

財經事務及庫務局

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政府總部二十四樓



**CB(1)988/12-13(03)**  
**FINANCIAL SERVICES AND THE  
TREASURY BUREAU**

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**By Fax (2877 5029)**

2 May 2013

Mr Bonny Loo  
Assistant Legal Advisor  
Legal Service Division  
Legislative Council Secretariat  
Legislative Council Complex  
Legislative Council Road  
Central, Hong Kong

Dear Mr Loo,

### **Inland Revenue (Amendment) Bill 2013**

Thank you for your letter of 19 April 2013 on the captioned Bill. Our responses to your questions are set out in the following paragraphs.

#### ***Clause 8 – proposed section 4 of the Inland Revenue (Disclosure of Information) Rules (Cap. 112 sub. leg. BI) (Disclosure Rules)***

2. In order to protect taxpayers' privacy and confidentiality of information exchanged, we will continue to adopt the highly prudent safeguard measures in our comprehensive avoidance of double taxation agreements (CDTAs) and future tax information exchange agreements (TIEAs), which include the following –

- (a) we will only exchange information upon receipt of requests and no information will be exchanged on an automatic or spontaneous basis;
- (b) the information sought should be foreseeably relevant, i.e. no fishing expeditions;
- (c) information received by our treaty partners should be treated as confidential;
- (d) information would only be disclosed to the tax authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of and the determination of appeals in relation to taxes falling within the scope of exchange of information (EoI) but not for release to their oversight bodies unless there are legitimate reasons given by the treaty partners;
- (e) information requested should not be disclosed to a third jurisdiction;
- (f) there is no obligation to supply information under certain circumstances, for example, where the information would disclose any trade, business, industrial, commercial or professional secret or trade process, or which would be covered by legal professional privilege, etc.; and
- (g) we will not accede to any requests from our treaty partners for tax examinations abroad and assistance in collection of taxes.

3. Regarding the “foreseeable relevance” criterion, as mentioned in paragraph 2(b) above, it is adopted to guard against fishing expeditions for information to be exchanged. The EoI Article in the CDTAs of Hong Kong only allows EoI that is foreseeably relevant for carrying out the provisions of the agreement or to the administration or enforcement of the domestic laws concerning taxes of the contracting parties. The expression “administration or enforcement of the tax law” in the proposed amendments to section 4 of the Disclosure Rules aligns with the wording in our CDTAs and the standard wording adopted in the EoI Article of the Organisation for Economic and Cooperation and Development’s (OECD) Model Tax Convention on Income and on Capital. The term “tax assessment” in the present context refers to the use of tax information

exchanged in the determination of tax liability during the administration or enforcement of the tax laws of a territory outside Hong Kong. The policy intent of the proposed amendments is to enable Hong Kong to carry out its treaty obligations under CDTAs and future TIEAs. In the proposed amendments, we have followed the wording in the EoI Article to spell out clearly the purpose of EoI and to enable our EoI arrangement to be in line with the OECD model. We have made it simpler in the presentation in the LegCo Brief and also the Explanatory Memorandum for easier comprehension.

***Consequential amendments to Personal Data (Privacy) Ordinance (Cap. 486)***

4. As mentioned in paragraphs 2(c) and (e) above, any information to be exchanged under CDTAs and future TIEAs will be treated as confidential and should not be disclosed to any third jurisdictions.

5. The definition of the term “tax” in section 58(1A) of the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO) makes reference to section 49(1A) of the Inland Revenue Ordinance (Cap. 112) (IRO). The definition includes any tax of a territory outside Hong Kong if -

- (a) arrangements having effect under section 49(1A) of the IRO are made with the government of that territory; and
- (b) that tax is the subject of a provision of the arrangements that requires disclosure of information concerning tax of that territory.

Under the current Bill, the words “with a view to affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of that territory” will be deleted from section 49(1A) of the IRO. Section 49(1B) is inserted to restrict the arrangements permitted under section 49(1A) to those for the purposes of affording relief from double taxation and exchanging information. Accordingly, the Chief Executive in Council will continue to specify under section 49(1A) that arrangements for affording relief from double taxation or exchanging information should have effect.

6. In other words, the Bill has been drafted such that the existing section 58(1A) of the PDPO could cater for the enhanced EoI

arrangement under CDTAs as well as the EoI arrangement under future TIEAs. No other consequential amendments to any provisions of the PDPO are necessary.

***Drafting matters – Clause 4(3)***

7. It is not desirable to omit the word “But” in the proposed section 49(1B) of the IRO. The word is a useful cohesive link at the beginning of the sentence to alert the reader to the contrast of meaning with section 49(1A), as the new sentence restricts the scope of the arrangements that may be specified in the order provided for by the previous sentence.

8. It is not necessary to substitute the word “But” with “However”. To start a sentence with “but” is grammatically correct<sup>1</sup>.

9. The word “but” is similarly used at the beginning of a sentence in the following legislative provisions in Hong Kong –

- (a) section 97(3) of the Bills of Exchange Ordinance (Cap. 19);
- (b) section 79K(5) of the Companies Ordinance (Cap. 32);
- (c) section 3(2) of the Partnership Ordinance (Cap. 38);
- (d) section 26 of the Widows and Orphans Pension Ordinance (Cap. 94);
- (e) section 27(3) of the Marriage Ordinance (Cap. 181);
- (f) section 15 of the Marine Insurance Ordinance (Cap. 329);
- (g) regulation 207(b) of the Merchant Shipping (Instructions to Surveyors) (Passenger Ships) Regulations (Cap. 369 sub. leg. C);
- (h) sections 26(2) and 34(4) of the Electoral Affairs Commission (Registration of Electors) (Village Representative Election) Regulation (Cap. 541 sub. leg. K);
- (i) section 35(2) of the Financial Reporting Council Ordinance (Cap. 588); and
- (j) section 7(3) of the Church of England Trust Ordinance

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<sup>1</sup> *The Cambridge Guide to English Usage* (2004) states: “The fact that **but** is a conjunction does not prevent it from being used at the beginning of a sentence. The point is that it then becomes a *conjunct*” (p. 84). The grammatical basis for this usage is that “but” can be either a conjunction (linking words, phrases or clauses together) or a conjunct (forging a cohesive link with the previous sentence or clause). Conjuncts are classified as a type of adverb and include words like “however”, “also” and “therefore”, which can appear at the beginning of a sentence. The role of conjuncts, as well as conjunctions, is to relate ideas to each other. They help to show the logic behind the information offered by expressing relationships such as addition, contrast, causation or circumstance.

(Cap. 1014).

A copy of the above-mentioned provisions (with emphasis added) is attached at **Annex A**.

*Other matters*

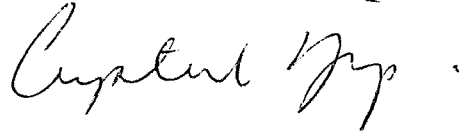
10. Our legislative amendment proposals aim to enable Hong Kong to enter into TIEAs and to enhance the existing EoI arrangements under CDTAs to meet the international standard adopting a minimum necessary approach. As advised by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum), whether Hong Kong could pass the Phase 2 peer review will largely hinge on the availability of a legal framework for TIEAs. Failing the Phase 2 peer review, Hong Kong may run the risk of being labeled as an uncooperative jurisdiction and other jurisdictions may also impose unilateral sanctions on Hong Kong. Thus, it is time-critical for Hong Kong to have in place the legal framework for TIEAs by mid-2013 before the Global Forum finishes the Phase 2 peer review report on Hong Kong in September 2013.

11. If past practice could be of any illustration, the OECD has previously published lists of committed jurisdictions and uncooperative tax havens. The Global Forum has indicated that if Hong Kong fails the Phase 2 peer review, we would face the risk of being sidelined by the international community. As far as we understand, unilateral sanctions imposed by other jurisdictions may include disclosure and documentation requirement for transactions; imposition of or higher withholding taxes on payments; denying deduction of payments made to entities concerned; and transactions subject to transfer pricing regulations or anti-abuse rules.

12. While not directly related to the Bill, we would like to take the opportunity of the current legislative exercise to keep LegCo Members abreast of some recent developments relating to EoI in the international arena. In July 2012, the OECD approved an update to the EoI Article of its Model Tax Convention and its Commentary. We consider that our existing EoI regime already provides necessary flexibility for the Inland Revenue Department to accede to requests concerning a group of taxpayers, and to abide by OECD's new requirements on the use of tax information exchanged for non-tax related purposes provided that such other use is allowed under the laws of both contracting parties and the competent authority of the supplying party authorizes such use. A copy

of the 2012 version of the EoI Article is attached at **Annex B**.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Crystal Yip', with a small horizontal line above the 'y'.

( Miss Crystal Yip )  
for Secretary for Financial Services  
and the Treasury

Encls

c.c.      DoJ (Attn: Mr Michael Lam  
   Mr Peter Sze)

Fax no.: 2536 8124  
Fax no.: 2536 8143

IRD (Attn: Ms Mabel Mei)

Fax no.: 2511 7414

Chapter:	19	Title:	<b>BILLS OF EXCHANGE ORDINANCE</b>	Gazette Number:	
Section:	97	Heading:	<b>Signature</b>	Version Date:	30/06/1997

(1) Where by this Ordinance any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where by this Ordinance any instrument or writing is required to be signed, it is sufficient if the instrument or writing is sealed with the corporate seal.

(3) **But** nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

Chapter:	32	Title:	<b>COMPANIES ORDINANCE</b>	Gazette Number:	
Section:	79K	Heading:	<b>Treatment of assets in the relevant accounts</b>	Version Date:	30/06/1997

(1) For the purposes of sections 79B and 79C, a provision of any kind mentioned in paragraph 30(1) of the Tenth Schedule, other than one in respect of a diminution in value of a fixed asset appearing on a revaluation of all the fixed assets of the company, or of all of its fixed assets other than goodwill, is treated as a realised loss.

(2) If, on the revaluation of a fixed asset, an unrealised profit is shown to have been made and, on or after the revaluation, a sum is written off or retained for depreciation of that asset over a period, then an amount equal to the amount by which that sum exceeds the sum which would have been so written off or retained for the depreciation of that asset over that period, if that profit had not been made, is treated for purposes of sections 79B and 79C as a realised profit made over that period.

(3) Where there is no record of the original cost of an asset, or a record cannot be obtained without unreasonable expense or delay, then for the purpose of determining whether the company has made a profit or loss in respect of that asset, its cost is taken to be the value ascribed to it in the earliest available record of its value made on or after its acquisition by the company.

(4) Subject to subsection (6), any consideration by the directors of the value at a particular time of a fixed asset is treated as a revaluation of the asset for the purposes of determining whether any such revaluation of the company's fixed assets as is required for purposes of the exception from subsection (1) has taken place at that time.

(5) **But** where any such assets which have not actually been revalued are treated as revalued for those purposes under subsection (4), that exception applies only if the directors are satisfied that their aggregate value at the time in question is not less than the aggregate amount at which they are for the time being stated in the company's accounts.

(6) Where section 79G(2), 79H(2) or 79I(2) applies to the relevant accounts, subsections (4) and (5) do not apply for the purpose of determining whether a revaluation of the company's fixed

assets affecting the amount of the relevant items (that is, the items mentioned in section 79F(2)) as stated in those accounts has taken place, unless it is stated in a note to the accounts-

- (a) that the directors have considered the value at any time of any fixed assets of the company, without actually revaluing those assets;
- (b) that they are satisfied that the aggregate value of those assets at the time in question is or was not less than the aggregate amount at which they are or were for the time being stated in the company's accounts; and
- (c) that the relevant items in question are accordingly stated in the relevant accounts on the basis that a revaluation of the company's fixed assets which by virtue of subsections (4) and (5) included the assets in question took place at that time.

(7) For the purposes of this section, assets of a company are taken to be fixed assets if they are intended for use or otherwise to be held on a continuing basis in the company's activities.

Chapter:	38	Title:	<b>PARTNERSHIP ORDINANCE</b>	Gazette Number:	25 of 1998
Section:	3	Heading:	<b>Definition of partnership</b>	Version Date:	01/07/1997

(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2) **But** the relation between members of any company or association which is-

- (a) registered as a company under any Ordinance relating to the registration of joint-stock companies; or (Amended 50 of 1911; 1 of 1912 Schedule)
- (b) formed or incorporated by or in pursuance of any other Ordinance, or any enactment or instrument, (Amended 25 of 1998 s. 2)

is not a partnership within the meaning of this Ordinance.

Chapter:	94	Title:	<b>WIDOWS AND ORPHANS PENSION ORDINANCE</b>	Gazette Number:	
Section:	26	Heading:	<b>Mode and condition of payment of pension</b>	Version Date:	30/06/1997

The pension payable to any person entitled thereto shall begin upon the death of the officer or of his widow, as the case may be, and shall accrue daily and shall be paid monthly. **But** before any such payment, it shall be lawful for the directors to require proof that any widow or child is alive and entitled to the pension claimed by such widow or child.

(Amended 50 of 1911; 51 of 1911; 12 of 1912 Schedule; 13 of 1912 Schedule)

Chapter:	181	Title:	<b>MARRIAGE ORDINANCE</b>	Gazette Number:	L.N. 10 of 2006
Section:	27	Heading:	<b>Invalid marriages</b>	Version Date:	13/03/2006



(1) A marriage shall be null and void on the ground of kindred or affinity as provided in Schedule 5. (Replaced 23 of 2005 s. 13)

(2) A marriage shall be null and void-

(a) if-

(i) it is not celebrated-

(A) by the Registrar in the office of the Registrar;

(B) by a competent minister in a licensed place of worship; or

(C) by a civil celebrant in accordance with section 21(3A),

and it is not-

(D) authorized by a special licence;

(E) celebrated under paragraph (b) of the proviso to section 21(3); or

(F) celebrated under section 39;

(ii) it is celebrated under a false name; or

(iii) no certificate of the Registrar has been issued or no special licence has been granted in respect of the marriage,

and both parties knowingly and wilfully acquiesce in its celebration in such circumstances; or

(b) if at the time of its celebration any party is under 16 years of age. (Replaced 23 of 2005 s. 13)

(3) **But** no marriage shall, after celebration, be deemed invalid by reason that any provision of this Ordinance, other than the foregoing, has not been complied with.

Chapter:	329	Title:	<b>MARINE INSURANCE ORDINANCE</b>	Gazette Number:	
Section:	15	Heading:	<b>Assignment of interest</b>	Version Date:	30/06/1997

Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

**But** the provisions of this section do not affect a transmission of interest by operation of law.

Chapter:	369C	Title:	<b>MERCHANT SHIPPING (INSTRUCTIONS TO SURVEYORS) (PASSENGER SHIPS) REGULATIONS</b>	Gazette Number:	
Regulation:	207	Heading:	<b>Water-tube boilers, general</b>	Version Date:	30/06/1997

(a) Water-tube boilers shall, as regards construction, and the quality and tests of the material used in their construction, comply with the general rules laid down for cylindrical boilers, except as hereinafter specified; and they shall be so designed as to

ensure water circulation over every part of surfaces exposed to flame when working under service conditions.

- (b) The tubes of water-tube boilers which connect the drums or headers, and are the means for circulating the water when generating steam, are to be set at an inclination of not less than 15 degrees from the horizontal. **But** in the case of boilers where each tube is in series with one or more tubes so as to form a continuous run, the inclination may be 5 degrees and upwards.
- (c) It is desirable that provision should be made in the design so that solid matter in the water can be deposited automatically without danger arising from such matter collecting on parts exposed to heat.

Chapter:	541K	Title:	<b>Electoral Affairs Commission (Registration of Electors) (Village Representative Election) Regulation</b>	Gazette Number:	E.R. 2 of 2012
Section:	26	Heading:	<b>ERO to deliver copies of notices of claim and notices of objection to Revising Officer</b>	Version Date:	02/08/2012

- (1) Every year the ERO must deliver to the Revising Officer, in accordance with this section, a copy of each notice of objection or notice of claim received by the ERO.
- (2) The copies of those notices may be delivered in one or more batches as the ERO considers appropriate. **But**, all notices received in respect of a provisional register must be delivered within 3 working days after the last date for lodging a notice of objection or notice of claim in respect of that provisional register.

Chapter:	541K	Title:	<b>Electoral Affairs Commission (Registration of Electors) (Village Representative Election) Regulation</b>	Gazette Number:	E.R. 2 of 2012
Section:	34	Heading:	<b>ERO's responsibility regarding communications</b>	Version Date:	02/08/2012

- (1) A communication that the ERO is required by this Regulation to send by registered post to a person, in compiling an Existing Villages register, must be sent by registered post to the last address furnished by the person as his or her principal residential address.
- (2) Subject to subsection (4), a communication that the ERO is required by this Regulation to send by registered post to a person, in compiling an Indigenous Villages and Composite Indigenous Villages register, must be sent by registered post-
  - (a) to the last address furnished by the person as his or her principal residential address; or
  - (b) if the person has not furnished a principal residential address, to that person's postal address

in Hong Kong.

- (3) If, under this Regulation, any communication is sent to a person by the ERO by registered post, that person is deemed to have received it unless it is returned through the post undelivered to the addressee.
- (4) If a person seeking registration or registered in the Indigenous Villages and Composite Indigenous Villages register does not furnish to the ERO the principal residential address or a postal address in Hong Kong, the ERO is not required to send to that person any communication which the ERO, if not for this subsection, would have been required to send to that person by registered post. **But**, the ERO may send that communication to that person by any other means that the person has made available to the ERO, if in the circumstances of the case, the ERO considers it appropriate to do so.
- (5) Without prejudice to section 12(4), if a person seeking registration or registered in the Indigenous Villages and Composite Indigenous Villages register, does not furnish to the ERO-
  - (a) the principal residential address;
  - (b) a postal address in Hong Kong for the ERO to communicate with that person; or
  - (c) a facsimile number or an electronic mail address for the purpose of receiving communications,
 the ERO is not required to send to that person any communication that is required to be in writing (but not required to be sent by registered post) which the ERO, if not for this subsection, would have been required to send to that person.
- (6) In this section, **communication** (通訊) includes a decision, determination, inquiry, notice or notification.

Chapter:	588	Title:	<b>FINANCIAL REPORTING COUNCIL ORDINANCE</b>	Gazette Number:	L.N. 104 of 2007
Section:	35	Heading:	<b>Investigation reports</b>	Version Date:	16/07/2007

(1) As soon as practicable after the completion of an investigation under this Part, the investigator shall prepare a written report on the findings of the investigation.

(2) The investigator may, if it thinks fit, prepare an interim report on the investigation. **But** if the investigator falls within section 21(2), (3) or (4), the investigator shall also prepare an interim report on the investigation as soon as practicable after being required by the Council to do so.

(3) The Council may adopt a report prepared under subsection (1) or (2).

(4) If, in the Council's opinion, any person named in a report prepared under subsection (1) or (2) would in the event of a publication or other disclosure of the report, or any part of the report, be adversely affected by the publication or disclosure, the investigator shall, before the report is adopted under subsection (3), first give the person a reasonable opportunity of being heard.

(5) After having adopted a report under subsection (3), the Council may cause the report, or any part of the report, to be published.

(6) In deciding whether or not to cause a report, or any part of a report, to be published under

subsection (5), the Council shall take into account---

- (a) whether or not the publication may adversely affect---
  - (i) any criminal proceedings before a court or magistrate;
  - (ii) any proceedings before the Market Misconduct Tribunal; or
  - (iii) any proceedings under Part V of the Professional Accountants Ordinance (Cap 50),
 that have been or are likely to be instituted;
- (b) whether or not the publication may adversely affect any person named in the report; and
- (c) whether or not the report, or that part of the report, should be published in the interest of the investing public or in the public interest.

(7) In any civil proceedings before a court or any proceedings before the Market Misconduct Tribunal or under Part V of the Professional Accountants Ordinance (Cap 50), a document purporting to be a copy of a report adopted under subsection (3), and purporting to be certified by the Chairman of the Council as a true copy of such a report, is, on its production without further proof, admissible as evidence of the facts stated in the report.

Chapter:	1014	Title:	<b>CHURCH OF ENGLAND TRUST ORDINANCE</b>	Gazette Number:	
Section:	7	Heading:	<b>Delegation of powers to church councils</b>	Version Date:	30/06/1997

(1) The trustees shall delegate the care and maintenance of any land, building, furniture, fittings, chattels, effects, records and memorials and the expenditure of income appertaining to Saint John's Cathedral Church and Saint Andrew's Church, Kowloon, respectively, and provision for the administration of the services to be performed therein, to the respective church councils of such churches to be appointed in manner hereinafter provided.

(2) The trustees may make similar delegation of their powers in the case of any other church to which this Ordinance for the time being applies. (Amended 33 of 1939; G.N. 840 of 1940 Supp. Schedule)

(3) Every such delegation shall be by an instrument in writing signed by the Bishop or his commissary and two of the trustees which shall be in the form provided in the Schedule and shall specify the property committed to the care of each church council and what powers and duties the church council shall have in the matter of making alteration or addition thereto: **But** no alterations by way of addition or diminution to the fabric or utensils or ornaments of such churches shall be made without the previous written consent of the Bishop. (Amended 33 of 1939; G.N. 840 of 1940 Supp. Schedule)

(4) The trustees shall have power by an instrument signed as aforesaid to revoke or amend any letter of delegation.



# UPDATE TO ARTICLE 26 OF THE OECD MODEL TAX CONVENTION AND ITS COMMENTARY

Approved by the OECD Council on 17 July 2012

## UPDATE TO ARTICLE 26 OF THE OECD MODEL TAX CONVENTION AND ITS COMMENTARY

Approved by the OECD Council on 17 July 2012

[The changes to the existing text of the OECD Model Tax Convention and its Commentary appear in ~~strike through~~ for deletions and ***bold italics*** for additions]

### *Article 26*

#### EXCHANGE OF INFORMATION

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

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

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

- a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

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

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

## COMMENTARY ON ARTICLE 26 CONCERNING THE EXCHANGE OF INFORMATION

### I. Preliminary remarks

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

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

3. The matter of administrative assistance for the purpose of tax collection is dealt with in Article 27, *but exchanges of information for the purpose of tax collection are governed by Article 26 (see paragraph 5 of the Commentary on Article 27). Similarly, mutual agreement procedures are dealt with in Article 25, but exchanges of information for the purposes of a mutual agreement procedure are governed by Article 26 (see paragraph 4 of the Commentary on Article 25).*

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

4.1 Many of the changes that were then made to the Article were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation. For instance, the change from "necessary" to "foreseeably relevant" and the insertion of the words "to the administration or enforcement" in paragraph 1 were made to achieve consistency with the Model Agreement on Exchange of Information on Tax Matters and were not intended to alter the effect of the provision. ~~New p~~**Paragraph 4** was added to incorporate into the text of the Article the general understanding previously expressed in the Commentary (~~ef. see~~ paragraph 19.6). ~~New p~~**Paragraph 5** was added to reflect ~~current~~ practices among the vast majority of OECD member

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<sup>+</sup> ~~Available on [www.oecd.org/taxation](http://www.oecd.org/taxation).~~

<sup>2</sup> OECD, Paris, 2000. ~~Available on [www.oecd.org/taxation](http://www.oecd.org/taxation).~~

countries (cf. ~~see~~ paragraph 19.10). The insertion of the words “or the oversight of the above” into ~~new~~ paragraph 2, on the other hand, constituted ~~s~~ a reversal of the previous rule.

4.2 The Commentary ~~was~~ also ~~has been~~ expanded considerably. This expansion in part reflected ~~s~~ the addition of ~~new~~ paragraphs 4 and 5 to the Article. Other changes were made to the Commentary to take into account ~~recent~~ developments and ~~current~~ country practices and more generally to remove doubts as to the proper interpretation of the Article.

*4.3 The Article and the Commentary were further modified in 2012 to take into account recent developments and to further elaborate on the interpretation of certain provisions of this Article. Paragraph 2 of the Article was amended to allow the competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorises such use. This was previously included as an optional provision in paragraph 12.3 of the Commentary.*

*4.4 The Commentary was expanded to develop the interpretation of the standard of “foreseeable relevance” and the term “fishing expeditions” through the addition of: general clarifications (see paragraph 5), language in respect of the identification of the taxpayer under examination or investigation (see paragraph 5.1), language in respect of requests in relation to a group of taxpayers (see paragraph 5.2) and new examples (see paragraphs 8(e) – 8(h) and 8.1). The Commentary further provides for an optional default standard of time limits within which the information is required to be provided unless a different agreement has been made by the competent authorities (see paragraphs 10.4 – 10.6) and that in accordance with the principle of reciprocity, if a Contracting State applies under paragraph 5 measures not normally foreseen in its domestic law or practice, such as to access and exchange bank information, that State is equally entitled to request similar information from the other Contracting State (see paragraph 15). Other clarifications were added in paragraphs 3, 5.3, 6, 11, 12, 12.3, 12.4, 16, 16.1 and 19.7.*

## II. Commentary on the provisions of the Article

### Paragraph 1

5. The main rule concerning the exchange of information is contained in the first sentence of the paragraph. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes of every kind and description imposed in these States even if, in the latter case, a particular Article of the Convention need not be applied. The standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. *In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably*



*relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are “fishing expeditions”, i.e. speculative requests that have no apparent nexus to an open inquiry or investigation.*

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

*5.2 The standard of “foreseeable relevance” can be met both in cases dealing with one taxpayer (whether identified by name or otherwise) or several taxpayers (whether identified by name or otherwise). Where a Contracting State undertakes an investigation into a particular group of taxpayers in accordance with its laws, any request related to the investigation will typically serve “the administration or enforcement” of its domestic tax laws and thus comply with the requirements of paragraph 1, provided it meets the standard of “foreseeable relevance”. However, where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition, as the requesting State cannot point to an ongoing investigation into the affairs of a particular taxpayer which in most cases would by itself dispel the notion of the request being random or speculative. In such cases it is therefore necessary that the requesting State provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis. It further requires a showing that the requested information would assist in determining compliance by the taxpayers in the group. As illustrated in example (h) of paragraph 8, in the case of a group request a third party will usually, although not necessarily, have actively contributed to the non-compliance of the taxpayers in the group, in which case such circumstance should also be described in the request. Furthermore, and as illustrated in example (a) of paragraph 8.1, a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance.*

*5.3 Contracting States may agree to an alternative formulation of ~~this~~ the standard of foreseeable relevance that is consistent with the scope of the Article and is therefore understood to require an effective exchange of information (e.g. by replacing, “is foreseeably relevant” with “is necessary”, ~~or~~ “is relevant” or “may be relevant”). The scope of exchange of information covers all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. Exchange of information for criminal tax matters can also be based on bilateral or multilateral treaties on mutual legal assistance (to the extent they also apply to tax crimes). In order to keep the exchange of information within the framework of the Convention, a limitation to the exchange of information is set so that information should be given only insofar as the taxation under the domestic taxation laws concerned is not contrary to the Convention.*

<sup>3</sup>

*See Paragraph 58 of its Commentary.*

5.4-4 The information covered by paragraph 1 is not limited to taxpayer-specific information. The competent authorities may also exchange other sensitive information related to tax administration and compliance improvement, for example risk analysis techniques or tax avoidance or evasion schemes.

5.2-5 The possibilities of assistance provided by the Article do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting States which relate to co-operation in tax matters. Since the exchange of information concerning the application of custom duties has a legal basis in other international instruments, the provisions of these more specialised instruments will generally prevail and the exchange of information concerning custom duties will not, in practice, be governed by the Article.

6. The following examples ~~may seek to~~ clarify the principles dealt with in paragraphs 5, **5.1 and 5.2** above. In ~~the all such cases~~ **examples mentioned in paragraphs 7 and 8** information can be exchanged under paragraph 1 **of Article 26. In the examples mentioned in paragraph 8.1, and assuming no further information is provided, the Contracting States are not obligated to provide information in response to a request for information. The examples are for illustrative purposes only. They should be read in the light of the overarching purpose of Article 26 not to restrict the scope of exchange of information but to allow information exchange “to the widest possible extent”.**

#### 7. Application of the Convention

- a) When applying Article 12, State A where the beneficiary is resident asks State B where the payer is resident, for information concerning the amount of royalty transmitted.
- b) Conversely, in order to grant the exemption provided for in Article 12, State B asks State A whether the recipient of the amounts paid is in fact a resident of the last-mentioned State and the beneficial owner of the royalties.
- c) Similarly, information may be needed with a view to the proper allocation of taxable profits between associated companies in different States or the adjustment of the profits shown in the accounts of a permanent establishment in one State and in the accounts of the head office in the other State (Articles 7, 9, 23 A and 23 B).
- d) Information may be needed for the purposes of applying Article 25.
- e) When applying Articles 15 and 23 A, State A, where the employee is resident, informs State B, where the employment is exercised for more than 183 days, of the amount exempted from taxation in State A.

#### 8. Implementation of the domestic laws

- a) A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods with a view to a correct application of the provisions of its domestic laws.
- b) A company in State A sells goods through a company in State C (possibly a low-tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between A and B, State A, with a view to ensuring the correct application of the provisions of its domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods.
- c) State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable it to check the prices charged by the company in State A by direct comparison (e.g. prices charged by a company or a group of companies in a dominant position). It should be borne in mind

that the exchange of information in this case might be a difficult and delicate matter owing in particular to the provisions of subparagraph c) of paragraph 3 relating to business and other secrets.

- d) State A, for the purpose of verifying VAT input tax credits claimed by a company situated in its territory for services performed by a company resident in State B, requests confirmation that the cost of services was properly entered into the books and records of the company in State B.
- e) *The tax authorities of State A conduct a tax investigation into the affairs of Mr. X. Based on this investigation the tax authorities have indications that Mr. X holds one or several undeclared bank accounts with Bank B in State B. However, State A has experienced that, in order to avoid detection, it is not unlikely that the bank accounts may be held in the name of relatives of the beneficial owner. State A therefore requests information on all accounts with Bank B of which Mr. X is the beneficial owner and all accounts held in the names of his spouse E and his children K and L.*
- f) *State A has obtained information on all transactions involving foreign credit cards carried out in its territory in a certain year. State A has processed the data and launched an investigation that identified all credit card numbers where the frequency and pattern of transactions and the type of use over the course of that year suggest that the cardholders were tax residents of State A. State A cannot obtain the names by using regular sources of information available under its internal taxation procedure, as the pertinent information is not in the possession or control of persons within its jurisdiction. The credit card numbers identify an issuer of such cards to be Bank B in State B. Based on an open inquiry or investigation, State A sends a request for information to State B, asking for the name, address and date of birth of the holders of the particular cards identified during its investigation and any other person that has signatory authority over those cards. State A supplies the relevant individual credit card numbers and further provides the above information to demonstrate the foreseeable relevance of the requested information to its investigation and more generally to the administration and enforcement of its tax law.*
- g) *Company A, resident of State A, is owned by foreign unlisted Company B, resident of State B. The tax authorities of State A suspect that managers X, Y and Z of Company A directly or indirectly own Company B. If that were the case, the dividends received by Company B from Company A would be taxable in their hands as resident shareholders under country A's controlled foreign company rules. The suspicion is based on information provided to State A's tax authorities by a former employee of Company A. When confronted with the allegations, the three managers of Company A deny having any ownership interest in Company B. The State A tax authorities have exhausted all domestic means of obtaining ownership information on Company B. State A now requests from State B information on whether X, Y and Z are shareholders of Company B. Furthermore, considering that ownership in such cases is often held through, for example, shell companies and nominee shareholders it requests information from State B on whether X, Y and Z indirectly hold an ownership interest in Company B. If State B is unable to determine whether X, Y or Z holds such an indirect interest, information is requested on the shareholder(s) so that it can continue its investigations.<sup>4</sup>*
- h) *Financial service provider B is established in State B. The tax authorities of State A have discovered that B is marketing a financial product to State A residents using misleading information suggesting that the product eliminates the State A income tax liability on the income accumulated within the product. The product requires that an account be opened with B through which the investment is made. State A's tax authorities have issued a taxpayer alert, warning all taxpayers about the product and clarifying that it does not achieve the suggested*

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*For cases where State B becomes aware of facts that call into question whether part of the shareholder information is foreseeably relevant, the competent authorities should consult and State B may ask State A to clarify foreseeable relevance in light of those facts, as discussed in paragraph 5.*

*tax effect and that income generated by the product must be reported. Nevertheless, B continues to market the product on its website, and State A has evidence that it also markets the product through a network of advisors. State A has already discovered several resident taxpayers that have invested in the product, all of whom had failed to report the income generated by their investments. State A has exhausted its domestic means of obtaining information on the identity of its residents that have invested in the product. State A requests information from the competent authority of State B on all State A residents that (i) have an account with B and (ii) have invested in the financial product. In the request, State A provides the above information, including details of the financial product and the status of its investigation.*

**8.1 Situations where Contracting States are not obligated to provide information in response to a request for information, assuming no further information is provided**

- a) Bank B is a bank established in State B. State A taxes its residents on the basis of their worldwide income. The competent authority of State A requests that the competent authority of State B provide the names, date and place of birth, and account balances (including information on any financial assets held in such accounts) of residents of State A that have an account with, hold signatory authority over, or a beneficial interest in an account with Bank B in State B. The request states that Bank B is known to have a large group of foreign account holders but does not contain any additional information.*
- b) Company B is a company established in State B. State A requests the names of all shareholders in Company B resident of State A and information on all dividend payments made to such shareholders. The requesting State A points out that Company B has significant business activity in State A and is therefore likely to have shareholders resident of State A. The request further states that it is well known that taxpayers often fail to disclose foreign source income or assets.*

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

- a) on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;*
- b) automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State; ~~see (cf. the OECD Council Recommendations of the OECD Council C(81)39, dated 5 May 1981, entitled "Recommendation of the Council concerning a standardised form for automatic exchanges of information under international tax agreements", the OECD Council Recommendation C(92)50, dated 23 July 1992, entitled "(Recommendation of the Council concerning a standard magnetic format for automatic exchange of tax information)", the OECD Council C(97)29/FINAL, dated 13 March 1997 (Recommendation on the use of Tax Identification Numbers in an international context) C(97)29/FINAL, dated 13 March 1997, the OECD Council Recommendation, C(97)30/FINAL, dated 10 July 1997 entitled "(Recommendation of the Council of the OECD on the Use of the Revised Standard Magnetic Format for Automatic Exchange of Information") and the OECD Council C(2001)28/FINAL, dated 22 March 2001 (Recommendation on the use of the OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes C(2001)28/FINAL);~~<sup>5</sup>*
- c) spontaneously, for example in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State.*

<sup>5</sup> ~~OECD Recommendations are available on [www.oecd.org/taxation](http://www.oecd.org/taxation).~~

9.1 These three forms of exchange (on request, automatic and spontaneous) may also be combined. It should also be stressed that the Article does not restrict the possibilities of exchanging information to these methods and that the Contracting States may use other techniques to obtain information which may be relevant to both Contracting States such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information. These techniques are fully described in the publication "Tax Information Exchange between OECD Member Countries: A Survey of Current Practices"<sup>6</sup> and can be summarised as follows:

- a simultaneous examination is an arrangement between two or more parties to examine simultaneously each in its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest, with a view of exchanging any relevant information which they so obtain (see the OECD Council Recommendation [C\(92\)81](#), dated 23 July 1992, on an OECD Model agreement for the undertaking of simultaneous examinations);
- a tax examination abroad allows for the possibility to obtain information through the presence of representatives of the competent authority of the requesting Contracting State. To the extent allowed by its domestic law, a Contracting State may permit authorised representatives of the other Contracting State to enter the first Contracting State to interview individuals or examine a person's books and records — or to be present at such interviews or examinations carried out by the tax authorities of the first Contracting State — in accordance with procedures mutually agreed upon by the competent authorities. Such a request might arise, for example, where the taxpayer in a Contracting State is permitted to keep records in the other Contracting State. This type of assistance is granted on a reciprocal basis. Countries' laws and practices differ as to the scope of rights granted to foreign tax officials. For instance, there are States where a foreign tax official will be prevented from any active participation in an investigation or examination on the territory of a country; there are also States where such participation is only possible with the taxpayer's consent. The Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters specifically addresses tax examinations abroad in its Article 9;
- an industry-wide exchange of information is the exchange of tax information especially concerning a whole economic sector (e.g. the oil or pharmaceutical industry, the banking sector, etc.) and not taxpayers in particular.

10. The manner in which the exchange of information agreed to in the Convention will finally be effected can be decided upon by the competent authorities of the Contracting States. For example, Contracting States may wish to use electronic or other communication and information technologies, including appropriate security systems, to improve the timeliness and quality of exchanges of information. Contracting States which are required, according to their law, to observe data protection laws, may wish to include provisions in their bilateral conventions concerning the protection of personal data exchanged. Data protection concerns the rights and fundamental freedoms of an individual, and in particular, the right to privacy, with regard to automatic processing of personal data. See, for example, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.<sup>7</sup>

10.1 Before 2000, the paragraph only authorised the exchange of information, and the use of the information exchanged, in relation to the taxes covered by the Convention under the general rules of Article 2. As drafted, the paragraph did not oblige the requested State to comply with a request for information concerning the imposition of a sales tax as such a tax was not covered by the Convention. The

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<sup>6</sup> OECD, Paris, 1994.

<sup>7</sup> See <http://conventions.coe.int>.

paragraph was then amended so as to apply to the exchange of information concerning any tax imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, and to allow the use of the information exchanged for purposes of the application of all such taxes. Some Contracting States may not, however, be in a position to exchange information, or to use the information obtained from a treaty partner, in relation to taxes that are not covered by the Convention under the general rules of Article 2. Such States are free to restrict the scope of paragraph 1 of the Article to the taxes covered by the Convention.

10.2 In some cases, a Contracting State may need to receive information in a particular form to satisfy its evidentiary or other legal requirements. Such forms may include depositions of witnesses and authenticated copies of original records. Contracting States should endeavour as far as possible to accommodate such requests. Under paragraph 3, the requested State may decline to provide the information in the specific form requested if, for instance, the requested form is not known or permitted under its law or administrative practice. A refusal to provide the information in the form requested does not affect the obligation to provide the information.

10.3 Nothing in the Convention prevents the application of the provisions of the Article to the exchange of information that existed prior to the entry into force of the Convention, as long as the assistance with respect to this information is provided after the Convention has entered into force and the provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such information, in particular when the provisions of that convention will have effect with respect to taxes arising or levied from a certain time.

***10.4 Contracting States may wish to improve the speediness and timeliness of exchange of information under this Article by agreeing on time limits for the provision of information. Contracting States may do so by adding the following language to the Article:***

***“6. The competent authorities of the Contracting States may agree on time limits for the provision of information under this Article. In the absence of such an agreement, the information shall be supplied as quickly as possible and, except where the delay is due to legal impediments, within the following time limits:***

- (a) Where the tax authorities of the requested Contracting State are already in possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within two months of the receipt of the information request;***
- (b) Where the tax authorities of the requested Contracting State are not already in the possession of the requested information, such information shall be supplied to the competent authority of the other Contracting State within six months of the receipt of the information request.***

***Provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits.”***

***10.5 The provisions (a) and (b) in optional paragraph 6, referenced in paragraph 10.4, set a default standard for time limits that would apply where the competent authorities have not made a different agreement on longer or shorter time limits. The default standard time limits are two months from the receipt of the information request if the requested information is already in the possession of the tax authorities of the requested Contracting State and six months in all other cases. Notwithstanding the default standard time limits or time limits otherwise agreed, competent authorities may come to different agreements on a case-by-case basis, for example, when they both agree more time is appropriate. This***

*may arise where the request is complex in nature. In such a case, the competent authority of a requesting Contracting State should not unreasonably deny a request by the competent authority of a requested Contracting State for more time. If a requested Contracting State is unable to supply the requested information within the prescribed time limit because of legal impediments (for example, because of ongoing litigation regarding a taxpayer's challenge to the validity of the request or ongoing litigation regarding a domestic notification procedure of the type described in paragraph 14.1), it would not be in violation of the time limits.*

**10.6** *The last sentence in optional paragraph 6, referenced in paragraph 10.4, which provides, "Provided that the other conditions of this Article are met, information shall be considered to have been exchanged in accordance with the provisions of this Article even if it is supplied after these time limits." makes it clear that no objection to the use or admissibility of information exchanged under this Article can be based on the fact that the information was exchanged after the time limits agreed to by the competent authorities or the default time limits provided for in the paragraph.*

#### *Paragraph 2*

**11.** Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation. The confidentiality rules of paragraph 2 apply to all types of information received under paragraph 1, including both information provided in a request and information transmitted in response to a request. *Hence, the confidentiality rules cover, for instance, competent authority letters, including the letter requesting information. At the same time, it is understood that the requested State can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested State to be able to obtain or provide the requested information to the requesting State, without frustrating the efforts of the requesting State. If, however, court proceedings or the like under the domestic laws of the requested State necessitate the disclosure of the competent authority letter itself, the competent authority of the requested State may disclose such a letter unless the requesting State otherwise specifies.* The maintenance of secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 2 that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State. *In situations in which the requested State determines that the requesting State does not comply with its duties regarding the confidentiality of the information exchanged under this Article, the requested State may suspend assistance under this Article until such time as proper assurance is given by the requesting State that those duties will indeed be respected. If necessary, the competent authorities may enter into specific arrangements or memoranda of understanding regarding the confidentiality of the information exchanged under this Article.*

**12.** *Subject to paragraphs 12.3 and 12.4,* the information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes with respect to which information may be exchanged according to the first sentence of paragraph 1, or the oversight of the above. This means that the information may also be communicated to the taxpayer, his proxy or to the witnesses. This also means that information can be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities only for the purposes mentioned in paragraph 2. Furthermore, information covered by paragraph 1, whether taxpayer-specific or not, should not be disclosed to persons or authorities not mentioned in paragraph 2, regardless of domestic information disclosure laws such as freedom of information or other legislation that allows greater access to governmental documents.

12.1 Information can also be disclosed to oversight bodies. Such oversight bodies include authorities that supervise tax administration and enforcement authorities as part of the general administration of the Government of a Contracting State. In their bilateral negotiations, however, Contracting States may depart from this principle and agree to exclude the disclosure of information to such supervisory bodies.

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

12.3 ~~Similarly, if the information appears to be of value to the receiving State for other purposes than those referred to in paragraph 12, that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance).~~ ***Information exchanged for tax purposes may be of value to the receiving State for purposes in addition to those referred to in the first and second sentences of paragraph 2 of Article 26. The last sentence of paragraph 2 therefore allows the Contracting States to share information received for tax purposes provided two conditions are met: first, the information may be used for other purposes under the laws of both States and, second, the competent authority of the supplying State authorises such use.*** ~~However, Contracting States may wish to~~ ***It*** allows the sharing of tax information by ***the*** tax authorities ***of the receiving State*** with other law enforcement agencies and judicial authorities ***in that State*** on certain high priority matters (e.g., to combat money laundering, corruption, terrorism financing). ***When a receiving State desires to use the information for an additional purpose (i.e. non-tax purpose), the receiving State should specify to the supplying State the other purpose for which it wishes to use the information and confirm that the receiving State can use the information for such other purpose under its laws. Where the supplying State is in a position to do so, having regard to, amongst others, international agreements or other arrangements between the Contracting States relating to mutual assistance between other law enforcement agencies and judicial authorities, the competent authority of the supplying State would generally be expected to authorise such use for other purposes if the information can be used for similar purposes in the supplying State. Law enforcement agencies and judicial authorities receiving information under the last sentence of paragraph 2 must treat that information as confidential consistent with the principles of paragraph 2.*** ~~Contracting States wishing to broaden the purposes for which they may use information exchanged under this Article may do so by adding the following text to the end of paragraph 2:~~

~~Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.~~

12.4 ***It is recognised that Contracting States may wish to achieve the overall objective inherent in the last sentence of paragraph 2 in other ways and they may do so by replacing the last sentence of paragraph 2 with the following text:***

***“The competent authority of the Contracting State that receives information under the provisions of this Article may, with the written consent of the Contracting State that provided the information, also make available that information to be used for other purposes allowed under the provisions of a mutual legal assistance treaty in force between the Contracting States that allows for the exchange of tax information.”***

13. As stated in paragraph 12, the information obtained can be communicated to the persons and authorities mentioned and on the basis of the ~~last~~ ***third*** sentence of paragraph 2 of the Article can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as



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

### *Paragraph 3*

14. This paragraph contains certain limitations to the main rule in favour of the requested State. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. However, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article.

14.1 Some countries' laws include procedures for notifying the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information. Such notification procedures may be an important aspect of the rights provided under domestic law. They can help prevent mistakes (e.g., in cases of mistaken identity) and facilitate exchange (by allowing taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting State). Notification procedures should not, however, be applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State. In other words, they should not prevent or unduly delay effective exchange of information. For instance, notification procedures should permit exceptions from prior notification, e.g. in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting State. A Contracting State that under its domestic law is required to notify the person who provided the information and/or the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance. Such information should be provided to the other Contracting State when a convention is concluded and thereafter whenever the relevant rules are modified.

15. Furthermore, the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system. Thus, a State may refuse to provide information where the requesting State would be precluded by law from obtaining or providing the information or where the requesting State's administrative practices (e.g., failure to provide sufficient administrative resources) result in a lack of reciprocity. However, it is recognised that too rigorous an application of the principle of reciprocity could frustrate effective exchange of information and that reciprocity should be interpreted in a broad and pragmatic manner. Different countries will necessarily have different mechanisms for obtaining and providing information. Variations in practices and procedures should not be used as a basis for denying a request unless the effect of these variations would be to limit in a significant way the requesting State's overall ability to obtain and provide the information if the requesting State itself received a legitimate request from the requested State. ***It is worth noting that if a Contracting State applies, under paragraph 5, measures not normally foreseen in its domestic law or practice, such as to access and exchange bank information, that State is equally entitled to request similar information from the other Contracting State. This would be fully in line with the principle of reciprocity which underlies subparagraphs a) and b) of paragraph 3.***

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

15.2 Most countries recognise under their domestic laws that information cannot be obtained from a person to the extent that such person can claim the privilege against self-incrimination. A requested State may, therefore, decline to provide information if the requesting State would have been precluded by its own self-incrimination rules from obtaining the information under similar circumstances. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. The overwhelming majority of information requests seek to obtain information from third parties such as banks, intermediaries or the other party to a contract and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

16. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examinations for their own purposes. *The paragraph assumes, of course, that tax authorities have the powers and resources necessary to facilitate effective information exchange. For instance, assume that a Contracting State requests information in connection with an investigation into the tax affairs of a particular taxpayer and specifies in the request that the information might be held by one of a few service providers identified in the request and established in the other Contracting State. In this case, the requested State would be expected to be able to obtain and provide such information to the extent that such information is held by one of the service providers identified in the request. In responding to a request the requested State should be guided by the overarching purpose of Article 26 which is to permit information exchange “to the widest possible extent” and may consider the importance of the requested information to the requesting State in relation to the administrative burden for the requested State.*

*16.1 Subparagraphs 3 a) and b) do not permit the requested State to decline a request where paragraph 4 or 5 applies. Paragraph 5 would apply, for instance, in situations in which the requested State’s inability to obtain the information was specifically related to the fact that the requested information was believed to be held by a bank or other financial institution. Thus, the application of paragraph 5 includes situations in which the tax authorities’ information gathering powers with respect to information held by banks and other financial institutions are subject to different requirements than those that are generally applicable with respect to information held by persons other than banks or other financial institutions. This would, for example, be the case where the tax authorities can only exercise their information gathering powers with respect to information held by banks and other financial institutions in instances where specific information on the taxpayer under examination or investigation is available. This would also be the case where, for example, the use of information gathering measures with respect to information held by banks and other financial institutions requires a higher probability that the information requested is held by the person believed to be in possession of the requested information than the degree of probability required for the use of information gathering measures with respect to information believed to be held by persons other than banks or financial institutions.*

17. The requested State is at liberty to refuse to give information in the cases referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement

on the exchange of information which is laid down in the Convention; consequently it cannot be objected that this State has failed to observe the obligation to secrecy.

18. If the structure of the information systems of two Contracting States is very different, the conditions under subparagraphs *a)* and *b)* of paragraph 3 will lead to the result that the Contracting States exchange very little information or perhaps none at all. In such a case, the Contracting States may find it appropriate to broaden the scope of the exchange of information.

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

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

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

19.2 In most cases of information exchange no issue of trade, business or other secret will arise. A trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g. may lead to severe financial hardship). The determination, assessment or collection of taxes as such could not be considered to result in serious damage. Financial information, including books and records, does not by its nature constitute a trade, business or other secret. In certain limited cases, however, the disclosure of financial information might reveal a trade, business or other secret. For instance, a request for information on certain purchase records may raise such an issue if the disclosure of such information revealed the proprietary formula used in the manufacture of a product. The protection of such information may also extend to information in the possession of third persons. For instance, a bank might hold a pending patent application for safe keeping or a secret trade process or formula might be described in a loan application or in a contract held by a bank. In such circumstances, details of the trade, business or other secret should be excised from the documents and the remaining financial information exchanged accordingly.

19.3 A requested State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law. However, the scope of protection afforded to such confidential communications should be narrowly defined. Such protection does not attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law. Also, information on the identity of a person such as a director or beneficial owner of a company is typically not protected as a confidential communication. Whilst the scope of protection afforded to confidential communications might differ among states, it should not be overly broad so as to hamper effective exchange of information.

Communications between attorneys, solicitors or other admitted legal representatives and their clients are only confidential if, and to the extent that, such representatives act in their capacity as attorneys, solicitors or other admitted legal representatives and not in a different capacity, such as nominee shareholders, trustees, settlors, company directors or under a power of attorney to represent a company in its business affairs. An assertion that information is protected as a confidential communication between an attorney, solicitor or other admitted legal representative and its client should be adjudicated exclusively in the Contracting State under the laws of which it arises. Thus, it is not intended that the courts of the requested State should adjudicate claims based on the laws of the requesting State.

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

“d) to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

(i) produced for the purposes of seeking or providing legal advice or

(ii) produced for the purposes of use in existing or contemplated legal proceedings.”

19.5 Paragraph 3 also includes a limitation with regard to information which concerns the vital interests of the State itself. To this end, it is stipulated that Contracting States do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*). However, this limitation should only become relevant in extreme cases. For instance, such a case could arise if a tax investigation in the requesting State were motivated by political, racial, or religious persecution. The limitation may also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested State. Thus, issues of public policy (*ordre public*) rarely arise in the context of information exchange between treaty partners.

#### *Paragraph 4*

19.6 Paragraph 4 was added in 2005 to deal explicitly with the obligation to exchange information in situations where the requested information is not needed by the requested State for domestic tax purposes. Prior to the addition of paragraph 4 this obligation was not expressly stated in the Article, but was clearly evidenced by the practices followed by Member countries which showed that, when collecting information requested by a treaty partner, Contracting States often use the special examining or investigative powers provided by their laws for purposes of levying their domestic taxes even though they do not themselves need the information for these purposes. This principle is also stated in the report "Improving Access to Bank Information for Tax Purposes".<sup>8</sup>

19.7 According to paragraph 4, Contracting States must use their information gathering measures, even though invoked solely to provide information to the other Contracting State ***and irrespective of whether the information could still be gathered or used for domestic tax purposes in the requested Contracting State. Thus, for instance, any restrictions on the ability of a requested Contracting State to obtain information from a person for domestic tax purposes at the time of a request (for example, because of the expiration of a statute of limitations under the requested State's domestic law or the prior completion of an audit) must not restrict its ability to use its information gathering measures for information exchange purposes.*** The term “information gathering measures” means laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information. ***Paragraph 4 does not oblige a requested***

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<sup>8</sup> OECD, Paris, 2000 (at paragraph 21 b).

***Contracting State to provide information in circumstances where it has attempted to obtain the requested information but finds that the information no longer exists following the expiration of a domestic record retention period. However, where the requested information is still available notwithstanding the expiration of such retention period, the requested State cannot decline to exchange the information available. Contracting States should ensure that reliable accounting records are kept for five years or more.***

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

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

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

#### *Paragraph 5*

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

19.11 Paragraph 5 stipulates that a Contracting State shall not decline to supply information to a treaty partner solely because the information is held by a bank or other financial institution. Thus, paragraph 5 overrides paragraph 3 to the extent that paragraph 3 would otherwise permit a requested Contracting State to decline to supply information on grounds of bank secrecy. The addition of this paragraph to the Article reflects the international trend in this area as reflected in the Model Agreement on Exchange of Information on Tax Matters<sup>9</sup> and as described in the report "Improving Access to Bank Information for Tax Purposes".<sup>10</sup> In accordance with that report, access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. The procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information.

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<sup>9</sup> Available on [www.oecd.org/taxation](http://www.oecd.org/taxation)

<sup>10</sup> OECD, Paris, 2000.

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

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

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

19.15 The following examples illustrate the application of paragraph 5:

- a) Company X owns a majority of the stock in a subsidiary company Y, and both companies are incorporated under the laws of State A. State B is conducting a tax examination of business operations of company Y in State B. In the course of this examination the question of both direct and indirect ownership in company Y becomes relevant and State B makes a request to State A for ownership information of any person in company Y's chain of ownership. In its reply State A should provide to State B ownership information for both company X and Y.
- b) An individual subject to tax in State A maintains a bank account with Bank B in State B. State A is examining the income tax return of the individual and makes a request to State B for all bank account income and asset information held by Bank B in order to determine whether there were deposits of untaxed earned income. State B should provide the requested bank information to State A.

#### **Observation on the Commentary**

20. [Deleted]

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