy or confidentiality.[43]

Historically, the UK has not provided assistance in the collection of other countries' taxes. In this context, assistance includes exchanging the financial information of taxpayers.[44] However, the UK has signed 148 international agreements – 124 Double Tax Conventions (DTCs) and 24 Tax Information Exchange Agreements (TIEAs) – which have created a network of EOI agreements with over 136 jurisdictions, including "all of the UK's main economic and diplomatic partners as well as financial centres".[45] Most international EOI for direct tax purposes is dealt with by an EOI team in the Centre for Exchange for Intelligence within HMRC's Risk and Intelligence Service in London.

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[40] HMRC, *Open Data Strategy*, June 2012, www.hmrc.gov.uk/transparency/open-data-strat.pdf, accessed 10 Sept. 2013.
[41] HMT, *Anti-Money Laundering and Counter Terrorist Finance Report 2011-12*, Jan. 2013, pp.15-16.
[42] See V. Nechaev, *Enhancing the Synergy between the FATF and the Egmont Group*, 21st Plenary of the Egmont Group of FIUs, Sun City, South Africa, 3 July 2013 (address on increasing FATF and EG synergy).
[43] *Egmont Group of Financial Intelligence Units Principles for Information Exchange between Financial Intelligence Units*, 28 October 2013, [24].
[44] See *Government of India v Taylor* [1955] AC 491; and P. Harris and D. Oliver, *International Commercial Tax* (CUP, 2010) at p.466.
[45] See OECD (2013), fn.18 above, at p.7.

In the UK, EOI can be based on bilateral agreements, multilateral agreements or EU legislation. The nature of the information exchanged can be targeted or broad. Where more than one legal instrument applies either to EOI (i) the instrument itself may address the issue or (ii) HMRC is free to select all of the available mechanisms or to choose the most appropriate.[46]

Bilateral Agreements

Territories can agree to co-operate in tax matters through EOI using bilateral agreements: DTCs or TIEAs. EOI provisions in a DTC are often based on Article 26 of the OECD Model Tax Convention (MTC). It is UK policy to include the latest version of MTC article 26 in all new DTCs.[47] TIEAs are also negotiated between two countries and enable governments to enforce their domestic tax laws by exchanging information relevant to a tax matter on request. TIEAs are either based on the OECD Model Agreement on Exchange of Information on Tax Matters model (MA) or one of the two FATCA-style models out of the US (Model IGAs). Currently, the UK's TIEAs broadly follow the MA. In the context of inheritance and estate duties, EOI may operate between the UK and other countries (e.g. Article 12 of the UK-US Estate and Gift Tax Convention 1980). The UK has entered a number of TIEAs with non-EU territories such as Jersey, Gibraltar and the Bahamas.

The UK's position with regards EOI appears to have been heavily influenced by external recommendations, in particular the OECD, the EU and, most recently, the USA. It would appear that the UK is moving towards automatic EOI as the default position.

Article 26: EOI on Request. The UK has entered into DTCs with 122 jurisdictions. EOI on request is provided for the administration and enforcement of domestic tax laws of the requesting jurisdiction where the information is: "foreseeably relevant" in 25 DTCs; "relevant" in 2 DTCs; and "necessary" in 93 DTCs.

Article 26: Application. EOI provisions in DTCs may apply to all persons or may be restricted in some way (e.g., the residents of one of the contracting states (CSs)). In the case of the UK, 45 DTCs have provisions that specifically provide for EOI with respect to *all* persons and 78 have EOI provisions that restrict the application to residents of one of the CSs. As stated by the Global Forum, the restriction is not significant in practice as the vast majority of these 78 jurisdictions are subject to EOI provisions in other EOI legal arrangements that apply to all persons.[48] Accordingly, there appears

[46] See OECD (2013), fn.18 above, at p.78.
[47] *Ibid.*
[48] *Ibid.* at pp.80-81.

to no applicability issue in respect of whose information can be exchanged within the UK's EOI network.[49]

Article 26: Banks. Of the UK's DTCs, 28 include the wording of Article 26(5) OECD Model Tax Convention (MTC). Thus, information cannot be withheld if it is held by a bank or other financial institution, nominee or person acting in an agency or a fiduciary capacity or it relates to ownership interests in a person. A further 10 do not contain the wording but either (i) the UK has TIEAs similar wording with those countries (Antigua and Barbuda, Belize, British Virgin Islands, Grenada, Guernsey, Isle of Man, Jersey and Saint Kitts and Nevis) or (ii) those countries are subject to Council Directive 77/799/EC (Finland and Greece). Approximately half (68) of the UK's DTCs, do not have provisions based upon Article 26(5) MTC but the UK interprets these DTCs as permitting reciprocal exchange of such information where domestic law permits such information exchange.[50] The UK has DTCs with 16 jurisdictions that either make no mention of bank information[51] or contain restrictive wording that does not permit the exchange of bank information.[52] Accordingly, it would appear that banking information cannot be legally exchanged via approximately an eighth of the UK's DTCs; can clearly be exchanged in approximately three eighths of the DTCs; and may be able to be exchanged in approximately half. The Global Forum is of the view that DTCs with provisions that are not in line with Article 26(5) 2005 should be re-negotiated. In practical terms, renegotiation may not affect the volume of data collected or exchanged by HMRC, as the treaty partner is an issue here. In other words, if the UK's biggest trading partners exchange data then a lot of data is already getting through.

TIEAs: EOI on Request. Of the UK's 22 TIEAs, EOI is provided for the administration and enforcement of domestic tax laws of the requesting jurisdiction where the information is: "foreseeably relevant" in 21 TIEAs; and "relevant" in the UK-Bermuda TIEA. All of the UK's TIEAs provide that all information including bank information can be exchanged.

Multilateral Agreements

The Council of Europe and OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (COEC) opened for signature by the member states of both organisations on 25 January 1988. It was amended in response to the call of the G20 at its April 2009 London Summit to align it to the international standard on exchange and to open it to all countries – in particular that developing

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[49] The Global Forum only cites one potential issue with Barbados and Jamaica: *ibid*.
[50] Of the 68 DTCs with restrictive wording but relaxed convention, exchange of bank information is most likely to be restricted in the UK's DTCs with Brunei, Kiribati, Tuvalu, Montserrat, Sierra Leone and Solomon Islands. See OECD (2013), fn.18 above, at p.83.
[51] UK-Oman DTC in spite of the fact it was re-negotiated post 2005.
[52] Barbados, Egypt, Fiji, Gambia, Israel, Jamaica, Kenya, Namibia, Nigeria, Papua New Guinea, Sri Lanka, Swaziland, Tunisia, Zambia and Zimbabwe. See OECD (2013), fn.18 above, at pp.82-83.

countries could benefit from the new more transparent environment.[53] It was opened for signature on 1 June 2011. It provides for all possible forms of administrative cooperation between States, contains strict rules on confidentiality and proper use, and permits automatic EOI.[54]

The G5 Multilateral Agreement on Automatic Exchange of Information was entered into by the UK, Germany, France, Italy and Spain. It now has a further 37 signatories.[55] It is not as onerous as US FATCA: it does not use FATCA definitions and is coordinated with AML and know your client procedures ("AML/KYC") already in existence across the EU. It is a multilateral information-sharing pilot. Tax information will be automatically shared between participating jurisdictions.

Black and Grey List Jurisdictions

The terminology of Black and Grey List Jurisdictions appears to have been superseded by the compliant status of jurisdictions within the Tax Transparency Guidelines of the Global Forum. At the annual meeting of the Global Forum, four countries (British Virgin Islands, Cyprus, the Seychelles and Luxembourg) were considered to be non-compliant and two countries were considered to be partially compliant (Turkey and Austria). The UK was considered to be largely compliant.

The UK has various bilateral arrangements with jurisdictions that are non-compliant (British Virgin Islands, Cyprus and Luxembourg) and partially compliant (Austria and Turkey). The UK has DTCs that contain an EOI article with all of the aforementioned countries bar the British Virgin Islands, with which the UK has entered into a FATCA-style arrangement.

Administrative Cooperation in Tax Matters under EU Law

European legislation relevant to EOI involves directives and regulations that provide for EOI at a general level, for certain types of income or for certain types of tax. These include:

The **Mutual Assistance Directive** 77/7799/EEC, which required information exchange prior to 1 January 2013, complemented the existing provisions on mutual assistance in bilateral tax treaties concluded between the Member States by requiring mutual assistance in the area of direct taxation and insurance premiums.

[53] The UK has signed but not yet ratified the amending protocol. See OECD (2013), fn.18 above, at p.77.
[54] OECD, *A Step Change in Tax Transparency: Delivering a Standardised, Secure and Cost Effective Model of Bilateral Automatic Exchange for the Multilateral Context* (Report for the G8 Summit 2013, June 2013), [21].
[55] Argentina, Belgium, Colombia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, UK (Crown Dependencies of Isle of Man, Guernsey and Jersey and Overseas Territories of Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Montserrat, Turks and Caicos).

The **new Mutual Assistance Directive** 2011/16/EU, which requires EOI on or after 1 January 2013, was implemented in the UK by European Administrative Co-operation (Taxation Regulations) 2012.[56]

Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

The **European Savings Directive** (EUSD), which entered into force on 1 January 2005, is a targeted measure. It aims to counter cross-border tax evasion by collecting and exchanging information about foreign resident individuals receiving savings income outside their resident state. All Member States are ultimately expected to automatically exchange information on interest payments by paying agents established in their territories. All Member States, except Belgium, Luxembourg and Austria, immediately introduced such a system of information reporting. Those countries were authorized to withhold tax at increasing rates during an interim period (as of 2011 WHT is 35%). Whilst Belgium now exchanges information on an automatic basis, Austria and Luxembourg continue to pay WHT.

The EUSD has been implemented in the UK by The Reporting of Savings Income Information Regulations 2003 (SI 2003/3297), which came into effect on 1 July 2005. The UK has signed nine reciprocal and nine non-reciprocal TIEAs in relation to the EUSD:

- Reciprocal – Jersey, Gibraltar, Guernsey, Isle of Man, Montserrat, British Virgin Islands, Netherlands Antilles and Aruba; and
- Non-reciprocal – Anguilla, Cayman Islands, Turks and Caicos.

Proposed amendments to enlarge the EUSD's scope include expanding the concept of interest payment, paying agent and beneficial owner. The aim is to incorporate payments arising from investment funds, pension funds, innovative instruments and payments made through trusts and foundations, to capture all types of savings income and products that generate interest or equivalent income. The aim is also to require tax authorities to take reasonable steps to establish the identity of beneficial owners using a 'look-through' approach.[57]

The amended version of the EUSD is seemingly some way off, given the opposition by Austria and Luxembourg and given that the amendments are subject to a unanimous vote.[58] The inability to achieve unanimity on the proposed amendments to the EUSD coupled with the recent pronouncements

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[56] SI 2012/3062.

[57] See Proposal for a Council Directive amending Directive 2003/48/EC on taxation of savings income in the form of interest payments 6946/11, 4 March 2011.

[58] Austria and Luxembourg will not approve the amendments while the result will leave them in a worse position than other (non-EU) financial centres (e.g. Switzerland). They wish to continue being permitted to charge withholding tax in place of automatic EOI until such time as non-EU financial centres change their practice. See EC*OFIN Report to the European Council on Tax Issues*, 16327/12, 23 Nov. 2012.

of support for FATCA-style reporting would appear to lend some weight to Eddie Teare's statement that FATCA style reporting is likely to be rolled out across the EU and possibly further afield.[59]

Asset Recovery Offices

The European Commission's Asset Recovery Offices programme has as its objective the facilitation of cooperation between Member States on the tracing and identification of proceeds of crime and other property belonging to criminals across the EU. Council Decision 2007/845/JHA obliges Member States to set up national central contact points to exchange information and best practices.[60] National Asset Recovery Offices are tasked with identifying illegally acquired assets on their national territory and facilitate exchange of relevant information at the EU level.

The UK government's view is that the UK is compliant with the Council Decision having created an Asset Recovery Office (ARO) within the UKFIU.[61] The UK ARO also processes non-EU requests including Egmont Group requests and Camden Assets Recovery Interagency Network (CARIN) channels. The UK has amended its legislation to enable the enforcement of overseas civil non-conviction based freezing orders in the UK courts (powers already available in criminal law cases).[62] Requests for information between AROs are regulated by set time limits varying from eight hours to two weeks.[63] In 2012, there were 72 inbound and 277 outbound requests from Member States.[64]

SOLVIT

SOLVIT is an informal problem-solving network that aims to provide a practical solution to a problem that arises with public authorities, where citizens and businesses exercise their free movement rights.[65] The problem must concern the misapplication or misinterpretation of EU legislation, causing a denial of internal market rights for the applicant. There is a SOLVIT Centre in all Member States, plus Norway, Lichtenstein and Iceland, that aim to solve problems within a short timeframe. In the UK, the Single Market Centre (set up 1 December 2012) brings together all the single market operational tools within a single team, including the Internal Market Scoreboard, SOLVIT and the Point of Single

[59] Isle of Man Treasury Minister Eddie Teare, Budget Speech, 19 February 2013 ("the FATCA model will ultimately be rolled out within Europe and beyond and it is very likely that it will replace the planned second EU Savings Directive").
[60] European Commission Press Release, *Commission report on 'Asset Recovery Offices': An important tool to go after criminals' money*, IP/11/464, 12/04/2011.
[61] European Scrutiny Committee, "The UK's Block Opt-Out of pre-Lisbon Criminal Law and Policing Measures", 7 Nov. 2013, [225], www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/683/68311.htm, accessed 9 Nov. 2013.
[62] STAR, "United Kingdom Asset Recovery Action Plan Implementation Road Map 2013", 27 Oct. 2013, star.worldbank.org/star/sites/star/files/uk_asset_recovery_action_plan_road_map-final.pdf, accessed 12 Nov. 2013.
[63] See European Scrutiny Committee (2013), at fn.61 above, [224].
[64] *Ibid.* [226].
[65] See EU Commission Communication 2001/71/0702 on "Effective Problem Solving in the Internal Market".

Contact (an online licensing service hosted by GOV.UK for services directive implementation).

FATCA

The Foreign Account Tax Compliance Act (FATCA) was enacted in the US as part of the Hiring Incentives to Restore Employment and comes into effect 1 July 2014. The objective is to improve compliance of US taxpayers with foreign financial assets and offshore accounts. FATCA relies upon foreign financial institutions reporting directly to the Inland Revenue Service (IRS) with information about financial accounts held by US taxpayers or held by foreign entities in which US taxpayers have substantial ownership. Non-compliant foreign financial institutions face a 30% withholding tax on certain US source payments irrespective of whether the payee is a US taxpayer.

In order to ensure compliance with FATCA, the US has to-date signed 19 intergovernmental agreements (IGAs) and claims to be negotiating with a further 80 countries.[66] There are two model agreements. Model One agreements provide that financial institutions report the information to their own governments, who then share the information with the IRS.[67] There are three model one versions: Model 1A Reciprocal; Model 1B Non-Reciprocal where there is a pre-existing DTC or TIEA; and an alternative Model 1B Non-Reciprocal where there is no pre-existing DTC or TIEA. Model Two agreements provide that financial institutions report directly to the IRS.[68] There are two Model 2 versions: one for a pre-existing TIEA or DTC and one where no such arrangements are in place.

G5 and FATCA. Given the data protection issues involved in disclosing account information directly to the IRS, the UK (along with France, Germany, Italy and Spain) negotiated with the US to find a workable model EOI agreement. The Model Agreement to Improve Tax Compliance and Implement FATCA was published in July 2012 (US Model Agreement). The US Model Agreement formed the basis for the UK's subsequent IGA with the US (the UK-US IGA).

In April 2013 a Joint Statement was issued by the G5 stating the intergovernmental approach to be adopted: the development of a multilateral tax information automatic exchange agreement based on the US Model Agreement (G5 Pilot). Since its publication 37 countries (including Luxembourg, Liechtenstein, Colombia, Greece, Iceland and Malta) have signed up to the G5 Pilot.

[66] UK, Ireland, Bermuda, Malta, Guernsey, Jersey, Isle of Man, Costa Rica, France, Italy, Mexico, Norway, Denmark, Germany, Japan, Mauritius, Netherlands, Spain and Switzerland.
[67] Costa Rica, France, Malta, the Netherlands, Cayman Islands, Denmark, Germany, Ireland, Mexico, Norway, Spain, Mauritius and the UK.
[68] Japan, Switzerland and Bermuda.

UK-US IGA. The UK has entered the "UK-US Agreement to Improve International Tax Compliance and Implement FATCA" (UK-US IGA), which was signed on 12 September 2012.[69] It is a Model 1A agreement and reduces some of the administrative burden of complying with the regulations and provides a mechanism for UK financial institutions to comply with their obligations without breaching data protection laws. Under the UK-US IGA, financial institutions pass information to HMRC who automatically pass that information to the IRS. HMRC will exchange information with IRS under its existing DTC. Article 27 of the UK-US DTC 2001 provides that all information exchanged will be subject to confidentiality and other protections.

In addition to avoiding the data protection issues, the main differences between the UK-US IGA and FATCA are: there will be fewer sanctions for non-compliance;[70] information gathering and reporting requirements will be more closely aligned with UK AML rules; and there will be exemptions for low risk products and institutions.[71]

Termination of Customer Relationships. Banking relationships can be terminated as part of non-compliance under FTACA. There is a chance that FATCA compliant financial institutions will not wish to do business with non-compliant institutions. There is also a chance that financial institutions may not wish to take on US account holders. Foreign financial institutions must either report details of all relevant accounts or close the account.

UK View on FACTA. The UK views FATCA-style agreement as having the potential to: "embed a new international standard in the exchange of information based around the FATCA model";[72] and promote enhanced tax transparency and automatic EOI which are a "key part of the Government's wider offshore evasion strategy".[73] HMT has been granted the statutory power to make regulations for the purpose of or in connection with giving effect to the UK-US inter-governmental agreement, as well as making regulations in respect of agreements or arrangements that correspond or are

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[69] The regulations that give effect to the UK-US Agreement are the International Tax Compliance (United States of America) Regulations 2013/1962 (Regulations 2013/1962), which have been recently reported by a Select Committee to the House of Commons because they may be *intra vires*. See House of Commons Select Committee on Statutory Instruments, Third Report of Session 2013-2014, www.publications.parliament.uk/pa/cm201314/cmselect/cmstatin/304-iii/304.pdf, accessed 14 Nov. 2013.

[70] FATCA withholding taxes may apply where there is significant non-compliance: UK-US IGA, Art.5 and Regulation 2013/1962, ss.12-19. For the meaning of 'significant non-compliance", see HMRC, *Implementation of the International Tax Compliance (United States of America) Regulations 2013: Guidance Notes*, 14 Aug. 2013, 10:2.

[71] Examples of exempt products include: ISAs, premium bonds, most pension schemes and child trust funds. UK-US IGA, Annex II, para. III. Examples of exempt institutions include: governmental organisations; Bank of England; and certain categories of financial institution with a local client base.

[72] HMRC, *Implementation of the UK-US Agreement to Improve International Tax Compliance and to Implement FATCA: Data Protection FAQs*, 2012, www.hmrc.gov.uk/budget-updates/march2012/draft-dpa-fatca-faqs.pdf, accessed 15 Oct. 2013.

[73] HMRC, *No Safe Havens – Our Offshore Evasion Strategy 2013 and Beyond*, Budget 2013, www.hmrc.gov.uk/budget2013/offshore-strategy.pdf, accessed 26 Oct. 2013.

substantially similar to that agreement.[74] HMRC estimates that the cost for UK business over the first 5 years is £1.1-2 billion. Thereafter, the cost will be approximately £50-£90 million per annum. HMRC estimates its own one-off IT and staff project costs at approximately £5m, with on-going annual costs of £1.4m from 2016.

Non-US UK IGAs

The UK has signed IGAs with a number of its Crown Dependencies (Isle of Man, Guernsey, Jersey) and Overseas Territories (Anguilla, Cayman Islands, Bermuda, Montserrat, Turks and Caicos, Gibraltar and the British Virgin Islands).[75] The UK approach when negotiating non-US IGAs is to aim for maximum consistency with the UK-US IGA. However, there are some differences between the US and non-US IGAs:

- the non-US IGAs provide for an alternative reporting regime,[76] on election, to individuals who are resident but not domiciled in the UK and who are taxed on a remittance as opposed to an arising basis;[77]
- like the UK-US IGA, the Crown Dependency IGAs are reciprocal; with the exception of Gibraltar, those with the Overseas Territories are not – there is no onus on the UK to provide information.

In the case of the Crown Dependencies, each government has committed to an annual automatic EOI relating to financial accounts maintained by financial institutions in their territory that belong to the other party's residents. The IGAs include a voluntary disclosure facility that includes a series of concessions for UK resident but non-domiciled individuals. The disclosure facility allows relevant eligible UK investors with interests in assets in Jersey, Guernsey and the Isle of Man to come forward and regularise their past tax affairs ahead of the information on their accounts becoming automatically available. Financial intermediaries in the Isle of Man, Jersey and Guernsey are required to contact all relevant persons to advise them of the facility terms before 31 December 2013, and to remind them again in the six-month period up to 30 September 2016.[78] The UK Government has stated that the

[74] FA 2013, s.222.
[75] Commitments for UK financial institutions will commence on 30 June 2014.
[76] It will apply between 6 Apr. 2013 and 30 Sept. 2016, and will cover the period from 6 Apr. 1999 (this date may alter slightly for companies or other legal persons) to 31 Dec. 2013, guaranteeing a maximum civil penalty of 10-40% of the tax determined due for that period.
[77] The alternative elective regime results from a need to ensure the IGAs are consistent with existing UK tax legislation. See HMRC (2013), fn.73 above, at p.5.
[78] For example, "Memorandum of Understanding between the Government of the Isle of Man and HMRC Relating to Cooperation in Tax Matters", 19 Feb. 2013, 3(a).

Crown Dependency Disclosure facilities are expected to generate £1 billion for the exchequer over the next five years.[79]

Tax Solutions of Equivalent Effect

The UK has various disclosure facilities in existence. These disclosure facilities provide an opportunity for eligible customers with assets or investments held in the various jurisdictions to bring their UK tax affairs up to date by fully disclosing all outstanding liabilities and paying any amount due. The UK's disclosure facilities can be separated into: the Crown Dependency Disclosure Facilities as discussed above; the Liechtenstein Disclosure Facility; the Co-operation Agreement with Switzerland; and the EUSD.

The **Liechtenstein Disclosure Facility** (LDF) is governed by a TIEA and a Memorandum of Understanding signed in 2009. A Joint Declaration was made in 2010. The LDF is targeted at persons with UK tax liabilities that have connections with Liechtenstein.[80] During a period that ends in 2016, Liechtenstein financial intermediaries must review and identify clients that may have UK tax liabilities and ask those clients to certify that they are fully UK tax compliant. Disclosure of tax irregularities is authorised during a period of 10 years prior to 6 April 1999 and for settlement on beneficial terms with a guarantee of no prosecution except in exceptional circumstances. The LDF applies to all the main UK taxes. As a result of the LDF, there have been more than 4,000 registrations. It is estimated that up to 5,000 people are liable to UK tax that have assets in Liechtenstein. The UK anticipates up to £3 billion will be recovered through the facility by 2016.[81]

The **UK-Swiss Tax Co-operation Agreement** came into force on 1 January 2013. It provides taxpayers with a choice of either (i) making a one-off payment on 31 May 2013 to clear past unpaid tax liabilities and/or a withholding tax (at a rate higher than the EUSD) on income and gains from 1 January 2013 or (ii) authorising their bank or paying agent to provide details of their Swiss assets to HMRC. This Agreement has been described as the "largest ever tax evasion settlement in UK history" and was anticipated to secure £5 billion through a significant one-off payment to address tax evaded in the past and a withholding tax on future investment income and gains arising in Switzerland.[82] However, current data appears to suggest that such an estimate was overoptimistic.

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[79] HMT, *Budget 2013*, 1.207, accessed 29 Oct. 2013: www.gov.uk/government/uploads/system/uploads/attachment_data/file/221885/budget2013_complete.pdf.
[80] Except those are under an investigation that falls within HMRC's Code of Practice 9 (i.e., on suspicion of serious fraud or under arrest for a criminal tax offence), who are not permitted to participate.
[81] A. Seely, "EU Savings Directive: Recent Development", House of Commons Library, 17 October 2013, p.11, citing C. Oates and R. Brockwell, "Tax Amnesty", *Tax Journal*, 31 Aug. 2009. The facility has brought in £340 million to-date. See HMRC (2013), fn.73 above, at p.5.
[82] *Ibid*.

The **EUSD** provides for automatic EOI or in the case of Austria and Luxembourg WHT until such time as Switzerland automatically exchanges information.[83] The EUSD, as currently formulated, has failed to achieve its objectives in that both the amount of income reported and the amount of withholding tax deducted has been in decline for some time.[84]

Conclusions

The OECD describes the UK as being a very active country in the EOI area: it receives 1200 requests a year.[85] However, the fundamental issue appears to be whether automatic EOI, or some other solution, is capable of ensuring that the right amount of tax is paid in the right place. Underlying this issue is the aspiration that everyone will contribute fairly. In terms of tax solutions equivalent to automatic EOI, various options exist: the imposition of withholding taxes; targeted enforcement actions; compensating whistle-blowers; and levying large penalties.[86] When considering the effectiveness of any of these alternatives the issue becomes which, if any, option is most likely to generate more revenue than needs to be spent on compliance without overly comprising confidentiality.[87]

Whilst automatic EOI would appear to be in keeping with transparency and open data initiatives, the danger with pushing this agenda is that it has significantly more potential to make too much personal data freely and quite possibly permanently available than alternative more targeted solutions. Whether the right to privacy should trump the right for government to freely monitor and access information regarding many of the activities of its citizens and the citizens of other countries is a moral dilemma that should be debated outside the tax arena.

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[83] T. Verhoosel, "Total Impasse on Savings Taxation", *Europolitics*, 15 May 2012 and "Under Pressure, Luxembourg & Vienna Continue to Block Progress", *Europolitics* 12 Sept. 2012.
[84] See Seely (2013), fn.81 above.
[85] See OECD (2013), fn.18 above, at p.8.
[86] F. Behrens, "Why FATCA will not Stand", *Wisconsin Law Review* (2013), p.205 at 229.
[87] For concern that FATCA will cost more in compliance than it generates in additional revenue: *ibid.* at p.223.