

# **Towards an International Code for administrative cooperation in tax matter and international tax governance\*\***

## **Hacia un Código Internacional para la cooperación administrativa en materia fiscal y gobernanza fiscal internacional**

### ABSTRACT

There is not a “Global Code” that encodes the duty of cooperation between tax authorities in the world, concerning the global tax system. This article addresses this issue by proposing a global Code of administrative cooperation in tax matters including both tax relations: between States, and between States, taxpayers and intermediary’s agents. It follows a wide concept of tax governance. The findings of this research have highlighted several practical applications for future practice.

\* Catedrática de Derecho Tributario (acreditada), Universidad de Barcelona. Licenciada en Derecho (Premio extraordinario de licenciatura n.º 1 promoción); doctora en Derecho (Premio extraordinario de Doctorado); licenciada en Ciencias Económicas y Empresariales. Directora de *Education and Law Review*. Premio de la AEDAF; premio del CEF. Investigadora principal y miembro de numerosos proyectos de investigación nacional e internacional. *Visiting scholar* en Harvard School of Law, European University Institute, Università di Roma ‘La Sapienza’, Università degli Studi di Firenze, IBFD (Amsterdam), Católica Pontificia Universidad de Perú, Università degli Studi di Bologna, LSE of London, University of Leeds (UK), Georgetown University (Washington), World Bank (Washington). Autora de un centenar de publicaciones, especializada en fiscalidad comparada. Ha ocupado cargos de gerencia en la Facultad de Derecho de la Universidad de Barcelona. Contacto: eandres@ub.edu

\*\* El presente trabajo se enmarca en el Proyecto de Investigación DER 2015-68768-P Resolución de controversias fiscales “transnacionales” y Cooperación Administrativa Internacional. Rasgos de una arquitectura institucional desde una perspectiva europea. Ministerio de Economía y Competitividad 2016-2019 (Investigadora principal: E. Andrés).

Recibido el 19 de abril de 2017, aprobado el 15 de octubre de 2017.

Para citar el artículo: ANDRÉS AUCEJO, E. Towards an International Code for administrative cooperation in tax matter and international tax governance. *Derecho del Estado* n.º 40, Universidad Externado de Colombia, enero-junio de 2018, pp. 45-85.

DOI: [HTTPS://DOI.ORG/10.18601/01229893.N40.03](https://doi.org/10.18601/01229893.n40.03)

This article analyses, firstly, the State of the question, starting with the legal sources (international and European sources of hard law and soft law) reviewing the differences with the Code as here proposed. It also examines some important Agents who emit relevant normative in international administrative tax cooperation and the role that these agents are developing nowadays (sometimes international organizations but also States like the United States, which Congress enacted the Foreign Account Tax Compliance Act, FATCA). Overlapping and gaps between different regulations are underlined. Finally, the consequences of this “General Code” lack for the functioning of a good international governance, are described. Hence, the need to create an International Cooperation Code on tax matters and international fiscal governance is concluded. That Code could be proposed by any International Organization as the World Bank nature, for instance, or the International Monetary Fund or whichever International or European Organization. This instrument could be documented through a multilateral instrument (soft law), to be signed by the States to become an international legal source (hard law). Filling this Code as Articulated Text (form) could be very useful for the International Community towards an International Tax Governance.

#### KEYWORDS

Code, international cooperation, FATCA, automatic exchange of information, common reporting standard, global code in tax matters, Art. 26 MC Organisation for Economic Cooperation (OECD) and Development, soft law, global forum, tax administrations, international tax governance.

#### RESUMEN

No existe un Código Global que incluya el deber de cooperación administrativa en materia fiscal entre las autoridades tributarias del mundo, concierne al sistema tributario global. Este artículo propone la creación de un Código Global de cooperación administrativa en temas fiscales, que incluya tanto las relaciones entre las administraciones tributarias como las relaciones entre las administraciones tributarias, los contribuyentes y los agentes intermediarios. Acoge por tanto un concepto amplio de gobernanza fiscal internacional. Los resultados de esta investigación podrán tener importantes repercusiones prácticas.

Este artículo analiza, en primer lugar, el estado de la cuestión, constatando cuáles son las fuentes jurídicas (internacionales y europeas, de *hard law* y de *soft law*) creadas hasta el momento y sus diferencias con el código que aquí se propone.

También se estudian algunos importantes agentes que emiten las principales normativas en materia de cooperación administrativa internacional y

el rol que desempeñan (dichos agentes son organizaciones internacionales, pero también Estados como Estados Unidos, cuyo Congreso emitió la norma “Foreign Account Tax Compliance Act”, FATCA). Se analizan solapamientos y lagunas de tales normativas. Se detectan las consecuencias importantes derivadas de la falta de un Código de Cooperación Global y Gobernanza Fiscal Internacional (consecuencias respecto del funcionamiento de la buena gobernanza internacional). Todo lo anterior lleva a concluir en la necesidad de crear un Código de Cooperación administrativa internacional en materia fiscal y gobernanza fiscal internacional. Dicho Código podría ser propuesto por una organización internacional de la naturaleza del Banco Mundial o el Fondo Monetario Internacional o cualquier organización internacional o europea. Este instrumento podría ser documentado a través de un instrumento multilateral (*soft law*) para su firma por los Estados convirtiéndolo en un instrumento *hard law*. Sería conveniente redactar este Código en forma de texto articulado en orden a facilitar la aclamada gobernanza fiscal internacional.

#### PALABRAS CLAVE

Código, cooperación internacional, FATCA, intercambio automático de información, Código Global, administraciones tributarias, artículo 26 Modelo de Convenio de la OCDE (Organización para la Cooperación Económica y el Desarrollo), *soft law*, Estándar Común de Reporte-OCDE, gobernanza fiscal internacional.

#### CONTENTS

Introduction. 1. The lack of both International Code and General Principle of International Tax Law regarding international administrative cooperation in tax matters. 1.1. From a European perspective. 1.2. From an international perspective. 2. The role of European Union compared to the United States and OECD. 3. Other international leagues. 4. The legal basis for the international exchange of tax information. 5. Overlapping rules on Automatic Information Exchange. 5.1. About the European Union context. 5.2. About the United States and OECD roles. 6. Consequences of the lack of a concept of international tax cooperation. 6.1. From bilateral treaties to multilateral instruments. 6.2. The current role of Article 26 MC OECD. 6.3. The prominence of “soft law”. 6.4. The power of United States (FATCA) in exchange of information guides. 6.5. The risk of economic globalization. 6.6. The absence of a principle of international administrative cooperation in tax matters has negatively affected taxpayers’ protection. Conclusion and prospects: proposal for an International Code on administrative cooperation in tax matters and international tax governance. International Administrative Cooperation Code in Tax Matters and International Tax Governance. Final notes by the author.

## INTRODUCTION

In reviewing the comparative fiscal literature, no “General Code” about international administrative cooperation in tax matters was found on the sources of international tax law. Several reports have shown that there is no general Code, no rule, which encodes the duty of cooperation between tax authorities in the world for the global tax system.

It is true that the OECD has recently undertaken specific initiatives concerning this matter such as the “Base Erosion and Profit Shifting” (BEPS) Project and the Common Reporting Standard (CRS) multilateral instrument, but these sources have different, wider, goals and mechanisms than the Code we are proposing. Our code is designed to develop the international administrative cooperation relationships in tax matters for the “global tax system” and not just for the corporate taxation and economic activities (BEPS). In addition, unlike the BEPS Project, our Code incorporates a wider vision of international fiscal governance, including relations between tax administrations and taxpayers, in an effort to protect the rights of taxpayers in international tax administrative cooperative relationships. Our Code proposes alternative disputes resolutions systems to resolve “all” kinds of disputes in tax matters, even considering the creation of an International “body” to resolve cross-border tax disputes. On the other hand, our Code regulates all kinds of instruments to achieve the international administrative cooperation in tax matters, and not just one instrument (Automatic Exchange of Information).

Prior studies have noted the significance of the lack of a Principle in Administrative Cooperation regarding cross-border tax issues, as we can see below:

Proprio l’inesistenza di un principio o di una consuetudine generale o particolare che crei in capo a ciascuno Stato una pretesa diretta ad ottenere la collaborazione di un altro Stato per la realizzazione degli atti necessari alla riscossione dei propri crediti tributari.<sup>1</sup>

Non può neanche essere sottaciuta l’assenza, nell’ambito del diritto tributario internazionale, di un principio generale, codificato o di natura convenzionale, atto a stabilire un dovere di collaborazione tra Amministrazioni finanziarie, al fine di contrastare fenomeni evasivi o elusivi.<sup>2</sup>

1 See SACCHETTO, C. Informe General. *XLIV Congreso de la IFA*, Estocolmo: IFA, 1990, 488. The absence of a principle or a general or specific custom that creates with respect to each State a claim seeking to obtain the assistance of another State to implement the measures required to collect tax receivables”. Sacchetto, C. L’evoluzione della cooperazione internazionale fra le amministrazioni finanziarie statali in materia di IVA ed imposte dirette: scambio di informazioni e verifiche ‘incrociate’ internazionali. *Boll. Trib.* 1990, n. 7, 488.

2 See CAPOLUPO, S. Più incisiva la disciplina europea sulla collaborazione amministrativa nelle imposte dirette. *Corriere tributario*, 2011, vol. 16, 1311 (Nor it can be neglected the absence,

Si annovera la mancanza di un principio generale di diritto tributario internazionale [...] che codifichi il dovere di collaborazione tra amministrazioni fiscali.<sup>3</sup>

L'esame dei principi internazionali universalmente riconosciuti non fa mai riferimento alla collaborazione internazionale in materia fiscale.<sup>4</sup>

Non esiste dunque un canone di diritto internazionale, o anche una semplice consuetudine, che deponga a favore di un obbligo di collaborazione tra le amministrazioni, tanto è vero che lì dove quest'obbligo sussiste, esso trova la sua fonte a livello convenzionale, o comunque negoziale.<sup>5</sup>

Notwithstanding the findings made by these authors, it could be argued that the principle of international tax cooperation and, more specifically, the principle of administrative cooperation in tax matters, could be accommodated in a generic way, in the "General Principle of International Law" on cooperation, which is recognized in both, the Charter of the United Nations, June, 1945, art. 1, par. 3<sup>6</sup> and also in the United Nations General Assembly, Resolution 2526 (XXV)<sup>7</sup>. It is correct that in the documents mentioned above, there is no indication of international tax cooperation. There is also no mention of an international administrative cooperation principle in tax matters.

in the context of international tax law, of a codified or conventional general principle designed to establish a duty of cooperation between tax authorities in order to tackle tax avoidance and evasion).

3 See BUCCISANO, A. Cooperazione amministrativa internazionale in materia fiscale. *Rivista di Diritto tributario*, 2012, n. 7-8, 669. "It includes the lack of a general principle of international tax law [...] that codifies the duty of cooperation between tax authorities".

4 See ARDITO, F. *La cooperazione internazionale in materia tributaria*. Padova: Cedam, 2007, 29 (The review of the universally recognized international principles never refers to international cooperation in tax matters).

5 See Tosi. L'attività istruttoria amministrativa internazionale fra le amministrazioni finanziarie statali in materia di IVA ed imposte dirette, cit., 634 ss. (Thus, there is not a rule of international law, nor a custom, which pleads in favor of an obligation of cooperation between administrations. Indeed, where such obligation exists, it is provided by conventions or otherwise by negotiation); BUCCISANO, Cooperazione amministrativa, cit., 669.

6 The purposes of the United Nations are: "3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

7 The duty of States to co-operate with one another in accordance with the Charter. States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences. To this end: (d) States Members of the United Nations have the duty to take joint and separate action in cooperation with the United Nations in accordance with the relevant provisions of the Charter.

There is only reference to the economic cooperation (and others).<sup>8</sup> Therefore our Code follows a general and all-embracing concept, inspired more by the United Nations Charter.

To arrive at the creation of this Code, the methodology is the following one:

Hypothesis: Our hypothesis analyses the absence of a global Code for the entire world tax system, which governs at the same body, both the relations of cooperation between tax administrations and between tax administrations in their relations with taxpayers, from a Global Fiscal Governance perspective. After analysing the legal sources of the international law and the European community law, this hypothesis is verified as true, since there is no previous “Code” of the conditions and dimensions of the Code as here proposed.

Objective 1: This article studies the “role” of some main institutional organizations and States involved. Some overlapping and gaps between the different regulations created by them are detected.

Objective 2: To analyses the important consequences of the absence of an International Cooperation Code, in order to conclude the need to create this Codex.

Final Objective and Conclusion: The need to create an “International Code for administrative cooperation in tax matters and International Tax Governance” is concluded. This Code would include the following chapters: Chapter I. About the international administrative tax cooperation between worldwide Tax Administrations. Chapter II. Relations of cooperation between Tax Administrations and taxpayers: the taxpayers’ rights concerning this framework. Chapter III. System of conflict resolution in cross-border tax matters: conventional and alternative systems. A proposal is included regarding the creation of an International “Body” to resolve cross-border tax disputes, where there could be developing kinds of alternative dispute resolution systems (mediation, arbitration, European or international ombudsman, tax agreements...). Chapter IV. Mechanisms to prevent and correct international tax fraud.

We propose the possibility of a multilateral instrument could be arbitrated, which could turn into a multilateral agreement opened to signature by States. It would be very useful this code was written in articulated text form.

<sup>8</sup> See MARINO, G. La cooperazione internazionale in materia tributaria, tra mito e realtà. *Rassegna Tributaria*, 2010, 53(2), 443-448.

1. THE LACK OF BOTH INTERNATIONAL CODE AND GENERAL PRINCIPLE OF INTERNATIONAL TAX LAW REGARDING INTERNATIONAL ADMINISTRATIVE COOPERATION IN TAX MATTERS

1.1. From a European perspective

As mentioned in the comparative literature review<sup>9</sup>, regarding European Union law, the principle of fiscal cooperation is not explicitly codified in the Treaty on the Functioning of the European Union, but, in the creation of the customs union with the consequential removal of tax barriers, there has been a process of harmonisation of tax legislation. Actions have been planned, for the exchange of information and administrative cooperation, to make the Law of the European Union effective. Close and regular cooperation will also help to combat fraud and illegal activities (art. 113, 115, 197 and 325 of the Treaty on the Functioning of the EU).<sup>10</sup>

Regarding the Community framework, from 2009-2010 the leading force for expanding international cooperation, between tax administrations from different jurisdictions in the world, has been the European Union, who approved a list of rules, considered hard law (in the framework of direct and indirect taxation), which ultimately aims to enable close cooperation between Member States in applying the tax system. As referenced below:

Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (repealed)<sup>11</sup>; Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (DO L 84 de 31.3.2010, p. 1); Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (DO L 268 de 12.10.2010, p. 1); Council Directive 2011/16/EU of 15 February 2011 on

9 See BUCCISANO, La cooperazione amministrativa internazionale in materia fiscale, cit., p. 671, with reference to Sacchetto, above fn. 1. About this matter, see WISSELINK, A. International exchange of tax information between European and other countries. *EC Tax Review*, 1997, Vol. 6, n. 2, 108-115; VASCEGA, M. and VAN THIEL, S. Assessment of Taxes in Cross-Border Situations: The New EU Directive on Administrative. Cooperation in the Field of Taxation. *EC Tax Review*, 2011, Vol. 20, n. 3, 148-154; and SEER, R. La cooperazione internazionale in materia fiscale - Situazione e prospettive nei paesi membri dell'EU – Dichiarazione e contributi. *Rivista di Diritto Tributario Internazionale*, 2009, 73-78.

10 See BUCCISANO, above fn. 3, p. 671; MELIS, G. Spunti sul metodo di coordinamento fiscale aperto quale possibile strumento per l'integrazione fiscale tra Stati dell'Unione Europea e Stati terzi. *Diritto e pratica tributaria internazionale*, 2008, Vol. 8, n. 1, 207; and SAPONARO, F. Lo scambio di informazioni tra amministrazioni finanziarie. *Rassegna tributaria*, 2005, Vol. 48, n. 2, 453.

11 Directive repealed by the Council (ECOFIN) on November 10, 2015 with effect from 1<sup>st</sup> January, 2016. However, this directive will be applied regarding to Austria until the end of 2016, with some exceptions.

administrative cooperation in the field of taxation<sup>12</sup> (amended by the ECOFIN council on December 9, 2014 –Directive 2014/107/UE-); Council Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004; Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (Codified version)<sup>13</sup>, or even the European Commission’s proposal for a Council Directive implementing a financial transaction tax through the enhanced cooperation procedure, published on 14 of February 2013<sup>14</sup>.

The Legislation is completed among other standards, such as; the Communication of 28 April 2009 (Communication on Promoting Good Governance in Tax Matters); European Parliament resolution of 10 February 2010 on promoting good governance in tax matters; the Communication from the Commission, 2012 Brussels, COM (2012) 722/2 final on an action plan to strengthen the fight against tax fraud and tax evasion and; Communication from the Commission to the Parliament and the Council of 18 March 2015 COM (2015) 136 final on fiscal transparency to combat tax evasion and avoidance, whose objectives certainly highlight the need to carry out a coordinated action by the Member States for a good tax governance, in order to reach two purposes: promote the correct application of national tax systems and, help in the fight against fiscal fraud and tax evasion.

### *1.2. From an international perspective*

Returning to the hypothesis posed at the beginning of this study, it is now possible to State that in the international context, as in the community context, there has not been created a “Global codification” about international administrative cooperation in tax matters.

We cannot deny that there have been some important initiatives to achieve more extensive cooperation and mutual assistance between countries, promoting not only the exchange of information, as a form of cooperation, but also

12 This directive establishes clearer and more precise rules on administrative cooperation between European Union (EU) countries. It applies to direct taxes as well as indirect taxes that are not yet covered by other EU legislation. However, the definition of cooperation is not included in the Directive, not even in the article 3 about definitions. The directive standardized procedures dictated by the EU under the comitology procedure of Decision 1999/468/EC provides.

13 As background of policy instruments for cooperation between States can be cited: Directive 77/799 / EEC of 19 December 1977 on mutual assistance (now repealed); which was extended to VAT under the Council Directive of December 6, 1979, as subsequently amended (integrated in Directive 2004/106 / EC), up to the current Regulation 904/2010 of 7 October. On excise tax Directive 92/12/EEC (as subsequently amended) was created.

14 See ENGLISH, J.; VELLA, J. and YEVGENYEVA, A. The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations. *British Tax Review*, 2013, n. 2, 223-259.

other systems of collaboration between the different tax administrations. We would like to remark that it has occurred through specific regulatory instruments. Specifically: a) *the Convention on Mutual Administrative Assistance in Tax Matters (1988)*. The Convention is, probably, the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance, a top priority for all countries. The Convention was developed jointly by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010 to respond to the call of the G20 at its April 2009 London Summit to align it to the international standard on exchange of information on request and to open it to all countries. b) *the Agreement on Exchange of Information on tax matters*, which purpose is to promote international cooperation in tax matters through exchange of information and recently, the new OECD Standard of automatic exchange of financial account information in tax matters. c) The Common Reporting Standard (CRS), d) The Base Erosion and Profit Shifting (BEPS) Project. The BEPS project is an important instrument for the international tax cooperation to combat the base erosion and profit shifting. As we can read in the background brief, January 2017, OECD, “The international tax landscape has changed dramatically in recent years as a result of economic challenges, and new standards have been developed to enable countries protect their revenue bases”. The BEPS package consists of reports on 15 actions. These actions have been created in order to combat the base erosion and profit shifting in the framework on Corporate income tax and economic activities. BEPS, says the source cited “is of major significance for developing countries due to their heavy reliance on corporate income tax, particularly from multinational enterprises”.

In the last decade of the 20<sup>th</sup> Century and intensively in the years since the 21<sup>st</sup> Century began, particularly from 2009, the Global Forum of transparency and exchange of information for tax purposes and, the G20, have both played a very important role in the international and European Community framework and there has been a profound movement and positive approach towards developing the necessary cooperation between different countries in this area, significantly enhancing all kinds of initiatives to that end. It can be observed that a strategy actively undertaken by the G20 and the OECD (with the reactivation of the Global Forum) is aiming to achieve a real and effective international administrative cooperation in tax matters. In this scenario, the exchange of tax information between tax administrations has a leading role. A key aspect of that cooperation is exchange of information.<sup>15</sup> The president of the OECD announced in 2009, “Over the past ten months, there has been

15 See OECD. *Automatic Exchange of Financial Account Information*, Background information brief, 2015, 2; MALHERBE, P. and BEYNSBERGER, M. The year of implementation of the standards. *Exchange of information and bank secrecy*. A. RUST and FORT, A. (eds.). Wolters Kluwer, 2012, 119-127.

a revolution in the tax world. More than a decade of work led by the OECD, together with the political leadership of the G20, has permitted unprecedented progress towards better transparency and exchange of information”.<sup>16</sup>

Note: Regarding the first initiatives of international cooperation on tax matters, from its inception (actions of the League of Nations), and its subsequent evolution, abundant literature has been reported. A number of researchers have also reported on such historical developments in transnational tax information exchange. I will therefore not dwell on matters already widely discussed.<sup>17</sup>

Several reports have shown that, from an international perspective it could be considered that:

- Cooperation between tax administrations is critical in the fight against tax evasion, regarding worldwide earnings and European earnings.<sup>18</sup>

- Cooperation between tax administrations is critical to maintain national tax sovereignty. Every day can be seen more and more cross-border transactions and the internationalization of financial instruments in a globalized world. In the global era, tax administrators must extend their reach beyond the borders of the Nation State.<sup>19</sup>

16 See OWENS, J. Moving towards better transparency and exchange of information on tax matters. *Bulletin for International Taxation*, 2009, n. 63(11), 557, and VANISTENDAEL, F. The international information exchange puzzle. *Tax Notes International*, 2014, Vol. 75, n. 13, 1149.

17 See League of Nations: Committee of Technical Experts on Double Taxation and Tax Evasion, *Double Taxation and Tax Evasion* (Report), 1927; DEAN, S. D. The incomplete global market for tax information. *Boston College Law Review*, 2008, Vol. 49, 605-672; AULT, H. J. Corporate Integration, Tax treaties and division of the international tax base: principles and practices. *Tax Law Review*, 1992, Vol. 47, n. 3, 565-608; PICCIOTO, S. *International Business Taxation as a Study in the Internationalization of Business regulation*, Cambridge: CUP, 1992; CANNAS, F. The historical development of the exchange of information for tax purpose. *Exchange of information for tax purposes*. GUNTHER, O. C. and TUCHLER, N. (eds.). Wien: Linde Verlag, 2013, 15-34; ANDRÉS AUCEJO, E. La cláusula de intercambio de información tributaria según el Convenio bilateral Hispano-Brasileño para evitar la doble imposición y prevenir la evasión fiscal en materia de impuestos sobre la renta; Impuestos. *Revista de Doctrina, Legislación y Jurisprudencia*, 2011, Vol. 27, n. 15-16, 19-48; SEER, R. Recent Development in Exchange of Information within the EU for Tax Matters. *EC Tax Review*, 2013, Vol. 22, n. 2, 66-77; WOULTERS, J. and MEUWISSEN, K. Global Tax Governance. *Leuven Centre for Global Governance Studies Working Paper*, 2011, 59; TANZI, V. and ZEE, H. H. Can Information Exchange be Effective in Taxing Cross-Border Income Flows? *Modern Issues in the Law of International Taxation*. ANDERSSON, K.; MELZ, P. and SILFVERBERG, C. (eds.). Stockholm: Kluwer Law International, 2001, 259-268; SEER, R. and GABERT, I. *Mutual assistance and information exchange*. Amsterdam: IBFD, 2010; TURINA, A. I recenti sviluppi internazionali in materia di scambio di informazioni. *Fiscalità internazionale*, 2010, Vol. 8, n. 2, 155-161; CAVELTI, L. U. Automatic information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation. *World Tax Journal*, 2013, Vol. 5, n. 2, 172-214; STEWART, M. Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration. *World Tax Journal*, 2012, Vol. 4, n. 2, 152-178, among others.

18 See OECD. *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (Report) (2014); CAVELTI, above fn. 17, 172-173.

19 See MALHERBE and BEYNSBERGER, above fn. 15, 120; STEWART, above fn. 17, 152.

– Cooperation between tax administrations is critical in an environment of global crisis for States to maintain their revenues.<sup>20</sup>

It should be noted that, some of the legal basis for information exchange rules were created before 2009. However, since the creation of the Global Forum of transparency and exchange of information for tax purposes, with the unconditional support of the G20, an awareness has been achieved in the countries in order to reach a greater cooperation in administrative tax matters. It was possible thanks to; the standards of transparency and exchange information; the peer review establishment of the Global Forum; the publication of annual OECD reports (Progress reports); and, in particular, the publication of “A progress Report on the Jurisdictions surveyed by the OECD Global Forum in implementing the internationally agreed tax standard”, published on April 2, 2009, addressing both cooperating and non-cooperating countries (famous black list).<sup>21</sup> In general, the jurisdictions have shown their interest in following the standards, in return for not being included on the blacklist<sup>22</sup>.

However, the first most decisive step towards greater administrative cooperation between tax administrations through automatic exchange of tax information was given by the United States in 2010.

In that year, the Congress of the United States enacted the “Hiring Incentives to Restore Employment (Hire) Act” which added new sections 1471 to 1474 (the Foreign Account Tax Compliance Act) to the United States Internal Revenue Code.<sup>23</sup> The name would not change in following revisions of the Code and is known by the acronym FATCA.<sup>24</sup>

In this Act, the system of automatic exchange of information, as a truly effective instrument towards cooperation, is established. This system greatly

20 See PITRONE, F. Lo scambio di informazioni e la Direttiva 2011/16/UE in materia di cooperazione amministrativa: innovazioni e profili critici. *Diritto e pratica tributaria internazionale*, 2012, Vol. IX, n. 2, 466; CAVELTI, above fn. 17, 173-174.

21 This report contains three lists: countries that had implemented standards (white list), those that had committed but had not implemented (grey list) and those that were not committed to implementing the standards (blacklist).

22 In the same way, PISTONE, P. Exchange of information and Rubik Agreements: the perspective of an EU Academic. *Bulletin for International Taxation*, 2013, Vol. 67, n. 4/5, 219, said: Many, if not all, countries have ‘voluntarily’ changed their position on fiscal transparency from 2009 onwards to avoid being considered as non-cooperative jurisdictions and ultimately being included in the list of undesirable jurisdictions. See also VANISTENDAEL, above fn. 16, 1149.

23 Commission on Taxation, JCX-42-09, Technical explanation of the “Foreign Account Tax Compliance Act of 2009”. See CAVELTI, above fn. 17, 182-183.

24 Since 2012 the five European countries had intention to develop and pilot multilateral tax information exchange based on the Model Intergovernmental Agreement to improve international tax compliance and to implement FATCA, development between these countries (France, Germany, Italy, Spain and UK) and the United States (Model IIGA) and nowadays several European jurisdictions have already adopted and implemented Model IIGAS.

improves the effectiveness in achieving cooperation between countries, as stated by the OECD.<sup>25</sup>

Hence, in the battle against tax havens and the relocation of income, the strong influence the USA, through FATCA, has set has really started a move towards cooperation through an automatic exchange of information as an efficient mechanism towards administrative cooperation in tax matters. The game changer in automatic exchange was the enactment of the Foreign Account Tax Compliance Act (FATCA)<sup>26</sup> in 2010, and the subsequent development of an intergovernmental approach to its implementation by the USA, in close cooperation with the G5 (Model IGA, Known as Model 1<sup>4</sup>. “The UK was the first to sign an IG with the US on September 12, 2012 (UK-US IGA)”<sup>27</sup>

In the years following the introduction of FATCA, the OECD began looking for a more effective mechanism of cooperation. It has recently taken automatic exchange as the standard of transparency because of its high efficiency and effective cooperation.

On June 2013, the G8 Leaders adopted the commitment to establish automatic exchange as the new global standard of transparency. On September 2013, the G20 Leaders endorsed the OECD (Global Forum) proposal for a truly global model of automatic exchange in order to present such a new single standard in time for the G20 February 2014 meeting. In February 2014, the G20 Finance Ministers and Central Bank Governors endorsed the global standard for automatic exchange of tax information. At the OECD Ministerial Council Meeting in Paris May, 6-7, 2014 was adopted the Declaration on Automatic Exchange of Information in Tax Matters, and on July 15, 2014 the OECD Council approved the *Standard for Automatic Exchange of Financial Information in Tax Matters*, and on September 2014 this standard was endorsed by the G20 Finance Ministers at meeting in Cairns.<sup>28</sup> The first edition of the CRS implementation handbook was published in August 2015. At the present (2016 and beyond), *the Global Forum is undertaking a review of the confidentiality rules and practices in place in committed jurisdictions, as to ensure that the automatic exchange of CRS information takes place in a secure*

25 It is true that the multilateral Convention on Mutual Assistance in tax matters OECD-Council of Europe included the automatic and spontaneous exchange as forms of collaboration. And in European Union context, the Saving Taxation Directive (2003) provided for twenty-four Member States (with a transitional period a withholding tax for some countries, as know). See VANISTENDAEL, above fn. 16, 163.

26 See PROSS, A. How tax transparency went global in 2014. *International Tax Review*, 2014, Vol. 26, n. 3, 10-13.

27 See DODD, J. International agreements to improve tax compliance (FATCA). *British Tax Review*, 2013, Vol. 4, 529-540.

28 See OECD. *Automatic Exchange of Financial Account Information, Background information brief*, above fn. 15; OECD. *Common Reporting Standard. Standard for Automatic Exchange of Financial Account Information* (Report), 2014; OECD. *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (Report), 2014.

environment.<sup>29</sup> In February, 2016 the business and industry advisory committee to the OECD (BIAC) has drafted the self-certification forms and has requested the OECD to make these forms available on the AEOI Portal to assist with the implementation of the CRS.<sup>30</sup> Recently the OECD has published the following documents: the *CRS Implementation Handbook*, the *CRS Status Message XML Schema* – as well as the related User Guide and the “*CRS -related Frequently Asked Questions*”. Besides that, the Action 5 of BEPS Project “is committed the Forum on Harmful Tax Practices to Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime” (executive summary Action 5: 2015 Final Report, p. 9).

More recent attention has focused on the new Common Reporting Standard cited. It is a subject currently “in vogue”, as one of the recent main trends of international taxation, and is being studied by the tax law authors of international tax law literature.<sup>31</sup> It is therefore to be expected that the automatic information exchange will be the dominating model of international cooperation in the future.<sup>32</sup>

Can be argued that the automatic exchange information has become the new global paradigm of multilateral international cooperation relations because it reduces costs and increases the effectiveness of global cooperation. However, this is only in theory and not in practice. Several questions remain unanswered. There are still many matters to address, such as: coordination systems between different kinds of legal instruments to achieve cooperation in tax matters; overlapping rules; the thin line between *fishing* expeditions *versus* automatic exchange of information; the effective protection of taxpayers’ rights; the implementation of costs; risk analysis and data protection, amongst others.

In addition, many countries have major obstacles to overcome before being able to enforce the Common Reporting Standard. On the one hand, not all countries have the technical and practical capability to write programs

29 See OECD. Automatic Exchange Portal, available at: <http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/>

30 See OECD. *Automatic Exchange Portal*, above fn. 29.

31 See BAKER, F. Automatic Exchange of Information. *British Tax Review*, 2013, n. 4, 371-373; Vanistendael. The international information exchange puzzle, above fn. 16; Vanistendael. EU Tax Agenda: exchange of information, transparency and abuse. *Tax Notes International*, 2015, Vol. 77, n. 2, 163-165, Pross, above fn. 26; PISTONE, P. Coordinating the action of regional and global players during the shift from bilateralism to multilateralism in international tax law. *World Tax Journal*, 2014, n. 6, 3-5; TELLO, C. P. FATCA: Catalyst for Global Cooperation on exchange tax information. *Bulletin for International Taxation*, 2014, vol. 68, n. 2, 88-102; SAPIRIE, M. Common Reporting Standard and FATCA. *Tax Notes International*, 2015, Vol. 77, n. 7, 558-560; P. Altenbunger. Coexistence between FATCA and MCAA-Potential conflicts. *Tax Notes International*, 2015, Vol. 77, n. 4, 337-340.

32 See CAVELTI, above fn. 17, 172.

and require technical assistance. On the other hand, national barriers exist preventing application of the common standard.

To apply this standard, many countries must first make substantial changes to their own national laws and practices. In some cases, changes through national parliaments will be required. For example, changes in domestic legislation to remove the restrictions on access to bank information, enabling financial institutions to gather more customer information to transmit it to the tax authorities.

Even though some of these questions have been included in some legal instruments, it is not enough because the scope is not global; not all instruments have been referenced, and not all instruments referenced cover the same issues.

## 2. THE ROLE OF EUROPEAN UNION COMPARED TO THE UNITED STATES AND OECD

Regarding the role of the European Union In recent years, the action it deployed on administrative cooperation has been insufficient in light of international development (dealing by the United States and the OECD), and is therefore adapting to international trends in this area through reform of its Directives.

Undoubtedly Europe has had to increase its pace to accommodate new trends and pressures prevailing international cooperation in a global world. In this global context, the United States and the OECD can be considered as leaders of change. Under pressure from the U.S. and OECD, the EU will make a big leap forward in automatic exchange of information following FATCA<sup>33</sup> Major reforms in this regard are:

- Directive on Administration Cooperation reform. In June 12, 2013 the European Commission adopted a legislative proposal to extend the scope of automatic Exchange of information in its Directive on administrative cooperation (OECD Standard). On March 21, 2014, the European Council invited the EU Ministers of Finance to ensure that, with the adoption of the revised Directive on Administrative Cooperation by the end of 2014, EU law will be fully aligned with the new single global standard of automatic exchange of information developed by the OECD. Furthermore, in October 14, 2014 the 28 Member States of the European Union reached a political agreement on an amended Directive that will implement the new Standard in the EU. The political agreement was formalised through the adoption of the amended Directive by the ECOFIN Council on December 9, 2014 (Directive 2014/107/UE).

- About the Saving Tax Directive (repealed): a new saving Direct was approved on March 24, 2014, nevertheless the Council (ECOFIN) repealed

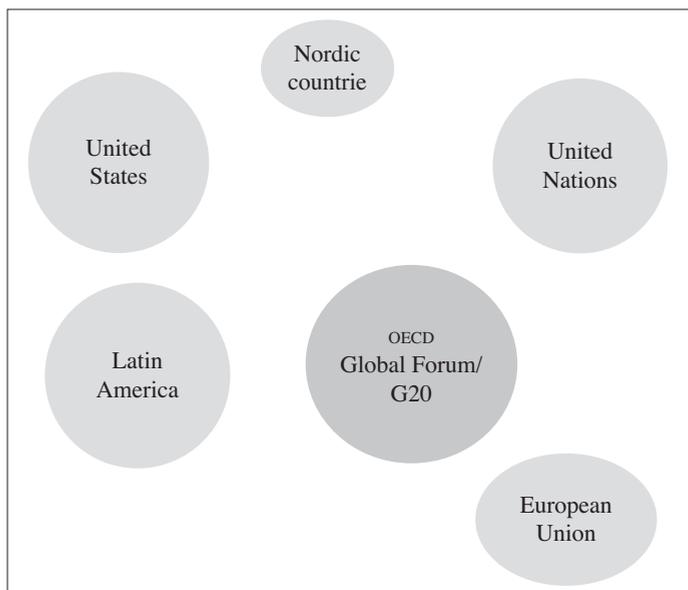
33 See VANISTANDEAEL. EU Tax Agenda: exchange of information, transparency and abuse, above fn. 31, 163.

that saving directive on November 15, 2015 with effect from 1<sup>st</sup> January, 2016, due to problems of overlap with reformed directive on administrative cooperation and because the Saving Tax Directive has been exceeded. Only for Austria the new standard for reporting will apply from 2017 (January, 1).

### 3. OTHER INTERNATIONAL LEAGUES

In addition to the OECD, United States and European Union, other international institutions have created regulatory instruments which also affect the administrative cooperation between countries, for example: the The Nordic Mutual Assistance Convention on Mutual Administrative Assistance in Tax Matters, by the Nordic Countries; the Model Agreement on the Exchange of Tax Information, developed by the Inter American Centre of Tax Administrations (CIAT) or the Model Agreement on Cooperation and Mutual Assistance on Issues of Compliance with Tax Legislation, developed by the Russian Federation.

FIGURE 1  
COUNTRIES AND INSTITUTIONS THAT PROVIDE  
BASIC RULES OF INFORMATION EXCHANGE



### 4. THE LEGAL BASIS FOR THE INTERNATIONAL EXCHANGE OF TAX INFORMATION

The table below illustrates the most important legal instruments of the international exchange of tax information.

**FIGURE 2**  
**LEGAL BASIS FOR INFORMATION EXCHANGE**  
**BETWEEN TAX ADMINISTRATIONS**

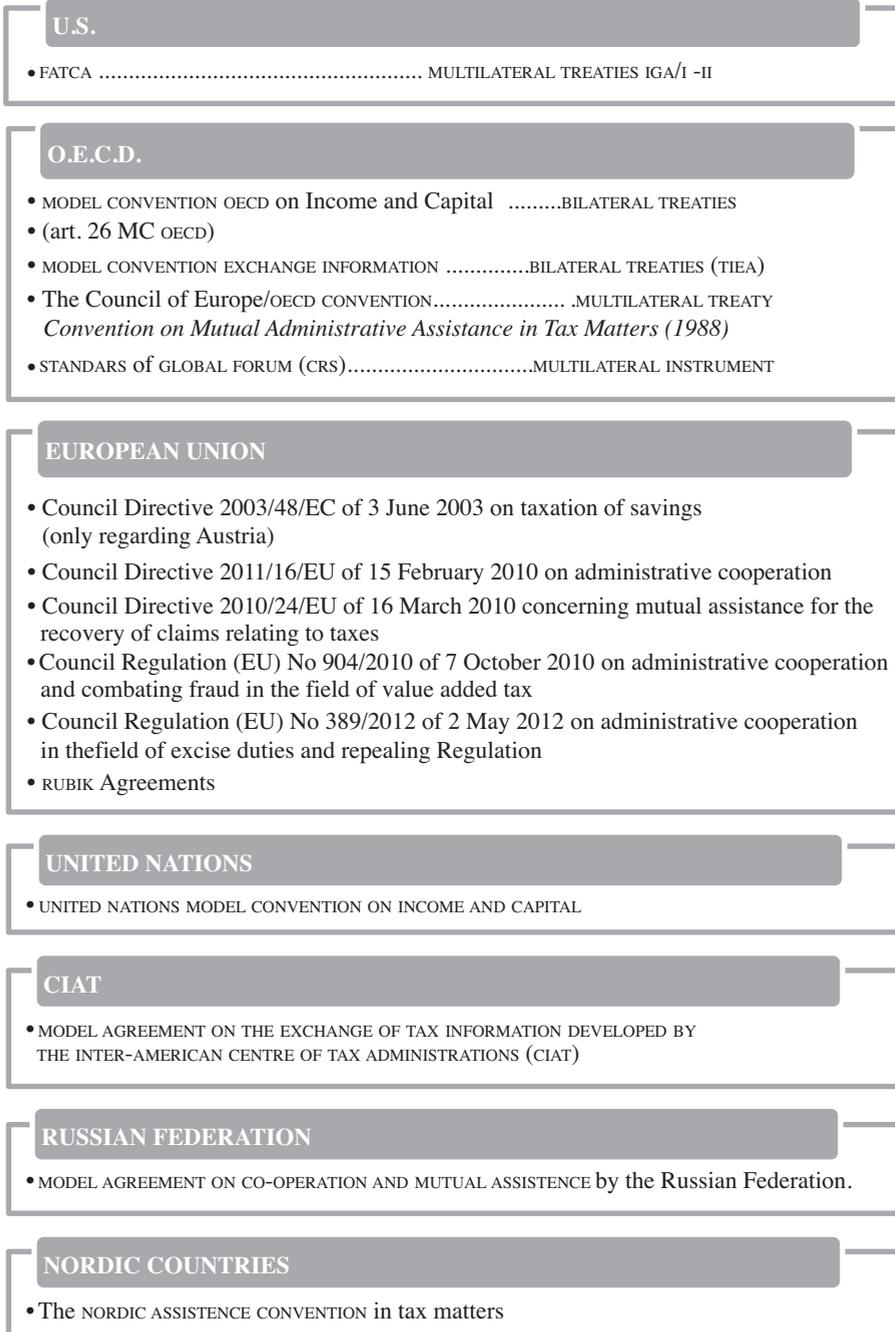


Figure 2 shows that there are a number of international legal instruments which make exchanges of information possible, for tax purposes. This though may produce some problems because there are different instruments to regulate the same matter, but carry different legal weight, scopes, extensions, procedures and formalities.

Nevertheless, it is a fact that some of these legal instruments have overlapping rules. As a result, when more than one legal instrument serves as the basis for information exchange, the problem of overlap is generally addressed within the instruments themselves. For example, there is a provision in Article 27, of the Council of Europe/OECD Convention, on Mutual Administrative Assistance in Tax Matters, which is also covered in Article 12, of the model agreement (*Agreement on Exchange of Information on tax matters*), and in paragraph 5.2, of the commentary on Article 26, of the Model Convention and, for EU Member States, in Article 11 of the 1977 EC directive “applicability of wider-ranging provisions of assistance” (repealed directive). Whereas No. 21, of the Preamble of Directive 2011/16/UE: “This Directive contains minimum rules and should therefore not affect Member States’ right to enter into wider cooperation with other Member States under their national legislation or in the framework of bilateral or multilateral agreements concluded with other Member States”.

Where there are applicable instruments regarding the co-existence of more than one information exchange provision and, if there are no domestic rules to the contrary, the competent authorities are generally free to choose the most appropriate instrument on a case-by-case basis. In these cases, it may be desirable for the competent authorities to agree on a common approach for determining which mechanism will be used in the specific circumstances.<sup>34</sup>

The European Union normative is considering the applicability of wider-ranging provisions of assistance. It could be argued that it would be a good rule of the general application (beyond EU) for the international administrative cooperation in tax matters.

Regardless, problems could occur because countries not only have to make a report to exchange information between themselves, but they also have to make a report to automatically exchange information with several countries worldwide at the same time. It requires worldwide coordination to solve substantive and more specifically procedural differences.

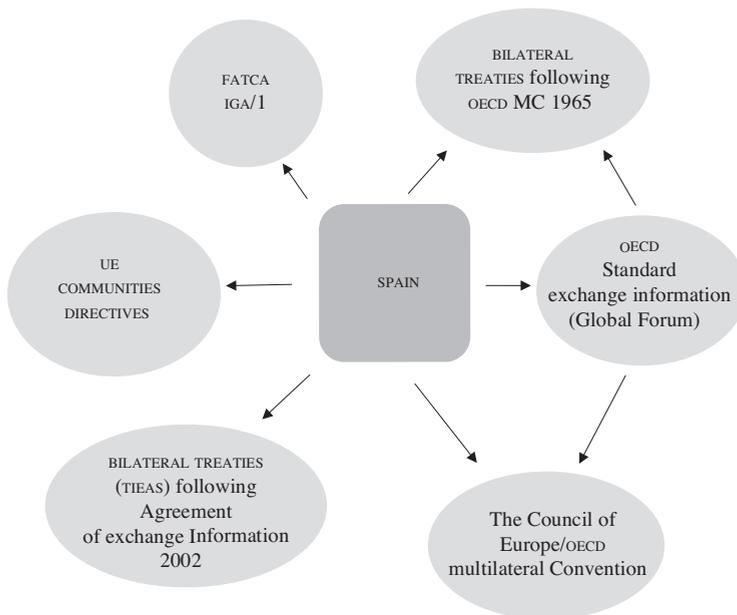
Although the OECD has long been working on the harmonisation of standards for effective information exchange, this is far from being worldwide achieved (following the last report of OECD of 29 June 2017, there are 93 signatures of multilateral competent authority agreement: <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf>).

34 See OECD, *Manual of the implementation of exchange of information provision for tax purposes* (Report), 2006.

For example: Spain is bound by EU rules on information exchange (following EU directives), but if information is requested by a third country outside the EU, Spain must provide tax information following OECD standards (as a cooperating jurisdiction), having signed the adherence to article 6 of the Multilateral Convention on Mutual Assistance on the automatic exchange of information and, if the information is requested by the U.S.A, it must provide the information following FATCA, IGA-I model (entered into by Spain on December 9, 2013).

In addition, Spain has signed several bilateral agreements to avoid double taxation (following OECD MC, art. 26), some bilateral agreements for exchange of information (following the Exchange of Information Agreement OECD 2002), different Agreements on Mutual Administrative Assistance in Tax Matters and other instruments of cross-border cooperation. Among the latter: the instrument of ratification of the Convention on Mutual Administrative Assistance in Tax Matters (1988) and the instrument of ratification of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters (2010).<sup>35</sup>

FIGURE 3  
LEGAL INSTRUMENTS CONCERNING TO THE SPANISH STATE



35 Spain has in force eighty-five agreements to avoid double taxation, currently; five TIEAS and ten agreements on mutual administrative assistance in tax matters and other cross-border cooperation instruments. Available at: [http://www.agenciatributaria.es/AEAT.internet/Inicio\\_es\\_ES/La\\_Agencia\\_Tributaria/Normativa/Fiscalidad\\_Internacional/Fiscalidad\\_Internacional.shtml](http://www.agenciatributaria.es/AEAT.internet/Inicio_es_ES/La_Agencia_Tributaria/Normativa/Fiscalidad_Internacional/Fiscalidad_Internacional.shtml)

## 5. OVERLAPPING RULES ON AUTOMATIC INFORMATION EXCHANGE

In the near future there will be, at least, three different but overlapping multilateral systems [FATCA (U.S.); Common Reporting Standard (OECD) and Cooperation Directives (UE)], all of the dealing with the issue of automatic exchange of information.<sup>36</sup>

*5.1. About the European Union context*

Recently, in the European Union context has been two legal bodies about the regulation of “Automatic Information exchange” of cross-border interest:

– For the application of the old savings Directive (which entered into force in July 2005) the European Union adopted common standards –FISC 39 and FISC 153– based on two previous works of the OECD: a) SMF (standard magnetic format) and STF (standard transmission format), XML-based language (PECHO, 2014: 34).

– The Directive on Administrative Cooperation –namely 2011/16/EU on administrative cooperation in direct taxation-. The Directive 2010/16/UE standardized procedures dictated by the EU under the comitology procedure of Decision 1999/468/EC provides. Recently, the ECOFIN Council approved the amendment of this Directive on December 9, 2014. This amendment incorporates the recently published OECD common reporting standard into the directive (Directive 2014/107/UE).

The existence of these two standards in the EU involved an overlap of regulations regarding automatic information exchange. This is due to the fact that the automatic exchange of information was been regulated by the saving directive. In 2014 there was an amendment from the Directive on administrative cooperation to include automatic exchange according to the OECD standard. As a result the savings Directive has been exceeded and wider automatic exchange of financial account information is required. For this reason the Council ECOFIN has removed the saving directive on November 10, 2015 with effect 1 January, 2016 (except for Austria from January 1, 2017).

Despite this, the EU has reformed the cooperation directive to incorporate the standard of automatic exchange OECD, however the procedures are under and it does not seem that a substantial change regarding the procedures currently applied in the savings directive will occur. The EU Saving Directive required reports which differ from the Common Reporting Standard and FATCA.<sup>37</sup> At this point it is unclear whether reporting under the administrative cooperation directive will converge with the CRS (KPMG International report).

<sup>36</sup> See ALTENBURGER, above fn. 31, 337.

<sup>37</sup> See KPMG International report. *Automatic Exchange of Information. How financial*

According to the Communication from the Commission to the European Parliament and the Council on March 18, 2015, the provisions of substantive and procedure, previously contained in the Saving Directive, are now included in the scope, and are more extensive, than the directive on administrative cooperation. This is included in the new fourth paragraph of Article 20 of the modified cooperation Directive. It is clear that the procedure rules contained in the saving tax Directive are not similar to the procedure rules contained in FATCA and in standard automatic exchange information of the OECD. Hence their convergence with the OECD standard might be adapted.

### 5.2. About the United States and OECD roles

In addition to what has been said before, FATCA remains a very complicated procedure to apply. The OECD revises its procedures to close the gap and trying to coordinate with other regulations, especially with FATCA, but nowadays the same procedures cannot be used between FATCA and the OECD standard as a consequence of the differences between them, because “there may be substantial differences in terms of the scope and processes required to implement FATCA as compared with the Standard”<sup>38</sup>

Differences between FATCA and the CRS (Common Reporting Standard) mean that financial institutions may not be able to use the same due diligence as reporting system for both standards.<sup>39</sup>

TABLE 1  
DIFFERENCES BETWEEN OECD STANDARD AUTOMATIC EXCHANGE  
INFORMATION AND FATCA<sup>40</sup>

OECE / STANDARD CRS (COMMON REPORTING STANDARD)	UNITED STATES FATCA
Multilateral nature	FATCA has evolved from unilateral US legislation to a global cooperative agreement
Based upon tax residence of the account holder	Refers to citizenship (based on nationality or status of US citizen)

*institutions can adapt to new global standards* (Report), 2014; Altenburger, above fn. 31, 337; Baker, above fn. 31, 371.

<sup>38</sup> G20. *G-20 Final Report. Global Forum of transparency and exchange of information for tax purposes* (Report) 2014 and VANISTANDAEL, above fn. 16, 1152.

<sup>39</sup> See KPMG (Report), above fn. 37, 26.

<sup>40</sup> See OECD, above fn. 18; G20, above fn. 38; OECD. *The Global Forum on Transparency an Exchange of Information for Tax Purposes*, Information brief, 2013; KPMG (Report), above fn. 37; TELLO, above fn. 31; SAPIRIE, above fn. 31; ALTENBURGER, above fn. 31, and PINA, V. La norma internacional sobre el intercambio automático de información de cuentas financieras. *Actualidad Jurídica Uría Menéndez*, 2014, Vol. 37, 128-132.

OECE / STANDARD CRS (COMMON REPORTING STANDARD)	UNITED STATES FATCA
No withholding tax	Presence of 30% withholding tax
Pre-existing accounts under \$ 50.000 are not excluded from review and reporting	Pre-existing accounts under \$ 50.000 are excluded from review and reporting.
Information is sent and received and information flows must pass through the tax administrations on both sides	Some FATCA Agreements provide only for sending information to the United States, which is done directly by the financial institutions.
In general financial institutions will have to collect and remit information on many more accounts under the CRS than under FATCA	

## 6. CONSEQUENCES OF THE LACK OF A CONCEPT OF INTERNATIONAL TAX COOPERATION

The fact that there is no general principle of International tax cooperation in tax matters has relevant implications as discussed below:

### 6.1. From bilateral treaties to multilateral instruments

Historically Mutual Assistance and International Cooperation in tax matters has been done through bilateral treaties to avoid double taxation.<sup>41</sup>

“The traditional form of co-operation between countries in the tax area is based on bilateral conventions”.<sup>42</sup>

Such treaties have mainly been adopted following the conventions of the OECD Model Convention: the OECD Model Tax Convention on Income and on Capital (OECD Model), created by the Committee on Fiscal Affairs of the OECD. Both the

41 See SACCHETO, above fn. 1, 488: “Storicamente quindi l’assistenza e la cooperazione in materia tributaria si sono realizzate secondo una logica ‘negoziale’ attraverso lo strumento delle convenzioni contro le doppie imposizioni, come contrapartita di reciproche concessioni”. See FORT, E.; HONDIUS, P. & NEUGEBAUER, J. Development of the International Information Exchange and Domestic Implementation. *Exchange of Information and Bank Secrecy*, 2013: “The most relevant legal basis for the international exchange of information can be found in Article 26 of the Model Convention of the Organization for Economic Co-operation and Development (OECD)”. See STEWARD, above fn. 17, 152: “International tax administrative co-operation was established and has remained, until very recently, in the pathways laid down by diplomatic bilateral negotiation”. See CAVELTI, above fn. 17, 174. See CALDERÓN, J. M. *Intercambio de información y fraude fiscal internacional*, Madrid: Estudios Financieros, 2000. See CALDERÓN, J. M. Tendencias actuales en materia de intercambio de información entre administraciones tributarias. *Crónica Tributaria*, 2001, vol. 99, 25-40; etc.

42 PETERSSON, L. Opportunities for Multilateral Co-operation between the Member States of the Council of Europe in the Field of Administrative Assistance in Tax Matters. *European Taxation*, 1980, 192.

Model Convention and the other existing models, such as those of the United Nations, the United System Model, etc., contain a clause under article 26 for tax information exchange<sup>43</sup>. The problem is that there is only a single provision in the Model Conventions and this is not sufficient to facilitate such a large scope.

However, nowadays the pendulum has swung subscribing towards multilateral agreements and hence the States are ascribing to the new standards of transparency, exchange of information and cooperation through multilateral instruments.

Hence, the trends on international taxation are shifting. We are living in a new era where ‘the international taxation is shifting from legal bilateralism to multilateralism’.<sup>44</sup> Despite this, in the near future we can wonder what will happen as a consequence of Brexit and new US policies in favour of the bilateralism treaties.

### 6.2. *The current role of Article 26 MC OECD*

We are witnessing a moment where the technical efficiency must prevail in matters of international cooperation, and for this reason, the OECD considers that whilst bilateral treaties such as those based on Article 26 of the OECD Model Tax Convention permit the exchanges of information, it may be more efficient to establish automatic exchange relationships on the basis of a multilateral exchange instrument.<sup>45</sup>

The authors of tax law have asserted deficiencies or limits of Article 26 MC OECD, whose purpose and scope is limited to the strict terms set forth in the wording of that article. Undoubtedly the most remarkable limit is that it only operates in countries with a treaty network and does not work in relation to countries, notably tax havens, where not signed bilateral treaties exist to avoid double taxation.<sup>46</sup>

43 “There are other models, for example U.S. and U.N. Models, but these also are based on the OECE Model”. See THURONYI, V. International tax co-operation and multilateral treaty. *Symposium: International Tax Policy in the New Millennium: Panel IV: The Pursuit of National Tax Policies in a Globalized Environment: Principal Papers*, 1641.

44 See PISTONE, above fn. 31, 3. Nevertheless, it is true that the speech of the advantages and disadvantages of multilateralism versus bilateralism had already worked much earlier by various authors. See HELFRICH and LAUBROCK, J. Critical Review of the OECD/Council of Europe Multilateral (Draft). Convention on Mutual Administrative Assistance in Tax Matters. *Bulletin of International Bureau of Fiscal Documentation*, 1987, Vol. 41, n. 8/9, 410-413.

45 OECD. *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, above fn. 28, 13.

46 See MALHERBE, P. and BEYNSBERGER, M. The year of implementation of the standards. *Exchange of information and bank secrecy*. RUST, A. and FORT, A. (eds.). Wolters Kluwer, 2012, 119-127; PITA, C. *El intercambio de informaciones tributarias* (Secretaría Ejecutiva - CIAT), Lisboa, 2007, 21; BAKER, above fn. 31, 371.

Taken together, these results suggest that the relevance of bilateral agreements to avoid double taxation with respect to administrative cooperation (ex. arts. 26-27 MC OECD) is ending, and may become, a “dead letter”. In that way, we can say that international administrative cooperation in the form of multilateral instruments have become much more effective than cooperation through bilateral tax treaties. In other words: “Articles 26 and 27 of tax treaties are gradually becoming obsolete”.<sup>47</sup>

However, this conclusion must be weighted for the following reasons: a) many developing countries prefer to sign bilateral treaties with a clause on exchange of information ex Art. 26 OECD Model as older versions, b) there are over 3000 bilateral agreements signed following the OECD Model, which means that its use has been widespread and cannot be replaced as quickly and c) to apply the standard for automatic exchange information in tax matters (OECD), the Competent Authority Agreements (CAA) can be executed within legal frameworks such as the equivalent of article 26 in a bilateral tax treaty; c) The new trends in the world if we see the new policies of Brexit an US in favour of bilateral treaties. Changes in the new international political and economic scenario have been developing: the Sarkozy-Obama-Merkel era is over. Nowadays, there is a strong presence of the new international trade policies led by U.S., U.K., and China. And these actions could displace the pendulum from the last tendencies in favour to multilateral systems toward the bilateralism models.<sup>48</sup> Nevertheless, in my opinion it is impossible to curb the importance that multilateralism movement has still achieved.

### 6.3. The prominence of “soft law”

The fact that a coded a general principle of administrative cooperation in tax matters in the international regulatory framework has not been codified, has perhaps influenced the so called *acquis* of ‘soft law’ enhancement to perform an important action to purposes establishing relations of tax cooperation between States in order to prevent tax evasion and avoidance, and to ensure the survival of States. Important instruments and reports enacted by different international institutions can be cited in regards to this:

– OECD Model Convention for the avoidance of double taxation and their Comments and also another Models Convention of different institutions. Most notably the OECD Model which has been adapting to emerging new needs arising from time immersed in globalization policies.

– OECD Tax Information Exchange Agreement 2002 (OECD TIEA).

47 See PISTONE, above fn. 31, 3.

48 ANDRÉS, E. et al. Report of the International Congress 2017: “International Administrative Cooperation in Tax Matters and Tax Governance”. Available at: <http://diposit.ub.edu/dspace/handle/2445/107197>

– *OECD Harmful Tax Competition: An Emerging Global Issue* (1998); ‘Towards Global Tax Cooperation: Progress in Identifying and Eliminating Harmful Tax Practices, OECD (2000)’; ‘The OECD’s Project on Harmful Tax Practices: The 2001 Progress Report, OECD’; ‘The OECD’s Project on Harmful Tax Practices: The 2004 Progress Report OECD’; ‘The OECD’s Project on Harmful Tax Practices: 2006 update on progress in member countries’.

– OECD Tax Cooperation: Towards a Level Playing Field (2006) (2007) (2008) (2009) (2010).

– OECD-Global Forum on Transparency and Exchange of Information. The Global Forum was restructured in September 2009 in response to the G20 call to strengthen the implementation of the Standard.<sup>49</sup> Since 2009 the Global Forum has published different annual reports about the implementation of the international standard for transparency and exchange of information on request for tax purposes. OECD, A progress report on the jurisdictions surveyed by the OECD global forum in implementing the internationally agreed tax standard (April 2, 2009); “Tax transparency: Report on Progress” (2011), (2012), (2013), (2014); Peer Review Reports, etc.

– *United Nations Reports*. United Nations issues annual reports where various topics are included, such as environmental taxation, international exchange of tax information, assistance with collection, etc. Documents can be consulted in the list of Documents on International Cooperation in Tax Matters,<sup>50</sup> enacted by the Committee of Experts on International Cooperation in Tax Matters.<sup>51</sup>

– *Reports and Recommendations of the European Union*. Among the number of reports and recommendations issued by the EU, the following can be highlighted: a) the Communication from the Commission to Parliament and the Council of Europe 2012, entitled Action Plan to strengthen the fight against tax fraud and tax evasion, and b) years before the Communication from the Commission to the Council, the Parliament and the economic and Social Committee on good governance in the tax area, of April 28, 2009, COM (2009) 201 end; and this year, The Communication from the Commission

49 See *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, Information brief, 2013, and R. Afandi. The role and work of the Global Forum on transparency and exchange of information for tax purposes. *Exchange of information for tax purposes*. GUNTHER, O.C. and TUCHLER, N. (eds.). Wien: Linde Verlag, 2013, 37-51.

50 ECOSOC Resolutions & Decisions (2011) (2012) (2013); Background papers - United Nations Model Tax Convention update (2010) (2009) (2008) (2007) (2006) (2005) (2004), available at: <http://www.un.org/esa/ffd/tax/documents/years.htm>

51 *The Committee of Experts on International Cooperation in Tax Matters as a subsidiary body of the Economic and Social Council is responsible for keeping under review and update, as necessary, the United Nations Model Double Taxation Convention between Developed and Developing Countries and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries*. Available at: <http://www.un.org/esa/ffd/tax/index.htm>.

to the Council, the Parliament, March 18, 2015 about fiscal transparency to combat evasion and fiscal avoidance.

#### *6.4. The power of United States (FATCA) in exchange of information guides*

The fact that there is no principle of international cooperation has facilitated the United States' pre-eminence in the world regarding the administrative cooperation in tax matters through its Foreign Account Tax Compliance Act (FATCA).

The United States has demonstrated its persuasive powers in the international tax matters relations, driving the adoption of the FATCA Model IGA with the G5 group. 'On 9 April 2013, the Ministers of Finance of France, Germany, Italy, Spain and the UK announced their intention to exchange FATCA-type information amongst themselves in addition to exchanging information with the United States'.<sup>52</sup>

Subsequently there has been an expansive force of the IGA I and II models (so much have proliferated a great number of agreements signed with the US). This has also generated significant criticism of the imperialistic nature of FATCA: FATCA for all or alternatives to FATCA, also enhancing the comparative studies on the Rubik agreements and Models of FATCA Agreements.<sup>53</sup>

#### *6.5. The risk of economic globalization*

The orphan hood of a general principle of international administrative cooperation in tax matters has not helped to prevent possible risks in a globalized world with free movement of capital.

The exponential increase in the phenomenon of relocation of production activities and/or the profit shifting, requires greater tax cooperation, imposes on the principle of transparency and exchange of information<sup>54</sup> (note that increasingly moving towards a model where investment, economic activities and fiscal operations performed "outside the walls" have gone from the exception to rule).

Recent trends in international tax law have led to a proliferation of studies on the relevance of exchange of information in tax matters. Indeed, nowadays

<sup>52</sup> OECD. *Common Reporting Standard. Standard for Automatic Exchange of Financial Account Information*, above fn. 28, 5.

<sup>53</sup> See PISTONE, above fn. 22; URINOV, V. The Rubik Model: an alternative for automatic tax information exchange regimes? *Bulletin for International Taxation*, 2015, Vol. 69, n. 2, 1-13, Stewart, above fn. 17; Cavelti, above fn. 17.

<sup>54</sup> BUCCISANO, above fn. 3, 670.

there is no doubt regarding the relevance of the fiscal information exchange between tax administrations for the States.<sup>55</sup>

And what's more, the drag effect of economic globalization on aspects such as: the intensification of sometimes pernicious fiscal competition, the proliferation of preferential tax regimes; the relocation of capital income, etc.; are all factors that have increased the role of information exchange on the international stage.

These results further support the idea that there has been a relevant shift in the way exchange of information is considered in international tax law: Not only like an instrument to avoid the international tax fraud, as well as a system to ensure the survival of States, because every day more, the transactions and economic activities are cross-border.<sup>56</sup>

Therefore, compared with a more traditional view that regarded the mechanism of international tax information exchange as a classical instrument in the fight against fraud and international tax evasion; due to emerging new realities in international economic-fiscal reality, a new trend is confirmed and adhered to. This thesis is that a State cannot manage the domestic tax system itself, both compared to other Member States of the European Union<sup>57</sup>

55 See CALDERÓN, J. M. *Intercambio de información y fraude fiscal internacional*, above fn. 41; CALDERÓN, J. M. *Tendencias actuales en materia de intercambio de información entre administraciones tributarias*, above fn. 41; CALDERÓN, J. M. *Intercambio de información y asistencia mutua. Convenios fiscales internacionales y fiscalidad de la Unión Europea*. Madrid: CISS - Wolters Kluwer, 2010; CALDERÓN, J. M. *Intercambio de información y asistencia mutua. Convenios fiscales internacionales y fiscalidad de la Unión Europea*, cit.; CALDERÓN, J. M. *Comentario de la STJCE 26.I.2006, As. C-533/03. 'Asistencia mutua e intercambio de información fiscal internacional entre autoridades administrativas de distintos Estados miembros a los efectos de IVA, impuestos directos y sobre primas de seguro. Base jurídica para adoptar normas de cooperación fiscal internacional que afecten al "Derecho tributario formal"'. Comentarios de la jurisprudencia tributaria del Tribunal de Justicia de las Comunidades Europeas. Años 2006-2007*. HERRERA, P. M. (dir.). Madrid: Instituto de Estudios Fiscales, 2008, 106-122. It is available extensive literature about in Andrés, above fn. 17.

56 Vid. Fn. 54.

57 See CAPOLUPO, above fn. 2, 1757: "Muovendo dal presupposto che uno Stato membro non può gestire il proprio sistema fiscale interno, soprattutto per quanto riguarda la fiscalità diretta, senza ricevere informazioni da altri Stati membri, il Consiglio ha ritenuto di mettere a punto una più incisiva ed efficace cooperazione amministrativa fra le Amministrazioni fiscali dei diversi Stati membri". See CAPOLUPO, S. *Presupposti e limiti della cooperazione fiscale tra gli Stati UE. Corriere tributario* 2011, n. 21, 1757 and sequents; and BARISSI, M. *Lo scambio di informazioni nella UE. Rivista di Diritto Tributario Internazionale*, 2001, n. 2, 327: "per la corretta applicazione di un sistema fiscale che debba confrontarsi con lo scenario sopra descritto è necessaria la conoscenza di fatti, elementi e notizie nell'esercizio della propria sovranità statale".

The EU Directive 2011/16 / EU on administrative cooperation in the field of taxation and is very clear about this in his first par. of the preamble: (1) The Member States' need for mutual assistance in the field of taxation is growing rapidly in a globalized era. There is a tremendous development of the mobility of taxpayers, of the number of cross-border transactions and of the internationalization of financial instruments, which makes it difficult for Member States to assess taxes due properly. This increasing difficulty affects the functioning of taxation systems

and to the international community.<sup>58</sup> This phenomenon increases in times of economic and financial crisis such as that which began in 2008.<sup>59</sup>

*6.6. The absence of a principle of international administrative cooperation in tax matters has negatively affected taxpayers' protection*

Over the last twenty years, academic literature has expressed concerns that, in the field of international information exchanges, no rights and guarantees of taxpayers have been sufficiently protected. In 1998 Professor Sacchetto announced that, with all probability, taxpayer protection is the weakest aspect of information exchange.<sup>60</sup>

The conflict is essentially the collision of two important faculties: the taxpayers' rights on the one hand, and, on the other hand, the States' rights to carry out exchanges of tax information. What needs to be achieved is to ensure taxpayers' rights and guarantees do not impede the procedures for the exchange of international information. This dichotomy is evident in the Multilateral Convention on Mutual Assistance of 1987, in the Model Convention on Information Exchange 2002 OECD in EU legislation and scientific literature.<sup>61</sup>

In recent years, scientific literature has developed greater scrutiny about taxpayers' rights. Some authors consider that in the present there are better

and entails double taxation, which itself incites tax fraud and tax evasion, while the powers of controls remain at national level. It thus jeopardises the functioning of the internal market. 2. Therefore, a single Member State cannot manage its internal taxation system, especially as regards direct taxation, without receiving information from other Member States.

58 Recently interesting contributions have been written by DEVELVA, P. & MOSQUERA, I. Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions. *Intertax*, 2017, Vol. 45, 5, pp. 362 seq.; MOSQUERA VALDERRAMA, I. The Rights of Multinationals in the Global Transparency Framework: McCarbysms? 18 *Derivs. & Fin. Instrums.* 1, 2016, Journals IBFD; MOSQUERA VALDERRAMA, I. Legitimidad y protección de derechos en el intercambio de información. La perspectiva del contribuyente. *Estudios de Derecho Tributario. Derecho Aduanero y Comercio Exterior*, 2016, 509-534.

See MARINO, above fn. 8, 433; J. Pedreira. La cooperación administrativa en la Unión Europea contra el fraude fiscal. *Quincena Fiscal*, 2012 n. 3, 109-130; CALDERÓN, J. M. El intercambio de información entre administraciones tributarias en un contexto de globalización económica y competencia fiscal perniciosa. *Las medidas anti-abuso en la normativa interna española y en los convenios para evitar la doble imposición internacional y su compatibilidad con el derecho comunitario*. SOLER, M. T. and SERRANO, F. (eds.). Madrid: Instituto de Estudios Fiscales, 2002, 270.

59 See PITRONE, above fn. 20.

60 See C. SACCHETTO. Informe General. *XLIV Congreso de la IFA*, Stokholm: IFA, 1990.

61 See ANDONINO. Lo scambio di informazioni tra le amministrazioni finanziarie. *Diritto e pratica tributaria*, 2008, Vol. LXXIX, n. 4, 707; CALDERÓN. Taxation protection within the exchange of information between State tax Administrations, above fn. 54, 462; MARTÍNEZ, L. *La protección jurídica del contribuyente en el intercambio de información entre Estados*. Valencia: Tirant lo Blanch, 2008, 25.

and more comprehensive protections for taxpayers, albeit more incipient<sup>62</sup>. The truth is that this matter is still a pending issue.

But it is striking that from a legal basis, the taxpayers' rights have not -always- been sufficiently regulated: often incompletely regulated or sometimes only indirectly regulated, despite to it is true that they have been regulated in different laws and other sources of law, starting by the Constitutions. In the OECD Model Convention and other Models like the US or UN Models, there are not explicitly and directly recognized taxpayers' rights, but in a way this has been perceived as a "hint". For example, in the 26th clause of the OECD Model limits and restrictions on the destination and use of the Tax Information Exchange are included. But a disciplined and detailed regulation has not been achieved<sup>63</sup>. As a consequence; bilateral agreements to avoid double taxation signed following the Model Convention OECD did not explicitly recognize taxpayers' rights.

Regarding the Multilateral agreement on mutual administrative assistance of 1988, its article 4.3 provides the right for residents or nationals and those related to be informed by the relevant authorities before transmitting the required information. However, one article is insufficient to fully protect the rights of taxpayers. On the other hand, the *Tax information exchange Agreement (2002) OECD* contains a specific article about taxpayers' rights regulation, but its scope remains limited. In particular Article 1 states: The rights and guarantees afforded to persons by the laws or administrative practice of the requested party shall continue to apply provided they do not unduly prevent or delay effective exchange of information.

In addition, in the European Directive on cooperation, no protection of the rights of taxpayers is contained. In its preamble, n. 28 provides that fundamental rights are respected in the planned European Charter of Nice 2000, but as a policy document it was not binding in nature. A very loose duty to notify the taxpayer is regulated for under Article 13a of the European Directive on cooperation but depends on the internal regulations of each State.

Studies on the subject have highlighted the supremacy of public finance reasons as well as a fast and effective exchange of information practical prior than taxpayers' rights.<sup>64</sup>

The most obvious finding to emerge from this and other studies is that taxpayers' rights are guaranteed when: a) a particular State recognizes those rights in its domestic law and b) depends whether this State wants to protect these rights when exchanging international information.

62 See CALDERÓN. Tendencias actuales en materia de intercambio de información entre administraciones tributarias, above fn. 54.

63 See MATELLONE, P. Tutela del contribuente nei confronti delle prove illecitamente acquisite all'estero. *Diritto e pratica tributaria*, 2013, Vol. XXXN, n. 4, 791-852.

64 See MASTELLONE, above fn. 62.

CONCLUSION AND PROSPECTS: PROPOSAL FOR AN INTERNATIONAL CODE ON ADMINISTRATIVE COOPERATION IN TAX MATTERS AND INTERNATIONAL TAX GOVERNANCE

What is now needed is a cross-national study involving the International Administrative Cooperation in tax matters. That is such an important regulation that, to our way of thinking, it justifies the construction of a specific principle about the concept, content and boundaries of international administrative cooperation between the countries in the world. Furthermore, we take into account the new international trends in international tax law.

As I prior said, the OECD has adopted multilateral instruments recently, such as the CRS multilateral instrument and the BEPS Project, but these instruments are not global instruments, but sectoral or specific instruments: the CRS regulates just one of the possible ways of international administrative cooperation in tax matters, and the BEPS Project encourages cooperation to avoid the base erosion and the Profit Shifting in the framework of the corporate income tax and economic activities at the international level. Of course our Code would include measures also incorporated in BEPS and CRS, but would be carried out it, with a global wider perspective, for the whole tax administration and taxpayers, who can apply the global tax system, regulating all forms of cooperation, and the kinds of relations between tax administrations and taxpayers, to protect their rights, including alternative dispute resolution systems, not just for corporate income taxation taxpayers, but also for the worldwide tax system.

Consequently, the fact that there is not a General Code on international tax international cooperation, together with the dizzying speed in the development of this area, has marked the asymmetric evolution of this matter, leading to significant gaps, sometimes major contradictions and often major dysfunctions, which could be solved with an administrative Code of International cooperation containing substantive and procedural part in administrative cooperation obligations of States. Of course, that general instrument would incorporate the different legal instruments for exchange of information. The findings of this study have a number of important implications for future practice.

This code could be proposed by any international institution such as the World Bank or the International Monetary Fund, which could be the sponsoring a Global Code involving as much as institutions possible: European Union, Global Forum of the OECD, G20, United Nations, CIAT league Nordics, Russian Federation, etc., as well as, could be proposed by whichever International Organization or the European Union.

The Global Forum has created a small working group to study the main difficulties of the countries to implement the Common Standard. The same sub-working group would be in charge of the negotiations and drafting of the code along with the other institutions. The United Nations could take

on these functions under its Committee of Experts. The United Nations has created a Committee of Experts on International Cooperation in tax matters which is making active efforts to support the single standard and encourage countries to support the multilateral model of the common standard of automatic exchange of information. Of course, it would be highly desirable to have a presence in Latin America since many of their States are not participating in the pilot project of the OECD (only Standard) and in many of these States require legislative changes to implement the standard. The cited other institutions should also join. And of course, to have a real presence in the other Continents as Africa, Asia and Oceania.

The structure of the Code should contain at least the following chapters which could be divided into sections and headings.

INTERNATIONAL ADMINISTRATIVE COOPERATION CODE  
IN TAX MATTERS AND INTERNATIONAL TAX GOVERNANCE

**TITLE I. COOPERATION BETWEEN TAX ADMINISTRATIONS**

**Sec. 1. International and EU legal basis**

Identify hard law and soft law sources regarding cooperation between tax administrations. In this Code should be included the general international legal basis for the information exchange among States (OECD model, UN model, US model, CIAT Model, agreement of information exchange OECD 2002, Multilateral convention of mutual assistance 1988, amending Protocol 2010, standard automatic exchange of tax information OECD) and the European sources (hard and soft law).

Direct taxation, Indirect Taxation, Customs...

**Sec. 2. Principles of administrative cooperation in tax matters**

**Sec. 3. Concept and activities of administrative cooperation/mutual assistance**

Exchange of information  
Presence of officials in countries of other tax administrations  
Participation of officials in investigations made by other countries  
Simultaneous controls  
Cooperation in tax notifications

**Sec. 4. Mutual assistance in tax collection**

**Sec. 5. International accounting and simplify accounting systems**

**Sec. 6. Simplify tax systems**

## **Sec. 7. Development of a general theory on good fiscal governance**

Another major pending issue in international taxation is the consolidation of an international tax governance. It is essential to establish good fiscal governance policies in developed and developing countries to contribute to the efficiency of tax systems.

In the European level have been carried out various actions such as: the Code of conduct for business taxation (1997), the action plan against fraud and tax evasion (2012), and recently the communication from the Commission to Parliament and the Council of 18 March 2015 on fiscal transparency to combat tax evasion and avoidance.

In the international context, there were multilateral discussions within the “Group of twenty” (G20) and the global forum on transparency and exchange of information between States. But, good international fiscal governance is far from being achieved.

## **Sec. 8. Standard administrative procedures for exchange of tax information and other cooperation activities**

Standardization of procedures for administrative cooperation. Protocols, forms, computer systems. It would be even necessary to develop common procedural standards and compatible information and communication technology.

“Standardisation of formats is critical to the efficiency and effectiveness of automatic exchange”. In the Automatic Standard for Automatic Exchange of Financial Account Information. Common Reporting Standard<sup>65</sup>, we can read: 3. *Common or compatible technical solutions. 16. Common or compatible technical solutions for reporting and exchanging information are a critical element in a standardised automatic exchange system - especially one that will be used by a large number of jurisdictions and financial institutions. Standardisation will reduce costs for all parties concerned. 17. The technical reporting format must be standardised so that information can be captured, exchanged and processed quickly and efficiently in a cost-effective manner and secure and compatible methods of transmission and encryption of data must be in place.*

As it has been stated in a report issued by the G20<sup>66</sup>: “specific cost for implementing the Standard may be lower if undertaken in coordination with FACTA implementation”. But not only FATCA, we propose that the main institutions which

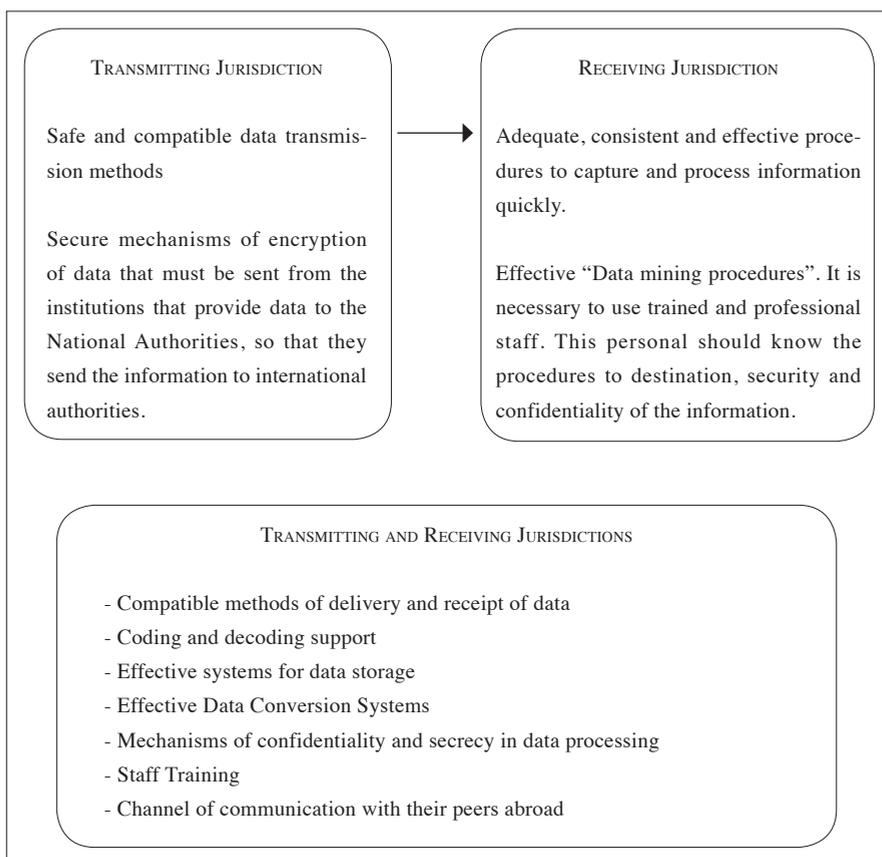
<sup>65</sup> See OECD. *Automatic Exchange of Financial Account Information, Background information brief*, above fn. 15

<sup>66</sup> G20. *G-20 Final Report. Global Forum of transparency and exchange of information for tax purposes* (Report), above fn. 38.

have created legal basis to automatic exchange information make an effort in order to achieve a global Standard automatic exchange system.

If we get that at least EU, OECD and US (with the commit of G20 and United Nations) reach an agreement to establish common rules to standardize procedures, it is likely that every country in the world would be governed by those rules.

FIGURE 4  
REQUIREMENTS OF TRANSMITTING AND RECEIVING JURISDICTIONS



As I prior said, Recently the OECD has published the following documents: the *CRS Implementation Handbook*, the *CRS Status Message XML Schema* – as well as the related *User Guide* and the “*CRS -related Frequently Asked Questions*”.

## Sec. 9. Costs

Another important chapter is the cost of implementing the exchange of information between States.

In the OECD Model, cost collection provisions costs and the problems derivative have been addressed by the competent authorities. Both the agreement on exchange of information OECD (art. 13) and the Multilateral Convention (art. 26) distinguish between ordinary and extraordinary costs. The ordinary costs are for the requested party while the applicant pays the extraordinary costs. Also in the Common standard reporting of the OECD there are reference to in its comments. In the costs issues, we can underline the Aims at proposing sustainable tax policy decision that will benefit developing countries from the Norway's Council.

It is very important to note that for States to apply a common global standard automatic exchange it is necessary to minimize costs through standardised procedures valid for all countries, because otherwise short and medium-term costs may be much higher than the benefits. This should therefore be conceived as a very important chapter of a future Code of Administrative cooperation in tax matters.

## **TITLE II. COOPERATION BETWEEN TAX ADMINISTRATION, TAXPAYERS AND INTERMEDIARY'S AGENTS**

### **Sec. 1. Legal basis**

Identify hard law and soft law sources regarding cooperation between tax administrations. Multilateral and bilateral treaties, EU Regulations and Directives, Recommendations, Charters of taxpayers' rights...

### **Sec. 2 Promoting tax compliance systems**

Cooperative Tax Compliance Framework: 2002. The Forum of Tax Administration (FTA); (2006) Final Declaration of Seoul; (2007) Communicated of Cabo, (OECD) "Study into Role of Tax Intermediaries"; (2009) OECD. Communicated of Paris. "Experiences and Practices of Eight"; (2009) OECD "General Administrative Principles". (2009) "Corporate Governance and Tax Risk Management"; (2010) OECD. "Tax compliance and Tax Accounting Systems"; (2013) OECD "Co-operative compliance: a framework; (2016) OECD. Co-operative Tax Compliance".

Concept: from "Enhanced Relationship" to "Co-operative Compliance".

Principles: Transparency, Loyally, Mutual security, Proportionality, Impartiality, etc.

Advantages for the Tax administrations and for the taxpayers.

Systems to be offer to the States (unilateral declaration by the tax authorities; mutual agreement between tax administration and tax payers and tax advisors; or Individual Agreements with each company).

Models of tax compliance applied in some countries as Netherland, Australia, U.S., Ireland, etc.

### **Sec. 3. A general theory about taxpayers' rights**

Towards an “international minimum standard on taxpayers' rights and protections”, accepted by all nations.

The taxpayers' rights are not included in the model convention for the avoidance of double taxation and bilateral agreements signed following such models; they have not been well regulated in EU Directives<sup>67</sup>, and even much less in FATCA. Only the multinational mutual assistance convention and the 1988 Model Agreement on Exchange of Information alluded to this matter, but with narrow scope. Therefore, there is a lack of a general theory of taxpayers' rights in exchange information. The legal basis for exchange of information contains rules on the confidentiality (art. 26.2 OECD Model, Art. 8 agreement information exchange, Art. 22 Multilateral Convention of mutual assistance, commentaries on the model CAA of new Standard for automatic exchange of financial account information). Also the OECD has published a guide what are considered to be the best practices about confidentiality and it provides practical guidance on how to ensure an adequate level of protection.<sup>68</sup> On the other hand, the European Commission has published *A European Taxpayers' Code*<sup>69</sup>. All this should be taken into consideration when developing a general theory of confidentiality that has a global reach.<sup>70</sup>

### **Sec. 4. The intermediary's agents**

## **TITLE III. CONFLICT RESOLUTION SYSTEMS**

### **Sec. 1. Traditional systems for conflict resolution (Courts, i.e. CJEU).**

MAPS

Appeals in Courts

### **Sec. 2. Cross-border alternative tax dispute resolution systems:**

Arbitration, ombudsman, mediation, tax agreements...

<sup>67</sup> Some has been regulated eg. in the administrative cooperation, Directive but with a little rules and very limited scope.

<sup>68</sup> Some authors have expressed concern that the standard of automatic exchange would impair the right to confidentiality. See PISTONE, above fn. 22.

<sup>69</sup> *A European Taxpayers' Code*. European Commission Directorate/ General Taxation and Customs Union, 2016. Ref. Ares (2016)6598744 - 24/11/2016.

<sup>70</sup> Automatic exchange of information. What it is, how it works, benefits, what remains to be done. OECD. Available at: [www.oecd.org/tax/eoi](http://www.oecd.org/tax/eoi)

This Code is concerned with bridging the gap between the opportunities offered by enhanced tool for administrative cooperation and the need to introduce more effective and efficient approaches to alternative modes of settlement of cross-border tax disputes.

This exercise would also place a focus on the need to incorporate alternative dispute resolution mechanisms within legal instruments providing for administrative cooperation, so to ensure a more immediate leverage for the safeguard of the rights of the concerned taxpayers. The scope of this section would then be further broadened in order to investigate the legal and institutional reforms that may promote the consolidation of a more robust alternative dispute resolution framework in relation to tax disputes. In particular, focus would be placed on the identification of the most suitable procedural tools, and in particular, on the desirability of extending mediation (which already forms the object of an EU Directive) to tax issues

The ultimate goal would be to create an international theory on cross-border alternative tax dispute resolution systems with the possibility to create and international institution/agency on alternative dispute resolution in cross-border tax matters.

Note:

In our Project funding by the Spanish ministry of economy and “competitiveness” (EUDISCOOP) DER 2015-68768-P<sup>71</sup> we propose the creation of a European Agency: centralised European body (typically, in the form of a European agency) entrusted with the channelling and oversight of alternative dispute resolution mechanisms. We consider the foreseen institutional reforms as the first core of a tendency towards administrative integration in tax matters within the European Union, which would encompass the emergence of a more comprehensive European Tax Agency which could serve as a “one-stop shop” for European taxpayers in relation to cross-border issues.

That we are proposing is the creation of an International ADR Agency. This Agency will has different sections, with expert people in each one of them, in order to put in practice the different systems to resolve transborder conflicts in tax matter. This sections would be: Mediation, Arbitration, Ombudsman, Agreements, etc.

71 *International Administrative Co-Operation and Alternative Resolution of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspectives* (EUDISCOOP) DER 2015-68768-P.

## TITLE IV. SYSTEMS COMBATING TAX FRAUD AT THE INTERNATIONAL AND EU

### Final notes by the author

1. The original version of this research was concluded in the International Bureau of Fiscal Documentation of Amsterdam in August 2015, as a result of a Grant of the Economy and “Competitiveness” Spain Ministry (Call: Herrero de Madariaga). To create it, the author was working many years before, motivating to create a Global Tax Cooperation multilateral instrument, to be followed worldwide one day.

2. This article is the embryo of a macro research and development Project of the Ministry of Economy and “Competitiveness” of Spain (Excellence Projects, call 2015), which resulted in funding in 2016 for the following four years (2016-2019). Reference: (EUDISCOOP) DER 2015-68768-P), <http://www.idi.mineco.ob.es/portal/site/MICINN>

3. The further development of this article has been carried out in the Universities of Barcelona; London School of Economics and Political Sciences. London, UK (2016); University of Leeds, England. UK (2016), Georgetown University. Washington (2017) and the World Bank. Washington (2017).

4. The main proposal about an “International Administrative Code in Tax Matters” had been made public by her Author, Eva Andrés Aucejo, in the “International Congress 2017: International Administrative Cooperation in tax matters and tax Governance” held in Barcelona, 26th & 27th of January 2017<sup>[72]</sup>.

5. It’s been almost three years since she wrote this code until its publication. Some of the previous anonymous referees (peer review) did not conceive the wider and breadth of this Code.

6. Nowadays the author is writing these lines from the World Bank, Washington, where she is holding conversations with both World Bank and International Monetary Fund Authorities, just about an “International Fiscal Cooperation and Global Tax Governance Code” multilateral instrument, like a platform for the

72 ANDRÉS AUCEJO, E. et al. Report of the International Congress 2017: “International Administrative Cooperation in Tax Matters and Tax Governance”. On Barcelona, January 26th, 2017. Faculty of Law. University of Barcelona. Available at: <http://diposit.ub.edu/dspace/handle/2445/107197>

ANDRÉS AUCEJO, E. et al. Chronicle of International Congress 2017: “International Administrative Cooperation in Tax Matters and Tax Governance”. On Barcelona, January 26th, 2017. Faculty of Law. University of Barcelona. Available at: <http://diposit.ub.edu/dspace/handle/2445/106783>

ANDRÉS AUCEJO, E. et al. EUDISCOOP/PROJECT. Book of the Conference Proceedings: International Congress 2017. International Administrative Cooperation in Tax Matters and Tax Governance. Available at: <http://diposit.ub.edu/dspace/handle/2445/106704>

international cooperation between the five Continents tax administrations. Just is the start. The Cooperation is the key.

7. I am really greeting to this Impact Factor SCOPUS, SCImago Review for the publication of this article.

#### REFERENCES

- AFANDI, R. (2013). "The role and work of the Global Forum on transparency and exchange of information for tax purposes", in *Exchange of information for tax purposes*, O.C. Gunther and N. Tuchler (eds.), Linde Verlag, Wien, 37-51.
- ALTENBUNGER, P. (2015). "Coexistence between FATCA and MCAA- Potential conflicts", *Tax Notes International*, vol. 77, n. 4, 337-340.
- ANDONINO. (2008). "Lo scambio de informazioni tra la amministrazioni finanziarie", *Diritto e pratica tributaria*, vol. LXXIX, n. 4, 707.
- ANDRÉS AUCEJO, E. (2011). "La cláusula de intercambio de información tributaria según el Convenio bilateral Hispano-Brasileño para evitar la doble imposición y prevenir la evasión fiscal en materia de impuestos sobre la renta; Impuestos." *Revista de doctrina, legislación y jurisprudencia*, vol. 27, n. 15-16, 19-48.
- ANDRES AUCEJO, E. et alter. (2017). Chronicle of International Congress 2017: "International Administrative Cooperation in Tax Matters and Tax Governance". On Barcelona, January 26th, 2017. Faculty of Law. University of Barcelona. <http://diposit.ub.edu/dspace/handle/2445/106783>
- ANDRES AUCEJO, E. et alter. (2017). EUDISCOOP/PROJECT. Book of the Conference Proceedings: International Congress 2017. International Administrative Cooperation in Tax Matters and Tax Governance. <http://diposit.ub.edu/dspace/handle/2445/106704>
- ANDRES AUCEJO, E. et alter. (2017). Report of the International Congress 2017: "International Administrative Cooperation in Tax Matters and Tax Governance". On Barcelona, January 26th, 2017. Faculty of Law. University of Barcelona. <http://diposit.ub.edu/dspace/handle/2445/107197>
- ANDRES, E. et alter. (2017). Report of the International Congress 2017: "International Administrative Cooperation in Tax Matters and Tax Governance, <http://diposit.ub.edu/dspace/handle/2445/107197>).
- ARDITO, F. (2007). *La cooperazione internazionale in materia tributaria*. Cedam, Padova.
- AULT, H. J. (1992). "Corporate Integration, Tax treaties and division of the international tax base: principles and practices", *Tax Law Review*, vol. 47, n. 3, 565-608.
- BAKER, F. (2013). "Automatic Exchange of Information", *British Tax Review*, n. 4, 371-373.
- BARISSI, M. (2001). "Lo scambio di informazioni nella UE", *Rivista di Diritto Tributario Internazionale*, n. 2, 327.

- BUCCISANO, A. (2012). “Cooperazione amministrativa internazionale in materia fiscale”, *Rivista di Diritto tributario*, n. 7-8.
- CALDERÓN, J. M. (2002). “El intercambio de información entre administraciones tributarias en un contexto de globalización económica y competencia fiscal perniciosa”, in *Las medidas anti-abuso en la normativa interna española y en los convenios para evitar la doble imposición internacional y su compatibilidad con el derecho comunitario*. (M. T. SOLER and F. SERRANO (eds.), Instituto de Estudios Fiscales, Madrid, 270.
- CALDERÓN, J. M. (2001). “Tendencias actuales en materia de intercambio de información entre administraciones tributarias”, *Crónica Tributaria*, vol. 99, 25-40.
- CALDERÓN, J. M. (2000). *Intercambio de información y Fraude Fiscal Internacional*, Estudios Financieros, Madrid.
- CANNAS, F. (2013). “The historical development of the exchange of information for tax purpose”, in *Exchange of information for tax purposes* (O. C. GUNTHER and N. TUCHLER (eds.), Linde Verlag, Wien, 15-34.
- CAPOLUPO, S. (2011). “Presupposti e limiti della cooperazione fiscale tra gli Stati UE”, *Corriere tributario*, n. 21, 1757.
- CAPOLUPO, S. (2011). “Più incisiva la disciplina europea sulla collaborazione amministrativa nelle imposte dirette”, *Corriere tributario*, vol. 16.
- CAVELTI, L. U. (2013). “Automatic information exchange versus the withholding tax regime globalization and increasing sovereignty conflicts in international taxation”, *World Tax Journal*, vol. 5, n. 2, 172-214.
- COMMISSION ON TAXATION. (2009). JCX-42-09, Technical explanation of the “Foreign Account Tax Compliance Act of 2009”. See Cavelti, above fn. 17, 182-183.
- DEAN, S.D. (2008). “The incomplete global market for tax information”, *Boston College Law Review*, vol. 49, 605-672.
- DODD, J. (2013). “International agreements to improve tax compliance (FATCA)”, *British Tax Review*, vol 4, 529-540.
- ENGLISCH, J., VELLA, J. and YEVGENYEVA, A. (2013). “The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations”, *British Tax Review*, n. 2, 223-259.
- FORT, E., HONDIUS, P. and NEUGEBAUER, J. (2013). “Development of the International Information Exchange and Domestic Implementation” in *Exchange of Information and Bank Secrecy*.
- G20. (2014). *G-20 Final Report. Global Forum of transparency and exchange of information for tax purposes* (Report).
- HELFRICH and LAUBROCK, J., (1987). “Critical Review of the OECD/Council of Europe Multilateral (Draft) Convention on Mutual Administrative Assistance in Tax Matters”, *Bulletin of International Bureau of Fiscal Documentation*, vol. 41, n. 8/9, 410-413.

- KPMG International report. (2014). *Automatic Exchange of Information. How financial institutions can adapt to new global standards* (Report).
- LEAGUE OF NATIONS: COMMITTEE OF TECHNICAL EXPERTS ON DOUBLE TAXATION AND TAX EVASION. (1927). *Double Taxation and Tax Evasion* (Report).
- MALHERBE, P. and BEYNSBERGER, M. (2012). “The year of implementation of the standards”, in *Exchange of information and bank secrecy* (A. RUST and A. FORT (eds.), Wolters Kluwer, 119-127.
- MARINO, G. (2010). “La cooperazione internazionale in materia tributaria, tra mito e realtà”, *Rassegna Tributaria*, 53(2), 443-448.
- MARTÍNEZ, L. (2008). *La protección jurídica del contribuyente en el intercambio de información entre Estados*. Ed. Tirant Lo Blanch, Valencia, 25.
- MATELLONE, P. (2013). “Tutela del contribuente nei confronti delle prove illecitamente acquisite all'estero”, *Diritto e pratica tributaria*, vol. XXXN, n. 4, 791-852.
- MELIS, G. (2008). “Spunti sul metodo di coordinamento fiscale aperto quale possibile strumento per l'integrazione fiscale tra Stati dell'Unione Europea e Stati terzi”, *Diritto e pratica tributaria internazionale*, vol. 8, n. 1, 207.
- MOSQUERA VALDERRAMA, I. (2016). “Legitimidad y protección de derechos en el intercambio de información. La perspectiva del contribuyente. Estudios de Derecho Tributario”, *Derecho Aduanero y Comercio Exterior*”, 509-534.
- OECD. (2012). *Automatic Exchange of Financial Account Information*, Background information brief, 2015, 2; P. MALHERBE and M. BEYNSBERGER, “The year of implementation of the standars”, in *Exchange of information and bank secrecy* (A. RUST and A. FORT (eds.), Wolters Kluwer, 119-127.
- OECD. *Automatic Exchange Portal*, available at <http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/>
- OECD. (2014). *Common Reporting Standard. Standard for Automatic Exchange of Financial Account Information* (Report).
- OECD. (2006). *Manual of the implementation of exchange of information provision for tax purposes* (Report).
- OECD. (2014). *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (Report).
- OECD. (2014). *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (Report).
- OECD. *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, above fn. 28, 13.
- OECD. (2013). *The Global Forum on Transparency an Exchange of Information for Tax Purposes*, Information brief.

- OWENS, J. (2009). "Moving towards better transparency and exchange of information on tax matters", *Bulletin for International Taxation*, 2009, n. 63(11), 557.
- PETTERSSON, L. (1980). "Opportunities for Multilateral Co-operation between the Member States of the Council of Europe in the Field of Administrative Assistance in Tax Matters", *European Taxation*, 192.
- PICCIOTO, S. (1992). *International Business Taxation as a Study in the Internationalization of Business regulation*, CUP, Cambridge.
- PINA, V. (2014). "La norma internacional sobre el intercambio automático de información de cuentas financieras", *Actualidad Jurídica Uría Menéndez*, vol. 37, 128-132.
- PISTONE, P. (2012). "Lo scambio di informazioni e la Direttiva 2011/16/UE in materia di cooperazione amministrativa: innovazioni e profili critici", *Diritto e pratica tributaria internazionale*, vol. IX, n. 2, 466; Cavelti, above fn. 17, 173-174.
- PISTONE, P. (2014). "Coordinating the action of regional and global players during the shift from bilateralism to multilateralism in international tax law", *World Tax Journal*, n. 6, 3-5.
- PISTONE, P. (2013). "Exchange of information and Rubik Agreements: the perspective of an EU Academic", *Bulletin for International Taxation*, vol. 67, n. 4/5, 219.
- PITA, C. (2007). *El intercambio de informaciones tributarias* (Secretaría Ejecutiva – CIAT), Lisboa, 21.
- PROSS, A. (2014). "How tax transparency went global in 2014", *International Tax Review*, vol. 26, n. 3, 10-13.
- SACCHETTO, C. (1990). "L'evoluzione della cooperazione internazionale fra le amministrazioni finanziarie statali in materia di IVA ed Imposte dirette: scambio di informazioni e verifiche "incrociate" internazionali", *boll. Trib.*, n. 7.
- SACCHETTO, C. (1990). "Informe General", in *XLIV Congreso de la IFA*, IFA, Estocolmo.
- SAPIRIE, M. (2015). "The Common Reporting Standard and FATCA", *Tax Notes International*, vol. 77, n. 7, 558-560.
- SAPONARO, F. (2005). "Lo scambio di informazioni tra amministrazioni finanziarie", *Rassegna tributaria*, vol. 48, n. 2, 453.
- SEER, R. and GABERT, I. (eds.). (2010). *Mutual assistance and information exchange*, IBFD, Amsterdam.
- SEER, R. (2009). "La cooperazione internazionale in materia fiscale - Situazione e prospettive nei paesi membri dell'EU - Dichiarazione e contributi", *Rivista di Diritto Tributario Internazionale*, 73-78.
- SEER, R. (2013). "Recent Development in Exchange of Information within the EU for Tax Matters", *EC Tax Review*, vol. 22, n. 2, 66-77.
- STEWART, M. (2012). "Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration", *World Tax Journal*, vol. 4, n. 2, 152-178.

- TANZI, V. and ZEE, H. H. (2001). "Can Information Exchange be Effective in Taxing Cross-Border Income Flows?" in *Modern Issues in the Law of International Taxation* (K. ANDERSON, P. MELZ and C. SILFVERBERG (eds.), Kluwer Law International, Stockholm, 259-268.
- TELLO, C. P. (2014). "FATCA: Catalyst for Global Cooperation on exchange tax information", *Bulletin for International Taxation*, vol. 68, n. 2, 88-102.
- THURONYI, V. "International tax co-operation and multilateral treaty", *Symposium: International Tax Policy in the New Millennium: Panel IV: The Pursuit of National Tax Policies in a Globalized Environment: Principal Papers*, 1641.
- TOSI, L. (1996). "L'attività istruttoria amministrativa internazionale fra le amministrazioni finanziarie statali in materia di IVA ed imposte dirette: scambio di informazioni e verifica "incrociate" internazionali", *Rivista di Diritto tributario*, I.
- TURINA, A. (2010). "I recenti sviluppi internazionali in materia di scambio di informazioni", *Fiscalità internazionale*, vol. 8, n. 2, 155-161.
- URINOV, V. (2015). "The Rubik Model: an alternative for automatic tax information exchange regimes?", *Bulletin for International Taxation*, vol. 69, n. 2, 1-13, Stewart, above fn. 17; Cavelti, above fn. 17.
- VANISTENDAEL, F. (2015). "EU Tax Agenda: exchange of information, transparency and abuse", *Tax Notes International*, vol. 77, n. 2, 163-165.
- VANISTENDAEL, F. (2014). "The international information exchange puzzle", *Tax Notes International*, vol. 75, n. 13, 1149.
- VASCEGA, M and VAN THIEL, S. (2011). "Assessment of Taxes in Cross-Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation", *EC Tax Review*, vol. 20, n. 3, 148-154.
- WISSELINK, A. (1997). "International exchange of tax information between European and other countries", *EC Tax Review*, vol. 6, n. 2, 108-115.
- WOULTERS, J. and MEUWISSEN, K. (2011). "Global Tax Governance", *Leuven Centre for Global Governance Studies Working Paper*, 59.