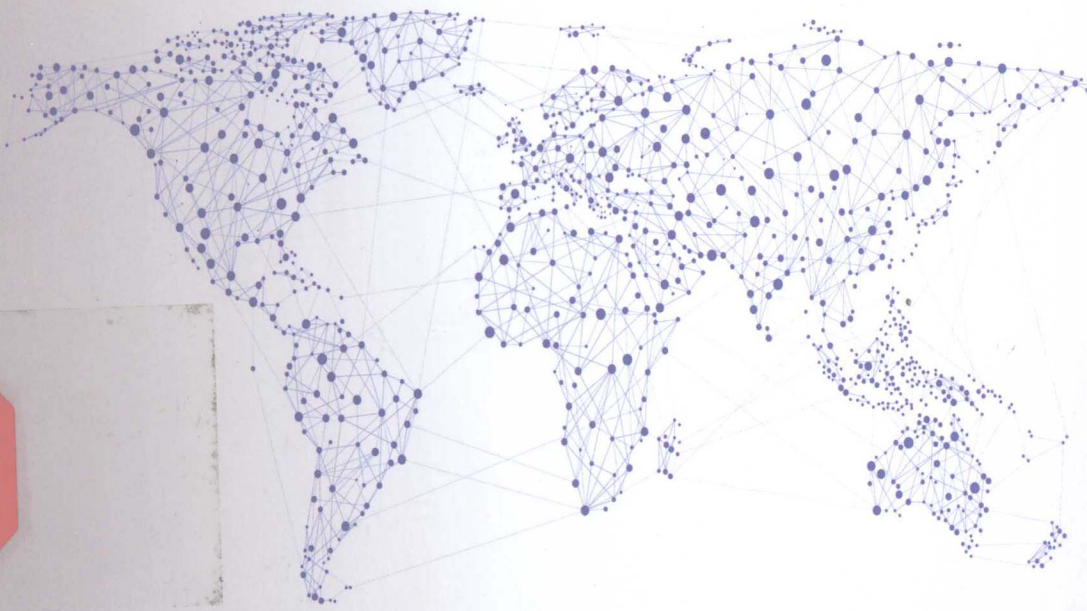
XAVIER OBERSON

EE
Elgar

INTERNATIONAL EXCHANGE OF INFORMATION IN TAX MATTERS

Towards Global Transparency



International Exchange of Information in Tax Matters

Towards Global Transparency

Xavier Oberson

Professor of Law, University of Geneva, Switzerland

常州大学山书馆
藏书章

Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

© Xavier Oberson 2015

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2015930140

This book is available electronically in the **Elgar**online
Law subject collection
DOI 10.4337/9781784714727

MIX
Paper from responsible sources
FSC® C013056

ISBN 978 1 78471 471 0 (cased)
ISBN 978 1 78471 472 7 (eBook)

Typeset by Columns Design XML Ltd, Reading
Printed and bound in Great Britain by T.J. International Ltd, Padstow

Abbreviations

AEOI	automatic exchange of information
AML	anti-money laundering
Archives	Archives de droit fiscal suisse (ASA) (periodical)
ATF	'Arrêt du Tribunal fédéral'
CAA	competent authority agreement
CDFI	Cahiers de Droit Fiscal International
CMAAT	CoE/OECD Multilateral Convention on Administrative Assistance in Tax Matters
CoE	Council of Europe
CRS	common reporting standard
DoJ	United States Department of Justice
DPD	Data Protection Directive
DRC	EU Directive on recovery of tax claims
DTC	double taxation convention
DTT	double taxation treaty
EATLP	European Association of Tax law Professors
ECHR	European Convention/Court on Human Rights
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council
EID	Exchange of Information Directive
EOI	Exchange of Information
ET	European Taxation (periodical)
EUDAC	EU Directive on Administrative Assistance
EUSD	EU Savings Directive
FAC	Federal Administrative Court
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
FFI	foreign financial institution
FIU	Financial Intelligence Unit
FStR	IFF Forum für Steuerrecht (periodical)

GIIN	Global Intermediary Identification Number
Global Forum	Global Forum on Transparency and Exchange of Information for Tax Purposes
G5	Group of five
G8	Group of eight
G20	Group of twenty
IAAT	Swiss Federal Law on Administrative Assistance in Tax Matters
IBFD	International Bureau of Fiscal Documentation
IFA	International Fiscal Association
IGA	intergovernmental agreement
IMAC	International Mutual Assistance in Criminal Matters
Intertax	International Taxation (periodical)
IRC	Internal Revenue Code (USA)
IRS	Internal Revenue Service (United States)
KYC	'know your customer'
LDF	Liechtenstein Disclosure Facility
LoN	League of Nations
MFN	most favoured nation
MoU	Memorandum of Understanding
NFE	non-financial entity
NFFE	non-financial foreign entity
OECD	Organisation for Economic Co-operation and Development
OECD Model	OECD Model Double Taxation Convention on Income and on Capital
OJ	Official Journal of the EU
QI	Qualified Intermediary
TFEU	Treaty on the Functioning of the EU
TIEA	Tax Information Exchange Agreement
TIEA Model	Model Agreement on Exchange of Information in Tax Matters
TIN	Taxpayer Identification Number
TNI	Tax Notes International (periodical)
UCI	undertakings for collective investment
UCITS	undertakings for collective investment in transferable securities

此为试读,需要完整PDF请访问: www.ertongbook.com

Contents

1. General introduction

The power to levy taxes is one of the key features of the Sovereignty of States. At the beginning, taxes were levied on a territorial basis, focusing on the place of situation of the assets or the location of transfers of goods. Later, with the development of industrial States and the need to finance global infrastructures and social services, modern States tended to move towards more global systems of taxation, notably on worldwide income tax. This major development led to a need to combat double international taxation (with rules such as exemption or credit methods) and, as a consequence, exchange of information. Indeed, in order to insure a fair international level of tax, each State has to be able to verify the global position of any relevant taxpayer.

Parallel to this development, globalization led to an effort to develop instruments to combat international tax fraud and evasion. Sophisticated taxpayers, such as multinational companies, could try to use the international legal framework, typically double taxation treaties (DTT), in order to insure double non-taxation. Other taxpayers, including individuals, were developing schemes of tax evasion through the use of offshore or complex structures. The transfer of the place of residence to tax favourable countries also started to develop.

As a consequence, international organizations and governments entered into exchange of information networks around the world with a view to fostering global transparency.

In fact, the need for international agreement in tax matters is the result of a conflict, based on international public law, between the principle of universality in taxation, on the one hand, and the principle of territoriality for the implementation of the tax rules, on the other hand.[1] Indeed, it is generally recognized that states have the right to tax persons (individual or entities) globally (universally), so long as there is a personal connection with that state (universality). By contrast, states are usually locked inside their territory in order to implement or enforce their tax rules. States therefore need international treaties, bilateral or multilateral, in

[1] Seer/Gabert (2009), p. 23.

order to solve this conflict and in particular obtain information or collection measures to ensure a fair and global taxation of their taxpayers.

While the trend towards exchange of information in tax matters started a long time ago, namely during the works of the League of Nations in 1919, it really developed globally after the publication of the various OECD Models of double taxation convention, as of 1963, and took another impetus, following the publication, in 1998, of the OECD Report against harmful tax competition.

Following the financial crisis of 2008, a major acceleration of the movement took place in the 'big bang' of 2009. This led to the renegotiation of hundreds of double taxation conventions based on the OECD Model Double Taxation Convention (DTC) around the world and the signature of tax exchange of information agreements (TIEA) with tax haven countries in an unprecedented way. The United States, with the enactment of FATCA in 2010, was pushing towards a global standard and has succeeded in designing a system, which is now adopted around the world, notably through the mechanism of the intergovernmental agreements.

Countries started to exchange information around the world like never before. In 2013, a step further was reached: the global consensus towards the automatic exchange of information as the new global standard. This tremendous development toward exchange of information, and more generally administrative assistance in tax matters, with its constant and rapid evolution, raises of course many issues. Different, sometimes conflicting, rules and models have been developed in parallel by different institutions and governments. There is therefore a need for coordination and consultation among the various actors. In addition, while the focus relied on the efficiency and global acceptance by countries of the rules of the exchange of information, the legal positions of the persons involved, the taxpayers, have remained of less concern. In fact, their situation remains mostly a question of domestic law, with all the potential differences that this may cause.

The purpose of this book is therefore to describe the main developments in the area of exchange of information in tax matters, the various existing instruments, their interaction and the position of the persons involved during the process.

We will thus start by describing the historical development towards a mechanism of global exchange of information in tax matters. Then, we will focus on an analysis of the main instruments providing for international exchange of information in tax matters. This includes double taxation treaties, TIEAs, the CoE/OECD Multilateral Convention on

Mutual Administrative Assistance in Tax Matters (CMAAT), European Directives, the Swiss Rubik models and the FATCA regime. We will move on to the development of a global model of international automatic exchange of information. There are already various systems in force, which could serve as models. The proper design of this new system has therefore to take into account the complexities of the existing models and try to coordinate them. Moving towards automatic exchange of information also requires taking a look at potential solutions for solving the past.

Finally, after having analysed in detail the various systems of international exchange of information, their interaction and complexities, we will then move on to look at the position of the taxpayers involved. This should lead us to define more precisely the level of protection of the taxpayers, during the whole exchange of information process, and the existing rights that may be challenged during it. More precisely, we will distinguish between substantive rights, such as human or constitutional freedoms, which cover essential rights of protection of human features (privacy, possession, data protection, etc.), and procedural rights, namely rights of defence in the process as such.

2. Historical development of international exchange of information rules

I. FIRST MODELS

It appears that the first exchange of information rules took place in the framework of double taxation treaties concluded between Belgium and France (1843), and Belgium and the Netherlands (1845).[2]

The starting point of a model providing for the obligation to exchange information under a bilateral convention can be traced back to the works of the League of Nations.[3] Indeed, in 1927, the League's Committee of Technical Experts on Double Taxation and Tax Evasions issued a general report, that presented four separate model tax conventions.[4]

One year later, the committee and experts published the 1928 model double taxation treaty that would form the basis of bilateral treaties, which under the following works of the OECD, would form the basic structure of the international tax regime.[5] As Dean has demonstrated, the fate of the four models presented by the League of Nations would however be quite different.[6] Indeed, the Model designed against double taxation would clearly prevail over the others. Later on, the League of Nations issued two model tax treaties, the so-called Mexico drafts, in 1943, and the London drafts, in 1946, which included a model double

[2] Gangemi (1990), p. 19.

[3] Dean (2008), p. 35.

[4] See Reports Presented by the Comm. of Technical Experts on Double Taxation and Tax Evasion, League of Nations Doc. C.216M.85 1927 II (1927 Report); Dean (2008), p. 35.

[5] In this sense, Dean (2008), p. 35, who refers also to Avi-Yonah (1996), p. 1306.

[6] Dean (2008), p. 38.

taxation treaty and a model for the establishment of reciprocal administrative assistance in the field of taxation.[7] Finally, the two distinct drafts would be combined into a single model treaty.[8]

The Organisation for European Economic Co-operation (OEEC) published its recommendation concerning double taxation, on 25 February 1955, and its successor, the OECD, adopted in July 1963, a Draft Double Taxation Convention on income and capital. Article 26 of the OECD Draft would later become one of the leading frameworks for international exchange of information in tax matters. The essential feature of this type of exchange of information corresponds to an exchange of information upon request. In addition, it covers information relevant to carry out the provisions of the convention or to implement the domestic law of the requesting State. In the first case, we refer to a 'minor exchange' and, in a second case, to an 'extended exchange' clause.

At this stage, some countries, like Austria, Belgium, Luxembourg and Switzerland, were more in favour of granting a restricted exchange of information in tax matters. For instance, Switzerland, under the so-called 'traditional approach', would only accept a treaty with a minor exchange of information clause, limited to the information necessary to carry out the provisions of the treaty.[9] Therefore, Switzerland would not grant exchange of information about a taxpayer, resident in the requesting State, who did not claim any benefit from an applicable DTT, typically in order to obtain a reduced tax at source from Swiss source dividends, interests or royalties.

In 1979, the Council of Europe and the OECD issued in Strasbourg a Multilateral Convention on Mutual Administrative Assistance in Tax Matters (CMAAT), which was approved in 1987. It was open to signature first for OECD Members in 1988 and entered into force on 1 April 1995, after ratification from five States (United States, Denmark, Finland, Sweden and Norway).

---

[7] Fiscal Comm., London and Mexico Model Tax Conventions: Commentary and Text, League of Nations Doc. No. C.88.M.88.1946.IIa.; Dean (2008), p. 39.

[8] Dean (2008), p. 40.

[9] It should be noted that this position already evolved in 1996, under a new income tax treaty with the United States, where Switzerland was ready to exchange information in cases of 'tax fraud and the like'. This concept, derived from domestic Swiss law, corresponds to a tax evasion combined with fraudulent behaviour of the taxpayer, such as manoeuvres, 'schemes of lies' designed to deceive the tax administration; see infra p. 41.

此为试读,需要完整PDF请访问: www.ertongbook.com

II. THE DEVELOPMENT OF THE INITIATIVE AGAINST HARMFUL TAX COMPETITION AND ITS IMPACT

The year 1998 remains a landmark moment in the path towards global transparency. On that date, the OECD published the famous report against harmful tax competition. It sets a pattern to identify tax havens and harmful tax regimes of countries with a comprehensive tax system. Looking at this report in retrospect, it is interesting to note that most of the changes that would occur later in the area of exchange of information were already announced ten years before, albeit not in such an extensive and comprehensive form. Among the criteria to identify both tax haven and harmful tax regimes, the lack of effective exchange of information plays a key role. At that time, Luxembourg and Switzerland abstained from approving the report. Both countries however continued to participate in the works of the OECD on these matters.

The pressure started to grow notably against identified tax havens, which were further divided into two categories: cooperative and non-cooperative. In 2000, the OECD issued a report entitled Improving Access to Bank Information for Tax Purposes.[10] This time, both Switzerland and Luxembourg approved it. Retrospectively, it can be seen as a compromise because it only provides for a minimum standard of an exchange of information upon request, and subject to tax fraud, as defined according to the law of the requested State.[11] For a while, due notably to a public statement of the United States in early 2001,[12] the focus was less on the harmful features of corporate taxation than on exchange of information as such. The pressure however kept going on.

As a result of the works of the Global Forum on Transparency and Exchange of Information, which was created in 2000, the OECD issued in 2002 a model tax information exchange agreement (TIEA). The OECD presented both a multilateral and a bilateral model, which provided for exchange of information upon request, without the possibility for the requested State to oppose bank secrecy rules. Indeed, the

---

[10] OECD, Improving Access to Bank Information For Tax Purposes (OECD 2000), International Organizations Documentation IBFD.

[11] The approval of the 2000 OECD Report, and the later introduction of the EU Saving Directives, led Switzerland to modify its position in favour of an exchange of information in case of tax fraud according to the law of the requested State, see infra p. 23.

[12] See, US Treasury Department, Statement from Treasury Secretary O'Neil on OECD Tax Havens, of 10 May 2001.

request was based on the conditions set forth under the rules of the requesting States. While it appears that TIEAs had already been concluded in the past, notably between the United States and Caribbean countries, the OECD Model TIEA however represents a major development providing for a global framework, still based on exchange of information upon request. At first, the progress of TIEAs was rather slow; only a dozen of such agreements were signed, notably with the United States. Time would however show the success of these models, namely seven years after.

In 2005, strongly influenced by the works of the Global Forum and the adoption of the Model TIEA, the OECD Model DTC, and its Commentary, were modified in order to comply with the global standard. A new par. 5 to Art. 26 was adopted. It provides, in particular, that the requested State cannot decline to supply information solely because it is held by a bank, other financial institution, or because it relates to the ownership interests in a person.

III. DEVELOPMENTS AT THE EU LEVEL

At the EU level, actions were also being undertaken in order to fight against tax evasion and develop exchange of information. Significant instruments have been put in place, notably in the area of VAT and various excise duties. On 27 January 1992, the Council Regulation (218/1992) on administrative cooperation in the field of indirect taxation (VAT) was adopted, followed later by a new Council Regulation on 7 October 2003. In the field of direct taxes, the first Directive on exchange of information (77/799) was adopted on 19 December 1977. This Directive would then be modified many times in the future.

On 3 June 2003, the Directive 2003/48/EC on the taxation of savings income in the form of interest payments was adopted.[13] It entered into force on 1 July 2005. At the same time, bilateral agreements with equivalent rules were adopted between the EU and third States, namely Switzerland, Andorra, Monaco, Liechtenstein and San Marino.

---

[13] Council Directive 2004/48/EC of 3 June 2003 on the taxation of savings income in the form of interest payments, OJ L 157 of 26 June 2003, p. 38 ff.

IV. THE 'BIG BANG'

The year 2007 will remain the year of the last pause before the storm. It all started in Liechtenstein. A gentleman by the name of Kiefer was able to transfer a CD with clients' names from an accounting firm in Vaduz to Germany. The CD did contain a list of noncompliant German taxpayers. Without knowing it Mr. Kiefer provoked a major political crisis, resulting in the resignation of a top German politician involved in the fraud and put the issue at the forefront of the political agenda and in the media. Shortly after, in 2008, the UBS scandal started in the United States with thousands of undeclared bank accounts of US taxpayers under investigation.

The economic crisis of 2008, although not directly linked with the issue of bank secrecy and offshore accounts, gave a further impetus in favour of global transparency and put more pressure on tax havens. International organizations (such as the UN or the OECD), and notably G20 countries called for action in this field. As of 2008, the implementation of global standards of transparency and exchange of information has been at the top of the agenda of the G20 meetings in Washington, London and Pittsburgh.[14]

The Leader's statement of the London G20 meeting of 2 April 2009, stated:

> We agreed to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of bank secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of information of tax information.

Indeed, the G20 meeting of 2009 introduced white, grey, or black lists of countries, according to their level of implementation of a sufficient network of exchange of information treaties. The 'rule of 12' became reality. In order to belong to the white list, a country had to sign a minimum of 12 DTCs, with an extended exchange of information clause corresponding to the OECD Model, or of 12 TIEAs. This time the pressure from the world community was too strong. On 13 March 2009, a 'big bang' occurred: Austria, Belgium, Luxembourg and Switzerland, in particular, announced their willingness henceforth to apply the standard defined in Article 26 of the OECD Model DTC within the framework of new tax treaties. Those countries, during the London G20 summit on 2

---

[14] Cannas (2013), p. 28.

April 2009, were still on a 'grey' list, which refers to states that had committed to implementing the international standard without having done so in substance.[15] By September 2009, they had been moved to the white list.[16] March 2009 would further lead to negotiations of tax treaties, with extended exchange of information clauses, and of TIEA, all around the globe, like never before, including notable tax haven countries.

The Global Forum started to implement a 'peer review' process, in order to verify the level of implementation of the global standard. The *first phase* started in 2010. Some countries already had to modify their legislation, which could be viewed as too restrictive in view of the requirement of the generally accepted standard. The *second phase* of the peer review concentrates on the effective practices of the member states. It is still underway but important progress has generally been implemented globally.

According to the Global Forum, the *international standard*,

> which was developed by the OECD in co-operation with non-OECD countries and which was endorsed by G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting, requires the exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.[17]

In the United States, major developments also occurred. As of 2001, the 'Qualified Intermediary' (QI) agreements were implemented. They allow foreign financial institutions (FFI) to enter into QI agreements, which provide for determining the identity of their US clients, and levy a withholding tax of 30 per cent on US source income (dividends, interest, gross proceeds from sale). Under the QI, however, the FFI did not have to disclose the names of their US customers.

The UBS case, including the Birkenfeld whistleblowing,[18] drew a lot of attention from the media, and political pressure grew against the use of offshore structures, with the participation of banks or FFI to evade taxes. As a consequence, the United States introduced the Foreign Account Taxpayer Compliance Act (FATCA) in 2010. Under FATCA, foreign FFI

---

[15] OECD Global Forum, Progress Report, 2 April 2009.

[16] OECD Global Forum, Progress Report, 28 September 2009.

[17] OECD, Tax Co-operation 2010: Towards a Level Playing Field (2009); see also Malherbe/Beynsberger (2012), p. 125.

[18] For a description of the UBS saga, see infra p. 43 ff.

must identify and report to the IRS US account holders and non-US account holders with substantial US owner. Participating FFIs are also required to levy a 30 per cent withholding tax on certain payments of recalcitrant account holders.

In 2011, the Joint CoE/OECD CMAAT of 1988 was further amended.[19] It was opened for signature by non-OECD Member countries. The rules were adapted to the current standard on exchange of information. In particular, similar to Article 26, paragraph 5 of the OECD Model DTC, information held by banks or relating to the ownership must be exchanged. Increasingly, in parallel to the bilateral network of double taxation treaties, a multilateral form of cooperation was fostered. While on 27 May 2010, the new Protocol CMAAT had been signed by 15 countries, it has nowadays been signed by more than 65 countries.

The same year, at the EU level, the Directive 2011/16/EU on administrative cooperation in the field of taxation, replacing Directive 771/799/EEC, was adopted.[20] It provides for the exchange of information upon request or spontaneously, and for an automatic exchange of information, as from 1 January 2015, that is available on the following five specific categories of income and capital: employment income, director's fees, life insurance products, pensions and ownership and income from immovable property. It should be noted that there is already a pending proposal to extend such automatic exchange to dividends, capital gains, and other income held in specific financial accounts.

In the same period, Switzerland started to implement an alternative model, the so-called 'Rubik' agreements. In a nutshell, the model is based on a withholding tax on Swiss source income to foreign residents in Contracting States, which is then transferred to that state, while preserving anonymity of the taxpayer. The rate corresponds to the state of residence. Withholding tax agreements have been signed by Switzerland in 2012 with the United Kingdom, Austria and Germany (but the latter was finally not ratified).

A further development took place in 2012. On 17 July 2012, the OECD updated its Commentary on the OECD Model and confirmed the admissibility of so called 'group requests' in the context of exchange of information.[21] It means that a request may not only refer to a single identified taxpayer but also pertain to a specific group of taxpayers, who

---

[19] See in particular, Pross/Russo (2012), p. 381.

[20] Council Directive 2011/16/EU on administrative cooperation in the field of taxation of 15 February 2011, O.J. L 64/1 of 11.03.2011.

[21] See, notably, OECD Model Tax Convention on Income and on Capital: Commentary on Article 26, para. 5.2. (22 July 2010).

are in a similar situation. The prohibition of fishing expeditions still applies under the standard, so that the group must be sufficiently related to a specific and joint 'pattern of facts'.[22]

In the same year, the Financial Action Task Force (FATF) adopted a revision of its guidelines. According to the FATF Recommendation No 3 of February 2012, serious tax crimes (direct or indirect), a concept to be defined under domestic tax law, becomes a predicate offence for criminal money laundering prosecution. This rule, which was already implemented by many States, namely in Europe, became thus a global standard. Following that trend a proposal of a new EU Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing of February 5 2013 (COM (2013) 45 final) is under analysis.

The development of money laundering rules in the tax area has a direct impact on exchange of information. Indeed, coordination between criminal and tax rules will foster such exchanges. In addition, criminal rules on identification of the beneficial owner of complex structures, implemented for anti money laundering purposes, may be used as additional tools in the tax area, in order to identify beneficial owners or controlling persons.

V. TOWARDS AUTOMATIC EXCHANGE OF INFORMATION

While most observers were thinking that giant steps had already been achieved in the area of exchange of information, a major development, somewhat comparable to the 'big bang' of 2009, again took place in 2013: the move towards automatic exchange of information.

In fact, the movement can already be traced back to 2012. In particular, in February 2012, five European countries (France, Germany, Italy, Spain and the United Kingdom) announced their intention to develop a system of multilateral automatic exchange of information with the United States, in order to implement the FATCA rules. This agreement forms the basis of the so-called Model 1 IGA. This development can be described as a 'turning point' toward the global standard of automatic exchange of information.[23] Indeed, the FATCA system of global reporting started to

---

[22] For an example of a group request, see Federal Administrative Court (FAC), of 5 March 2009 ('case UBS I'), Archives 2009, p. 837; see infra p. 43.

[23] See also Tello/Malherbe (2014), p. 1; Grinberg (2014), p. 333ff; Grinberg (2012), pp. 305, 375; Morse (2012), p. 529 ff.

此为试读,需要完整PDF请访问: www.ertongbook.com