

Subject 2

Exchange of information: issues, use and collaboration



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Virtual Event

16 – 25 November 2020

Webinar on Subject 2

Exchange of Information: issues, use and collaboration

17 November 2020, 15:00 – 17:00 CET



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Chair

- Christoph Schelling (Switzerland)

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Panel Members

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1. Exchange of Information on Request (EOIR)

Speaker:

Huey Min Chia-Tern (Singapore)



1. Exchange of Information on Request (EOIR)

1.1. Key question: What are the main issues/pressure points in the implementation of the EOIR Standard?

Topics:

- Introduction to GFTEI
- Jurisdictional Review on EOIR
- Key Observations in EOIR Reviews
- Going Forward



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- **Introduction to the Global Forum on Transparency and Exchange of Information for Tax Purposes (GFTEI)**
 - Leading international body working on the implementation of global standards on transparency and exchange of information through:
 - Monitoring the implementation of EOI standards;
 - Conducting peer reviews to assess effectiveness of implementation; and
 - Providing technical assistance to support its members



- **Jurisdictional Review on EOIR**

- The **Peer Review Group (PRG)** oversees GFTEI's peer reviews in relation to the Exchange of Information upon Request (EOIR) standard
 - Robust and transparent reviews of jurisdictions' legal and regulatory frameworks for EOIR and also of the jurisdictions' practical application of said frameworks.

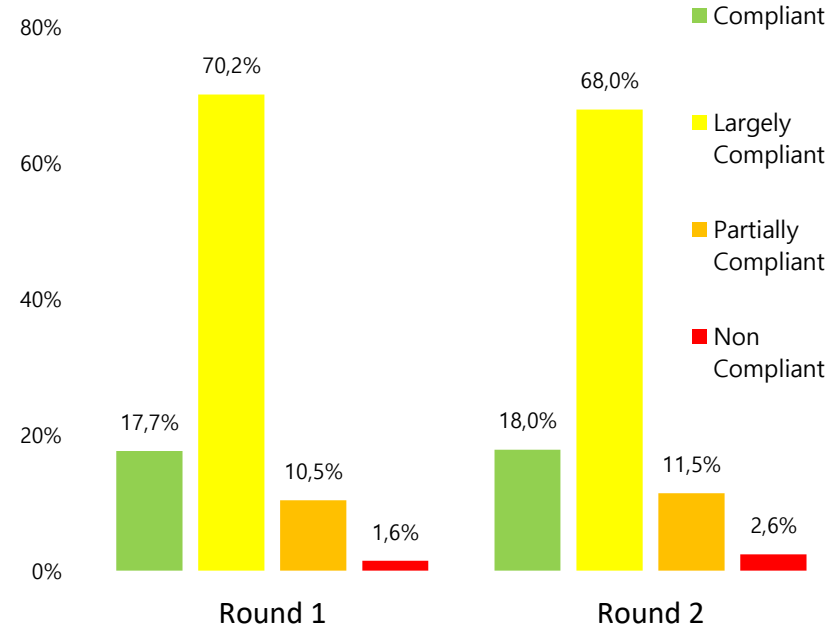
- **Scope of EOIR Review**

- A. Availability of Information
- B. Access to Information
- C. Exchanging information

- **State of Play for Round 2**

- 78 jurisdictions reviewed till date; 83 more jurisdictions to be reviewed
- Similar to Round 1, most jurisdictions assigned an overall rating of "C"/"LC" in ongoing review.

**PROFILE OF OVERALL RATINGS IN
ROUND 1 AND ROUND 2**





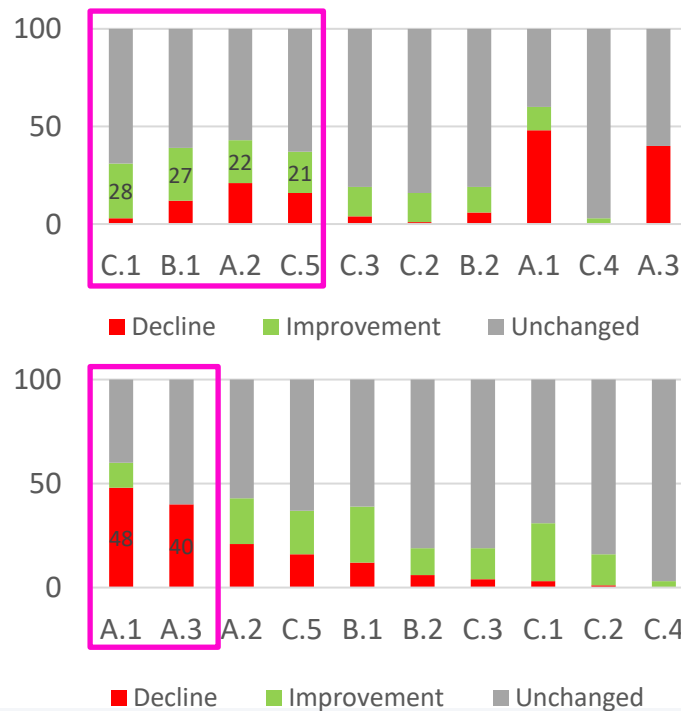
- **Key Observations in Round 2 EOIR Reviews**

- **R1 vs R2 Comparison: Improvements in ratings**
 - Element A2: Availability of accounting information
 - Element B1: Access to information
 - Element C1: EOIR mechanisms
 - Element C5: Quality and timeliness of information

- **R1 vs R2 Comparison: Declines in ratings**
 - Element A1: Availability of ownership and identity information (including beneficial ownership)
 - Element A3: Availability of banking information

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ELEMENTWISE COMPARISON BETWEEN
R1 AND R2 (%)

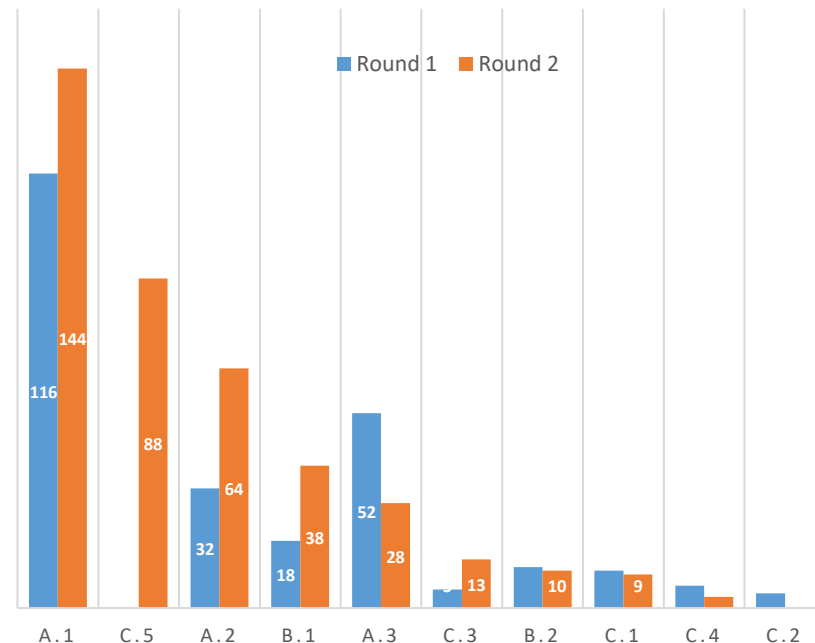




- **Key Observations in Round 2 EOIR Reviews**

- **Highest number of recommendations**
 - Element A1: Availability of ownership and identity information (including beneficial ownership)
 - Element C5: Quality and timeliness of information

NUMBER OF IN-BOX RECOMMENDATIONS BY
ELEMENT IN R2





- **Key Observations in Round 2 EOIR Reviews**
 - **Beneficial ownership (Elements A.1 and A.3)**
 - Recommendations mainly indicate improvements needed to ensure accuracy and verification of BO information
 - Frequency and depth of supervision could be further improved
 - **Quality of requests and timeliness of information (Element C.5)**
 - Clear and specific EOI requests will facilitate timely provision of information
 - Adequate organizational set-up, processes, and resources are key in ensuring effective & timely EOI



- **Key Observations in Round 2 EOIR Reviews**
 - **Foreseeable Relevance (Element C.1)**
 - Fewer recommendations in Round 2 suggest more jurisdictions adopting a broader interpretation of “foreseeable relevance”
 - Bilateral issues vs systematic issues distinguished in Round 2 reports
 - Strong working relationship needed to facilitate efficient processing of requests
 - **Confidentiality (Element C.3)**
 - Few recommendations relating to legislative framework in current review indicate that most jurisdictions have legislative frameworks in place



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- **Going forward**

- Current round of peer reviews are anticipated to be completed by **Q3 2024**.
- In view of GFTEI's interest in **ensuring continued transparency and effectiveness in EOIR practice** among jurisdictions, GFTEI is currently in discussions about what **future processes** may entail:
 - A possible **enhanced follow up** review process
 - **Peer inputs** as an integral part of new process
 - Forming a **Task Force on Risk** to identify any **emerging challenges or risks**
 - Need for **consistency and alignment** across various reviews and governing bodies



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1. Exchange of Information on Request (EOIR)

Speaker:

Xavier Oberson (Switzerland)



1. Exchange of Information on Request (EOIR)

1.2. Key question: What are the main challenges in practice in applying the law governing EOIR?

Topics:

- The meaning of the foreseeable relevance, subsidiarity and specialty principles
- Particularities of group and bulk requests
- Procedural rights of concerned persons in a requested jurisdiction
- Case law



I. “Foreseeable relevance” of the request

1. In General

The assessment of the standard is at first the competence of the requesting State.

The standard requires that at the time of the request there is a “reasonable possibility” that the information would appear to be relevant.

Principle of proportionality.



I. “Foreseeable relevance” of the request

2. Status of the taxpayer

- Case of residence/residence conflict (art. 4 par. 2 OECD Model DTC). Leading case, Swiss Federal Supreme Court (SFSC), 24 September 2015, ATF 142 II 161.
- Taxpayer (individual) under a special regime (e.g. “lump-sum” agreement based on Swiss law). *Leading case*, SFSC, 1 February 2019, ATF 145 II 112.



I. “Foreseeable relevance” of the request

3. Transfer pricing

Requests for information on the application of transfer pricing rules are in general relevant. For example:

- a request aiming at verifying the “economic substance” of a company established in the requested State (SFSC, 12 March 2016, ATF 142 II 69);
- a request for the balance sheets and the applicable allocation rules for the profits between associated enterprises (French-Swiss group) (SFSC, 13 February 2017, ATF 143 II 185).



I. “Foreseeable relevance” of the request

4. Identification of the taxpayer

In some cases the requesting State does not know the name of the person involved but has other elements that may identify the taxpayer (credit card number, account number, etc.).

Starting with individual requests, the practice evolved into so-called “group request” and more recently “bulk request” (collective request).



II. Limits to the exchange of information

There are limits based on domestic law (principle of reciprocity) and on the protection of business or commercial secrets (Art 26 par. 3 OECD Model DTC).

Under the exception of Art. 26 par. 5 OECD Model DTC, requested State cannot refuse to give information related to banks (banking secrecy is not an obstacle) or related to the ownership of the taxpayer.



II. Limits to the exchange of information

In particular, courts have ruled that the scope of relevant banking information includes bank accounts for which the taxpayer is the beneficial owner, the “indirect” owner, or holder of a power of attorney (SFSC, 16 April 2018, ATF 144 II 206).



III. Group request

1. Concept

Request based on a group of taxpayers identified not by their names, but by a “pattern of behavior”, systematic and repetitive, which may be suspected on not having complied with their tax obligations in the requesting jurisdiction.

Under specific conditions, such requests have been regarded as admissible (and not as prohibited “fishing expeditions”, see also OECD Commentary ad Art. 26 par. 1 DTC, of 12 July 2012).



III. Group request

2. Examples of case law

Swiss Federal Administrative Court, 5 March 2009 (“*UBS I*”, A-7342/2008). Request on a group of about 250 US taxpayers, which have circumvented the QI regulations (with collaboration of the bank), by interposing intermediate offshore entities, while the beneficial owner was known by the bank, was held to be admissible.



III. Group request

2. Examples of case law

Leading case, SFSC, 12 December 2016 (ATF 143 II 136). Request from the Dutch tax authorities on a group of resident taxpayers, who during a limited period of time, had received a letter from the bank threatening cancellation of the relationship if client failed to show proof of compliance. The request is admissible, under the following conditions: (i) must provide for a detailed description of the group; (ii) describe the relevant applicable law and the motive of the request; (iii) demonstrate that the information is adequate to achieve compliance.



IV. Bulk (collective) requests

1. Concept

Contrary to a group request, a bulk request is one relating to several taxpayers, identified either by their names, or by other means (e.g. bank account numbers, digital references, credit card numbers).



IV. Bulk (collective) requests

2. Examples of case law

Request from the tax authorities of Norway based on 9 credit card numbers of unknown individuals (SFSC, ATF 143 II 628). The request was allowed, albeit under an analysis similar to group request.



IV. Bulk (collective) requests

2. Examples of case law

Leading case, SFSC, 11 May 2019 (ATF 146 II 150). French bulk request on about 40 000 French resident taxpayers with bank accounts in Switzerland. Judging on many issues (proportionality, specialty, etc.), the SFSC found the request, which stemmed from data seized by a German prosecutor and forwarded to the French authorities, was admissible and not a fishing expedition.



V. Other relevant principles

1. Principle of subsidiarity

The requested State must first use all regular sources of information available under its domestic law before sending a request.



V. Other relevant principles

2. Principle of specialty

Two aspects:

First, information may only be disclosed to the persons or authorities listed in provisions similar to Art. 26 par. 2 OECD Model DTC.

Second, such persons or authorities may use the information only for the purposes mentioned in paragraph 2. For the disclosure to a third country, conditions set forth under such paragraph should be met.



V. Other relevant principles

3. Principle of good faith

Based on the Vienna Convention of 23 May 1969 for the application and interpretation of treaties (art. 24 and 31).

Impact in the case of requests based on “stolen data”:

- Request accepted (crime was committed abroad) SFSC, 16 February 2017 (ATF 143 II 202).
- Request rejected (crime was committed in Switzerland) SFSC, 17, March 2017, (ATF 143 II 224 “*Falciani list*”).



VI. Rights of taxpayers

1. Content

Very different rules among States.

Substantive rights (constitutional rights, human rights, right of privacy, data protection rules).

Procedural rights (right to be notified, right to be heard, right to appeal).



VI. Rights of taxpayers

2. Examples of case law

Detailed and complex case law (in a nutshell for concerned persons the requested State should balance the conflicting private and public interests).

SFSC, 18 December 2017 (ATF 144 II 29). In the context of the US DOJ program with Swiss banks, the Court admitted that the names of a lawyer/notary public and of bank employees could be redacted (“caviardés”).

European Court of Human Rights (Art. 6, 8 EHRC)



VI. Rights of taxpayers

2. Examples of case law

EU Court of Justice :

- Cases C-245/19 and C-246/19, *Luxembourg v. B.*, 6, October 2020, right to an effective remedy guaranteed by the EU Charter, in the context of exchange of information).
- Case C-682/15, 16 May 2017, *Berlioz*.
- Case C-276/12, 22 October 2013, *Sabou*.



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2. Automatic Exchange of Information (AEOI) and Spontaneous Exchange of Information (SEOI)

Speaker:

Maria José Garde (Spain)



2. Automatic Exchange of Information (AEOI) and Spontaneous Exchange of Information (SEOI)

2.1. Key question: What are the main issues/pressure points in the implementation of the AEOI Standard and exchange of information on rulings?

Topics:

- Numbers and peer reviews of CRS Standard
- Impact and relevance
- Proposed revision of CRS
- Exchange of information on rulings
- Other fields for AEOI (mandatory disclosure rules, esp. as set out in DAC 6)
- Use of data within the administration

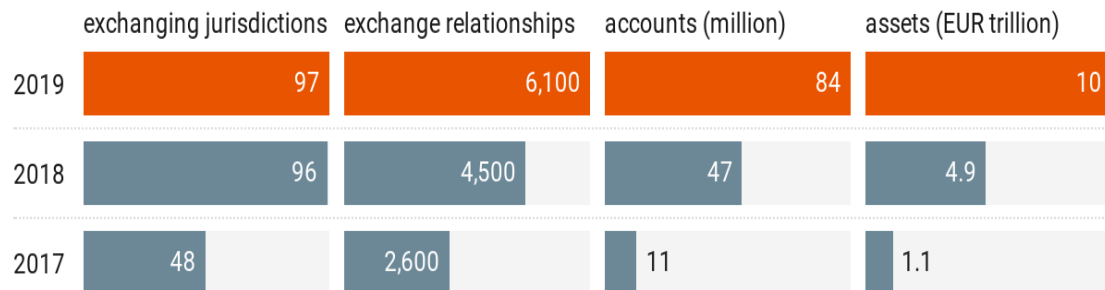


I. AEOI

Numbers and peer reviews of CRS Standard

Rapid spread of automatic exchange of information leads to much greater transparency over offshore accounts

Nearly 100 countries carried out automatic exchange of financial information in 2019. These exchanges covered information sent on **84 million accounts**, amounting to **EUR 10 trillion of total assets**.





II. AEOI: Impact and relevance

- Financial assets held offshore in banks, insurance companies, trusts, foundations, investment funds and other investment vehicles
- Underlying assets of the account holders and beneficial owners held through investment entities
- Strong deterrence effect:
 - Led to a decline of 20% to 25% in the bank deposits in international financial centers
 - About EUR 100 bi recovered in through voluntary disclosure programmes



III. AEOI Standard

Issues in the implementation

1. Effectiveness in practice
 - Ensuring completeness and accuracy of information
 - Domestic administrative compliance frameworks
2. Interaction with data protection and privacy rules
 - Wide swathe of data vs. legitimate public purpose and focused reporting
3. Efficient analysis of the data received
 - IT solutions

III. AEOI Standard

CRS review

- Possible expansion to virtual assets
- Address any loopholes



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IV. Exchange of information on rulings

Impact and relevance

- 18,000 tax rulings and almost 30,000 exchanges (2016-2020)
- Change in jurisdiction practices with respect to the issuance of rulings
- Source of information for targeted audits



IV. Exchange of information on rulings

Issues/pressure points

1. Effectiveness in practice
 - Ensuring that sufficient (and useful information) provided at the first step to avoid issues with foreseeable relevance
 - Open question summary is particularly important
2. Interaction with the EU rules (DAC 3)
 - Scope and timelines for exchanges (SEOI vs. automatic)
 - Administrative burdens to comply with two parallel frameworks



V. Other fields for AEOI

Country by Country reporting

1. Impact:

Tens of thousands of exchanges have provided information to jurisdictions who previously would not have had a global view on global activities of the MNE groups

2. Issues:

- Data quality such as missing TIN numbers – teething issues
- Divergences with the EU rules (DAC 4) with respect to mandatory local filing and notifications – possible administrative burdens



V. Other fields for AEOI

Mandatory Disclosure Rules

1. Differences between the OECD standard and the EU framework under DAC 6.

Case: Spain.

2. **Impact:** Insights into tax planning and deterrence effect

3. **Issues:**

- Scope and legal certainty issues
- Possible compliance burden on the industry and tax administrations alike



VI. Use of data within the administration

- Risk assessments,
- Compliance interventions,
- Notifications to taxpayers,
- Audit policy, practice and tax assessments
- Use of data analytics.



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2. Automatic Exchange of Information (AEOI) and Spontaneous Exchange of Information (SEOI)

Speaker:

Marnin Michaels (USA)



2. Automatic Exchange of Information (AEOI) and Spontaneous Exchange of Information (SEOI)

2.2. Key question: What are the main challenges in practice in applying the law governing the AEOI?

Topics:

- Experience with the US Foreign Account Tax Compliance Act (FATCA)
- Common Reporting Standard (CRS) and FATCA – issues and impact



I. Hot Topic

1. Group Requests

- Ratification of the 2009 protocol to the Swiss-US double tax treaty
- Is the information usable or searchable by the IRS?
- Potential double reporting of account balances and account holders



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I. Hot Topic

2. Ongoing LB&I Compliance Campaign –
FATCA filing accuracy





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I. Hot Topic

3. Requests for FATCA Relief for Non-Resident US Persons

- Comments made suggesting suspension of FATCA reporting for small businesses and same-country accounts



II. Future of FATCA

1. Regulations and Local Guidance

- Not anticipating changes to US Treasury Regulations anytime soon
- Not expecting major changes to local jurisdictional guidance



II. Future of FATCA

2. FATCA isn't going anywhere

- US Treasury
- General Accounting Office





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3. Improved cooperation and limits to cooperation

Speaker:

Reinhard Biebel (EU)



3. Improved cooperation and limits to cooperation

Key question: What are the objectives and limits of extended cooperation in the field of tax – in particular in the EU's perspective?

Topics:

- Main EU targets
- Informal means of cooperation, assistance in collection
- Data protection and data security
- Legal and political obstacles
- Further considerations



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Administrative Cooperation in the EU

The Directive on administrative cooperation in the field of direct taxation (DAC) is the key tool tax administrations have at their disposal for exchanging information useful for tax administration and control



Exchange of information

Spontaneous, request, automatic exchanges:

- Income and capital
- Financial accounts
- Tax rulings
- CBCR reports
- AML information
- Intermediaries
- Digital platforms (to come)
- Crypto assets (to come)

...



Other forms of cooperation

- Presence in administrative offices and participation in administrative enquiries
- Simultaneous (multilateral) controls
- Joint Audits
- Administrative notification
- TADEUS - Sharing of best practices and experience
- Cooperative compliance



Limits

- National legal framework
- Reciprocity
- Commercial, industrial or professional secrets
- Data protection
- Proportionality criterion
- IT aspects - digitalisation



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Further Considerations

- Data security
- Use of information
- Digitalisation – data analysis
- Resources
- Frequency of exchanges



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High-level main findings and take-aways from general and branch reports

General Co-Reporter:
Tatiana Falcão (Brazil)



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Aim: to provide an overview of the instruments for exchange of information (EOI) in tax matters that have been put in place during the last decade, identify the gaps in the network, and assess their effectiveness in achieving the intended result.



40 Branch Reports including EU Report

Argentina	Australia	Austria	Belgium	Brazil
Canada	Chinese Taipei	Colombia	Czech Republic	Denmark
Finland	France	Germany	Greece	India
Israel	Italy	Japan	Korea	Liechtenstein
Luxembourg	Mauritius	Mexico	Netherlands	New Zealand
Nigeria	Norway	Peru	Poland	Portugal
Russia	South Africa	Sweden	Spain	Switzerland
Turkey	UK	USA	Uruguay	EU Report



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General Report: 5 Sections

- 1: instruments of international application with potential worldwide coverage;
- 2: instruments and processes of regional application;
- 3: select issues regarding the handling of tax information subjected to EOI, and
- 4: assessing the impacts of virtual currencies on the existing EOI networks.
5. Conclusions

Addendum:

- European Union exchange of Information network,
- Other cross-border initiatives on exchange of information



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Practical implementation of EOI networks:

- Difficult to assess
- Lack of public data denoting the frequency and the effectiveness of EOI based on the quality of the information received



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Unbalanced EOI flows:

FATCA

CRS MCAA

CbCR MCAA

Unbalanced EOI flows:

FATCA: non-reciprocal EOI

CRS MCAA:

- non-reciprocal, but bilateral EOI.
- Majority of countries reporting greater incoming flows than outgoing flows



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CbCR MCAA:

- non-reciprocal, but bilateral EOI.
- OECD reports over 2400 bilateral exchange relationships have been activated globally
- Most countries receiving reports have between 40 to 70 activated relationships under CbCR MCAA.



CbCR MCAA:

- Of the 84 signatory states, about 60 states currently receive CbC reports from one or more treaty partners
- Only three countries – Mauritius, Seychelles and South Africa – are located in Africa (which comprises 54 countries)
- Only three countries – Argentina, Brazil and Uruguay – are located in South America (which comprises 14 countries)
- What does this mean for developing countries?



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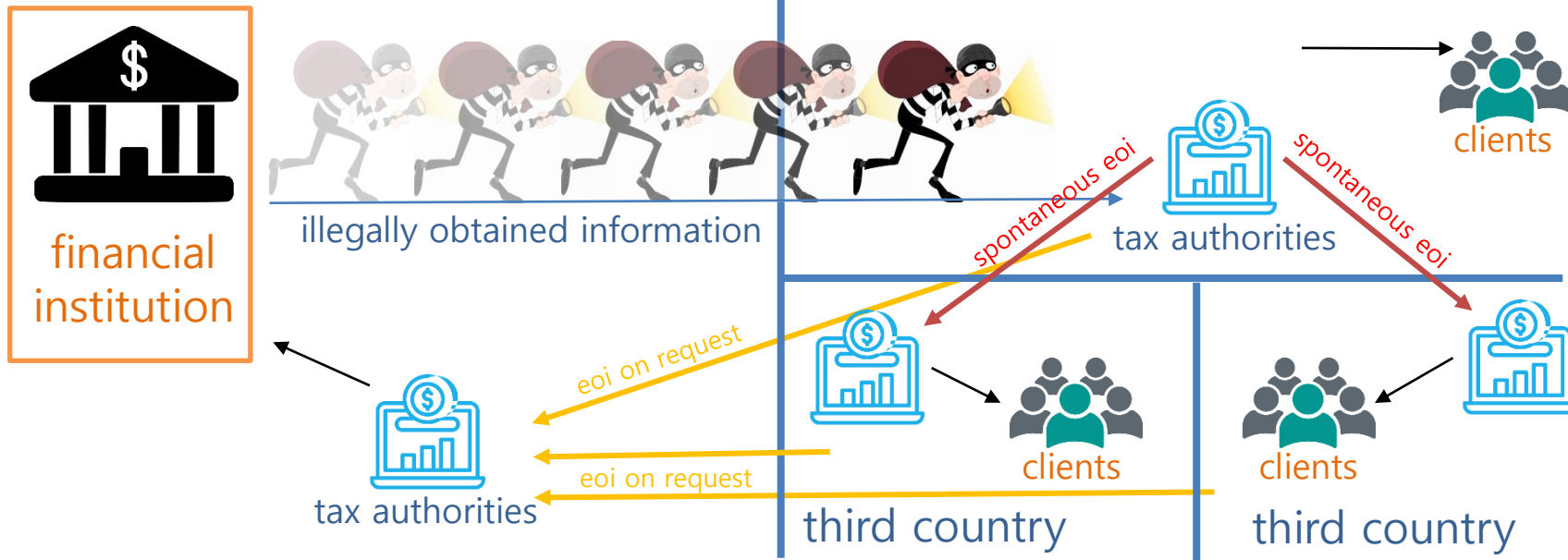
- Use of Stolen Data
- Whistleblower protection
- Taxation of Virtual currencies
- Stablecoin taxation



Stolen Data: typical case

the data-source country

the data-acquiring country





Whistleblower Protection

- No common approach to dealing with the topic
 - Most country reported no relevant tax rules on the topic
1. Protection via anti-corruption laws: Austria, Canada and New Zealand
 2. Tax Code or general law provides persons gave no overall duty of confidentiality towards their employers: United Kingdom, Uruguay and Chile
 3. Whistleblowing considered to be breach of confidentiality / criminal offense: Switzerland



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Whistleblower Protection

Lack of formal protection for whistleblowers in most countries might deter individuals from reporting on their employer's wrongdoings

BEPS 12 and DAC 6 both require the mandatory disclosure of aggressive tax schemes.

Possible standing solution?



Virtual Currencies

No formal consensual definition adopted at domestic level

Countries tend to place cryptocurrencies into one of the following categories: financial assets, derivatives and/or securities, commodities, digital or virtual assets, or securities.

Domestic practices:

- Currency: Germany and Italy
- Financial Asset:
- Argentina, Brazil, and South Africa
- Subject to EOI through FATCA +CRS



23 of 40 country Reports either did not include a cryptocurrency section or claimed that there was no legal conceptual approach to crypto-asset taxation:

- Colombia, the Czech Republic, Denmark, Finland, Greece, India, Japan, the Republic of Korea, Liechtenstein, Luxembourg, Mauritius, Mexico, New Zealand, Nigeria, Norway, Peru, Poland, Portugal, Russia, Switzerland, Turkey, the United Kingdom, and Uruguay
- India: proposition for a ban on the commercialization of cryptocurrencies



Stablecoins:

- A stablecoin is a cryptocurrency that is pegged to the price of another stable asset like gold, commodities or the US dollar
- Stablecoin taxation was raised by only a minority of reports, such as the EU, USA and Luxembourg, with only the US putting forward a definition for it
- EU Report: No global stablecoin arrangement should start until all the risks associated with the trading of cryptocurrencies are addressed



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Questions & Answers



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Conclusion