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Mutual Legal Assistance in Tax Matters

Introduction. The mobility of taxpayers, the number of cross-border transactions and the internationalization of the financial instruments have developed significantly in the last few decades. In today's increasingly borderless world, countries are working more closely together to prevent abuses of the global financial system in the area of taxation. Furthermore, the process of globalization presents significant challenges to tax administrations around the world and makes it difficult to establish correct assessment of taxes by the states. Therefore, the strengthening of mutual legal assistance as a mechanism for administrative cooperation between countries remains one of the outstanding issues in international taxation law. The concept of **mutual legal assistance in tax matters** among states has developed alongside the international tax law, through double taxation conventions that are result of the international organizations` great effort (mainly of the Organization for Economic Cooperation and Development: OECD) to encourage collaboration among domestic tax administrations through different agreements.

The model of mutual legal assistance in tax matters between the countries, especially the assistance in tax collection, is facing some major obstacles that include substantive and procedural tax problems because of the fact that the mutual assistance in tax matters is a form of extraterritorial fiscal intrusion. Taxpayers may have cross-border activity but tax authorities cannot go beyond their borders to take action to collect taxes. For a long time, the mutual assistance was exclusively based upon the traditional concept of bilateral cooperation but, as a result of its effectiveness in dealing with multinational enterprises and individuals that are organized on a global basis, steadily, more and more multilateral forms of cooperation emerge besides this bilateral assistance.

The most important multilateral instrument in the field of mutual assistance is the Convention on Mutual Assistance in Tax Matters from 1988, which had been developed jointly by the OECD and the Council of Europe and its Protocol which entered into force on 1st June 2011. It provides for a wide range of administrative assistance between any two countries that are parties to the Convention. Additionally, according to the role and importance of the OECD Model Tax Convention on Income and Capital, Article 27 dealing with assistance in the collection of taxes

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and going against the long tradition of not assisting other countries' tax enforcement, was added in 2003.

To fight tax evasion and tax fraud, the European Union, has also enacted Directives for administrative cooperation between the tax administrations of the Member States such as the old Directive 77/799/EEC and its later amendments, the Directive 2008/55/EC and the Directive 2011/16/UE, adopted in 15 February 2011.

This paper aims to provide an analysis of the concept and the procedure of the mutual assistance in tax matters. The paper will focus in particular on the legal framework of the mutual assistance.

1.Defining the concept of mutual assistance in tax matters

Mutual agreement procedure (MAP), as a basis of the mutual assistance in tax matters, *is a classic tool to resolve disputes regarding the application of double taxation treaties*. MAP is initiated at the request of a taxpayer, usually a business company who claims that it is overtaxed because one of the treaty states did not apply the tax treaty accurately, or because the application of the treaty in the both states is inconsistent. Typically, such disputes concern transfer pricing issues, valuation of intangibles or services or the existence of a residence or a permanent establishment.[1] Often, despite the tax payers` initiative, MAP is instigated at the request of the tax authorities of the contracting states.

The taxpayer or the tax authority addresses its claim to the "competent authority" of the resident contracting state. Usually, the competent authority is the Ministry of finance or a separate office (this is the case in Germany). If the competent authority considers the claim justified and if it is not itself able to remedy it, it can present the case to the competent authority of the other state and they can together "endeavour" to find a solution, which means that there is no obligation to resolve the dispute i.e. unrelieved double taxation may persist.[2] The MAP parties are the competent authorities of the contracting states, not the taxpayer who initiated it. The competent authorities are free to determine what approach they will pursue to reach a mutual agreement and if they take into account the interests of the particular taxpayer. Consequently, the MAP can be terminated without even reaching any mutual agreement. The taxpayer neither has a guarantee to obtain a solution in accordance with the substantive provisions of the treaty, nor even a right to influence significantly the procedure.[3]

If, at the end of the mutual agreement procedure, a mutual agreement is found, it is presented to the taxpayer who can then either accept or reject it. If the taxpayer accepts it, the mutual agreement becomes legally binding, which means that the taxpayer would definitely waive all remedies of domestic law. Conversely, if no mutual agreement is reached or if a mutual agreement is rejected, the taxpayer can still

[1]Gildemeister Arno, *Arbitration of Tax Treaty Disputes*, Transnational Dispute Management, 2007, 1-2.

[2]Herdin-Winter Judith, *Mutual Agreement Procedure*, Institute for Austrian and International Tax Law, Wien, 2012, 8.

[3]Romano Carlo, *Advanced Tax Rulings and Principles of Law: towards a European Tax Rulings System?,* Doctoral series, IBFD, Amsterdam, 2002, 78-82.

pursue or resume the available domestic remedies that, until then, have only been suspended.[4]

The concept of mutual legal assistance in tax matters among the states raises few crucial questions that are important for its efficient implementation, such as:[5]

- Should mutual assistance be limited only to taxes covered by the tax treaty or should extend to all taxes of the contracting states, including local taxes and social security? A number of experts from developing and developed countries consider that the mutual assistance should not be limited solely to taxes covered by a tax convention. It is noted that, practically, mutual assistance might be limited to taxes covered by tax conventions owing to the lack of capacity of tax administration to administer state or local taxes.

- Should there be similar mutual assistance provisions between developed and developing countries? Many developing countries find it difficult to meet the request and do not have a capacity to respond properly to the mutual assistance request.

In a majority of cases, mutual agreement procedures have produced satisfactory results and 80-90% of cases are resolved within three to four years.[6] Still, given the growing number and complexity of international tax disputes, sometimes being subject to political pressure due to shrinking tax revenues, the number of mutual agreement procedures without any actual outcome has steadily increased.[7] Some of the consequences of the unsolved mutual assistance procedures are the following:[8]

- double taxation of the taxpayers despite the existence of the tax treaties;
- taxpayers who initiate the mutual assistance procedure spend considerable amount of money for the whole process;
- uncertainty and unpredictability of the outcome that does not encourage taxpayers to request mutual assistance procedure;
- very limited taxpayers` rights to participate in the MAP procedure, lack of transparency of the procedure and absence of legally reasoned decisions etc.

In this manner and in the efforts to overcome these MAP obstacles and negative consequences, the European Court of Justice encouraged the EU Member States to make effective use of the existing mutual

[4]Luchtman Michiel, *European Cooperation between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities*, Ius commune Europaeum, No.76, Intersentia, 2008, 32-37.

[5] UN. Ad Hoc Group of Experts on International Cooperation in Tax Matters (11th: 2003: Geneva); UN. Department of Economic and Social Affairs, *International Cooperation in Tax Matters: Report of the Ad Hoc Group of experts on International Cooperation in Tax Matters on the work of its 11th meeting*, UN, New York, 2005, 6-9.

[6]Owens Jeffrey, *Mutual Assistance in Tax Matters*, Financial Times, 2007.

[7]OECD Committee on Fiscal Affairs, *Improving the Resolution of Tax Treaty Disputes*, OECD Publishing, 2007, 40-41.

[8]OECD Committee on Fiscal Affairs, *Best Practice No.17 of the Manual on Effective Mutual Agreement Procedures*, OECD Publishing, 2010, 8-11.

assistance options.[9] More recently, the ECJ has been increasingly emphasizing that taxpayers may also be required to contribute, to a greater extent, to the clarification of cross-border fact patterns. The tax authorities do not need to rely primarily on mutual assistance options.[10]

2.Legal framework of mutual assistance in tax matters

Currently, at both the European and international level, many measures are adopted to deal with tax havens on the one hand, and, on the other, to make mutual assistance more effective. The need for the effective mutual assistance in tax matters between the states arises from the discrepancy between material universality and formal territoriality. On the one hand, the principle of formal territoriality that applies in international law prohibits states from carrying out field audits or other investigations in other states, as national tax authorities cannot carry out sovereign acts on foreign national territory. On the other hand, no principle of material territoriality exists that prohibits connecting the legal consequences of national law with foreign facts and circumstances. In order to overcome this divergence, numerous legal bases regarding mutual assistance have been created.[11]

2.1 EU law. Given the legal requirement in some Member States to notify the taxpayer regarding the decisions and acts on its tax obligations and the difficulties encountered because of this by the tax authorities, including when the taxpayer has been established in another Member State, it is desirable that the tax authorities are able to request the cooperation of the competent authorities of the Member State in which the taxpayer has been established.[12] At the EU level, the mutual legal assistance in tax matters is governed by the Mutual Assistance Directive 1977 and the Mutual Assistance Directive 2011, the latter replacing the Mutual Assistance Directive 2008 from 1 January 2012 onwards. The Member States adopt directives in terms of Article 288 (3) of the EU Treaty. These directives set out minimum standards and limits, which the Member States must respect and implement in national law.[13]

The increased cooperation between the tax authorities in the Member States becomes increasingly important within the EU, given that the increasing market integration makes it even more likely that taxpayers will be active in more than one Member State. This was recognized for the first time in 1977 in the **Mutual Assistance Directive**

[9]Lang, Michael, *The Legal and Political Context of ECJ Case Law on Mutual Assistance*, European Taxation, IBFD, 2012, 199-200.
[10]Land, Michael, Pistone Pasquale, Shuch Josef, Staringer Claus, *Procedural Rules in the Tax Law in the Context of European Union and Domestic Law*, Kluwer Law international, Hague, 2010, 49-57.
[11]Seer, Roman, Gabert Isabel, *European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements*, Bulletin for International Taxation, IBFD, 2011, 88-89.
[12]Tudor Florin, *European Administrative Cooperation in the Field of Taxation*, Annals of "Dunarea de Jos" University of Galati, Fascicle I, Economics and Applied Informatics, Years XVIII-No. 1/2012, 2012, 55.
[13]Seer Roman, Gabert Isabel, *Mutual Assistance and Information Exchange*, National Reports, Amsterdam, EATLP, 2010, 5.

(77/799/EEC).[14] The actual subject matter of the Directive was mutual assistance between the competent authorities in the area of direct taxes and taxes on insurance premiums. Its main aim was installation of direct information systems between the EU tax authorities in order to reduce tax fraud and tax haven zones.[15] This Directive was, even with its latter amendments, designed in a different context from the modern requirements of the internal market and no longer allowed the completion of the new requirements in the administrative cooperation. The arrangements for mutual assistance for recovery set out in the Directive were considered insufficient.[16] Taking into account the number and importance of the adjustments necessary of the above-mentioned normative act, a simple change of it would not be sufficient to meet the objectives outlined above. The old Directive should therefore be repealed and replaced by a new legal instrument. This instrument should apply direct and indirect taxes and duties that are not currently subject to EU legislation. In this respect, the new directive is considered as a real adequate instrument to allow an effective administrative cooperation.[17]

The new **Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation**[18] is based on the achievements of the Directive 77/799/EEC, but provides clear and precise rules governing the administrative cooperation between the Member States, if this is necessary, in order to establish, especially concerning the exchange of information, a broader range of administrative cooperation among the Member States. It should, also, ensure clearer rules enable, in particular, the inclusion of all businesses and individuals from the Union, given the growing range of legal construction, including, but not limited to the traditional constructions such as trusts, foundations and investment funds as well as any new tool that can be set by national taxpayers. There should be more direct contact between the local or national offices responsible for the administrative cooperation from the Member States; the rule is the communication between the central liaison offices. The lack of direct contacts leads to inefficiency, use of insufficient arrangements for the administrative cooperation and delays in communicating information. It is therefore necessary to provide provisions that allow more direct contacts between services for more efficient and faster cooperation. The distribution of skills to the connection departments should be provided within the national provisions of each Member State.

[14]Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (77/799/EEC).

[15]Gold Gabi, *Constitutional, EU and International Framework of Mutual assistance in Tax Matters*, International Tax Institute, Hamburg, 2011, 10.

[16]Kiekebeld Ben, *Harmful Tax Competition in the European Union: Code of conduct, countermeasures and EU law*, EFS brochure series No.8, Kluwer, 2004, 98-99.

[17]Cvjetkovic Cvjetana, *Basic Legal Instruments of Mutual Assistance in Tax Matters in European Union*, Zbornik radova Pravnog fakulteta, Novi Sad, Vol. 45, No. 1, 2011, 471-473.

[18]Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

The Directive provided a completely new approach, by creating a new text that gives to the Member States the powers necessary for an effective international cooperation and counteracting the negative effects of the constantly increasing globalization on the domestic market. Collaboration between the Member States and the Commission is necessary for the permanent study of cooperation procedures and the sharing of experience and best practices in the fields considered. It is important for the efficiency of administrative cooperation that information and documents obtained under this Directive could, subject to the restrictions laid down in this Directive, be used by the Member State that received them also for other purposes. It is also important that Member States could transmit that information to a third country, under certain conditions. This Directive contains minimum rules and it should therefore not affect Member States' right to enter into wider cooperation with other Member States under their national legislation or in the framework of bilateral or multilateral agreements concluded with other Member States.

It should also be made clear that where a Member State provides a wider cooperation to a third country than the one provided for under this Directive, it should not refuse to provide such wider cooperation to other Member States wishing to enter into such mutual wider cooperation. An evaluation of the effectiveness of administrative cooperation should be made, especially on the basis of statistics.

(a) *Subject matter of the Directive*: The Directive lays down the rules and procedures under which the Member States shall cooperate with each other, with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in the Directive. It also lays down provisions for the exchange of information by electronic means, as well as rules and procedures under which the Member States and the Commission are to cooperate on matters concerning coordination and evaluation.

(b) *Scope of the directive*: This Directive shall apply to all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities within the EU territory. The Directive shall not apply to value added tax and customs duties, or to excise duties covered by other Union legislation on administrative cooperation between Member States. This Directive shall also not apply to compulsory social security contributions payable to the Member State or a subdivision of the Member State or to social security institutions established under public law.

(c) *Instruments for mutual assistance in tax matters established by the Directive:* the Directive provides two instruments for mutual assistance in tax matters between Member States - mutual assistance through exchange of information (exchange on information on request, mandatory automatic exchange of information and spontaneous exchange of information) and other forms of administrative cooperation (such as presence in administrative offices and participation in administrative enquiries, simultaneous controls, administrative notification, feedback of information or sharing of best practices and experience).

The Directive has, inter alia, increased the efficiency of administrative assistance and expedited mutual legal assistance in tax matters. The OECD Joint Audit Report from 2010 documented that thirteen EU Member States (Belgium, Finland, France, Hungary, Ireland, Luxemburg, Netherlands, Poland, Slovak Republic, Slovenia, Spain, Sweden and United Kingdom) have had an experience with multilateral controls audits under the EU Mutual Assistance Directive.[19] Meanwhile, there has been further political development: numerous countries outside the European Union have bowed to international pressure and have reformulated their tax and treaty policy. These states now also count on being able to claim the reward offered by the ECJ: they expect that many of the discriminatory rules imposed by Member States in relation to non-cooperating third countries will no longer be applicable in relation to them. Discrimination of cross-border fact patterns relative to domestic or EU-internal fact patterns, which, until now, has often been justified by a lack of information exchange, will be removed in relation to third countries willing to cooperate. This leads to an issue that has hardly been raised in the past: many third countries have a significantly greater interest in concluding tax agreements with Member States that also or exclusively address mutual assistance. The political pressure exerted on third countries is enormous. International organizations demand that they conclude a certain number of mutual assistance agreements, so that they are not ostracized by the "international community". Often, countries that, in the past, had no problem with their image as tax havens are now very interested in introducing a tax system that meets the international standard. As a visible sign of international acceptance, they strive to be integrated within a network of bilateral or multilateral treaties. Member States, in turn, see this as opportunity to expand mutual assistance instruments and, in this way, to combat tax evasion more effectively than before and to make it less attractive for taxpayers to shift their sources of income to low-tax countries.[20]

The ECJ case law on the role of mutual assistance in the review of justifications and proportionality with respect to the freedoms has always taken into account the political environment. Against this background, it would be consistent for the ECJ to take into account political developments and prevent the emergence of previously unintended incentives. If Member States were allowed the possibility to refuse to conclude international mutual assistance treaties and, at the same time, continue to apply discriminatory rules arbitrarily in relation to third countries, this would be counterproductive in view of existing case law and nearly intolerable in relation to third countries. For this reason, it would not be surprising if the ECJ were to clarify, in the future, that Member States may mention a lack of mutual assistance options pursuant to international treaties only if they are not themselves responsible for that state of affairs. The consequence of this would be that delays in concluding mutual assistance agreements would not just have an impact on political discussions, but might also have legal

[19]OECD, *Joint Audit Report of the Sixth meeting of the OECD Forum on Tax Administration*, Istanbul, 2010, 21-22.
[20]Lang Michael, *The Legal and Political Context of ECJ Case Law on Mutual Assistance*, European Taxation, IBFD, 2012, 200-202.

ramifications. The further development of case law proposed here would ensure that the expansion of international mutual assistance would continue to be backed by case law, even under changed conditions that might dampen the interest of individual Member States in concluding such treaties.[21]

2.2 *Multilateral legal instruments*. To achieve more effective regional groupings, countries have sometimes resorted to forms of administrative cooperation in tax matters not based on formally binding international agreements. Contrasting with this approach, regional or subregional multilateral conventions are becoming a solid reality.[22] They do not only encourage coordination of fiscal policies internationally and speed up the harmonization of fiscal norms and practices in terms of basic definitions, of procedures for identifying the source of taxability and of methods for avoiding double taxation, but they also propitiate wider cooperation among tax administrations to counteract international tax avoidance and evasion, while also allowing more effective defense of the taxpayer.

Multilateral cooperation agreements help for greater uniformity in the interpretation and application of provisions in a large number of countries as well as simplifying problems for domestic standpoint as a single convention replaces several bilateral ones on the same subject. In administrative assistance, a multilateral convention has added some advantage of allowing simultaneous actions in more than one country.[23] Multilateral treaties and conventions in the field of administrative cooperation exist and provide the framework for the mutual legal assistance in tax matters. One of the earliest examples of multilateral cooperation is the **Benelux Convention** signed in Brussels by Belgium, Netherlands and Luxembourg on 5 September 1952. This convention provides for assistance in the recovery of all direct and indirect taxes, including those levied by local authorities in the three States.[24]

Following this Convention and because of its positive results to improve and strengthen the mutual tax assistance and cooperation, in 1972 came into force the first **Nordic Convention on Mutual Assistance in Tax Matters** and since then the Nordic countries have been cooperating on an extensive scale to counteract international tax avoidance and evasion. This multilateral instrument was updated in 1989 and has a very wide scope. It covers a wide range of taxes and concerns all forms of assistance (exchange of information, assistance in the

[21]Ruiz Grau, *Convention on Mutual Administrative Assistance in Tax Matters and Community Rules: How to improve their interaction?*, EC Tax Review, 15. No.4, 2006, 199-200.
[22]Lang Michael, *Multilateral Tax Treaties: New Developments in International Tax Law*, Series on International Tax Law No.18, Kluwer Law International, Hague, 1998, 189.
[23]Ruiz Grau, Amparo Maria, *Mutual Assistance for Recovery of Tax Claims*, Kluwer Law International, London, 2003, 113-114.
[24]Collins M., *Draft Guidelines on International Co-operation against Tax Avoidance and Evasion*, UN, Geneva, 1981, 11-12.

recovery of tax claims including measures of conservancy, service of documents).[25]

The **Convention on Mutual Administrative Assistance in Tax Matters** (Convention on Mutual Administrative Assistance) is the most important multilateral agreement drawn up under the aegis of the OECD and the Council of Europe. This Convention is not the usual tax treaty. While it has some vague references in the protocol, the Convention does not refer to the elimination of double taxation. Instead, it provides a mutual assistance treaty to prevent evasion and avoidance of all taxes other than customs duties. It provides a solid legal framework to facilitate international cooperation through inter-country exchanges of tax information and assistance. Its objective is to enable each Party to the Convention to combat international tax evasion and better enforce its national tax laws, while at the same time respecting the rights of taxpayers.[26] The Convention contains 32 articles and covers administrative cooperation in the exchange of information, including well developed cooperation arrangements such as simultaneous inspections, as well as assistance in tax collection involving measures for enforcing recovery in another State, the notification of tax assessments issued by the other State, or the adoption of interim or conservancy measures.[27]

The Convention on Mutual Administrative Assistance was opened for signature in 1988 and entered into force in 1995. Therefore, 54 countries that are members of either the Council of Europe or the OECD or both may accede to it. Clearly, the added value of the Convention results from the relationship it regulates with non EU Members States The Parties are Azerbaijan, Belgium, Denmark, Finland, France, Georgia, Iceland, Italy, the Netherlands, Norway, Poland, Slovenia, Spain, Sweden, the United Kingdom and the United States. Some other countries have signed as well, but there is no entry into force yet (Ireland, Korea, Mexico, Moldova, Portugal). A number of additional countries (Argentina, Australia, Brazil, Canada, Germany, Indonesia, Japan, Russia, Turkey and South Africa) have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters on 3 November 2011 in the margins of the Cannes G20 summit. The Cannes G20 Summit final communiqué noted that: "We welcome the commitment made by all of us to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and strongly encourage other jurisdictions to join this Convention. In this context, we will consider exchanging information automatically on a voluntary basis

[25]Prats Francisco, Alfredo Gracia, *Mutual Assistance in Collection of Tax Debts*, UN, New York, 2001, 55-57.

[26]Klein Kenneth, Council of Europe – Organization for Economic Co-operation and Development: *Convention on Mutual Administrative Assistance in Tax Matters*, International Legal Materials, Vol. 27, No.5, 1988, 1160-1175.

[27]Daniels M., *International Cooperation Between Tax Authorities - the Multilateral Convention on Mutual Administrative Assistance in Tax Matters of the Council of Europe/OECD*, Legal issues of European integration: law review of the Europa Instituut, University of Amsterdam, Amsterdam, No. 1, 1988, 35-54.

as appropriate and as provided for in the convention".[28] Recently, India and Greece signed the Convention and the last country that has signed the Convention is Albania. The Convention provides one of the most comprehensive and efficient instruments to counteract international non-compliance in today's open and more integrated economy.[29]

The scope of the Convention on Mutual Administrative Assistance is broad as it covers a wide range of taxes and goes beyond exchange of information on request. It also provides for other forms of assistance including automatic exchange of information (Article 6), spontaneous exchanges of information (Article 7), simultaneous tax examinations (Article 8), performance of tax examinations abroad (Article 9), assistance in recovery of tax claims (Article 11), measures of conservancy (Article 12) and service of documents (Article 17). It can also be used to facilitate joint audits. The Convention may apply to all forms of compulsory payments to the government except for customs duties. It applies to taxes on income, profits, capital gains and net wealth levied at central government level. It also covers local taxes, compulsory social security contributions, estate, inheritance or gift taxes, etc.[30]

The Convention on Mutual Administrative Assistance also provides for automatic exchanges of information, but this form of assistance requires a preliminary agreement between the Competent Authorities of the Parties willing to provide each other information automatically. The Convention on Mutual Administrative Assistance was in many ways ahead of its time when it was drafted and its value to effective tax administration has been recognized recently. However, as it was drafted before the adoption of the internationally agreed standard on transparency and exchange of information, the assistance covered by the Convention on Mutual Administrative Assistance is subject to limitations existing in domestic laws. In particular, it does not require the exchange of bank information on request nor does it override any domestic tax interest requirement.[31]

The recent increased political attention on international tax evasion has led to a universal acceptance of the internationally agreed standard and all jurisdictions surveyed by the Global Forum on Transparency and Exchange of Information for Tax Purposes are now committed to implement it. The G20, at its 2009 London Summit, stressed the importance of quickly implementing these commitments. It also requested proposals to make it easier for developing countries to secure the benefits of the new cooperative tax environment, including a multilateral approach for the exchange of information. In line with the requests from the G20, an amending Protocol was opened for signature

[28]Craig Nyree, *Cross-border Assistance in the Collection of Taxes*, Tax Journal, 2012, 1.

[29]OECD and Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol*, OECD Publishing, 2011, 22-26.

[30]PwC, *Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol signed by India on 26 January 2012*, PwC News Alert, 2012, 2-3.

[31]Brown Karen, *Allowing Tax laws to Cross Borders to Defeat International Tax Avoidance: the Convention on Mutual Administrative Assistance in Tax Matters*, Brooklyn journal of international law, Vol. 15, No. 1, 2005, 59-108.

as from 27 May 2010. On that date it was signed by 11 countries already Parties to the Convention (Denmark, Finland, Iceland, Italy, France, Netherlands, Norway, Sweden, Ukraine, the United Kingdom and the United States). In addition, Korea, Mexico, Portugal and Slovenia signed both the Convention and the amending Protocol and Poland subsequently signed on 9 July 2010. A number of other countries are completing the internal procedures to permit them to become parties to the amended convention.[32]

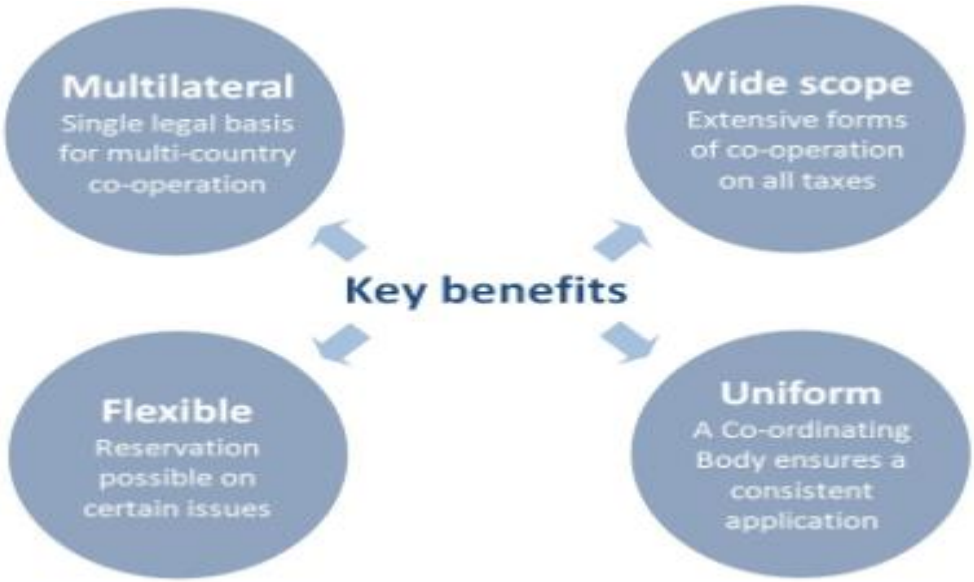
The amending Protocol makes several important changes. Firstly, it aligns the Convention on Mutual Administrative Assistance to the internationally agreed standard on exchange of information for tax purposes in that it provides that bank secrecy and, in addition, a domestic tax interest requirement should not prevent a country from exchanging information for tax purposes. Further, the Convention on Mutual Administrative Assistance presently contains several provisions that restrict the use of information exchanged under it. The protocol lifts these restrictions and the Convention on Mutual Administrative Assistance is now fully in line with the internationally agreed standard. The amending Protocol also provides for the opening of the Convention on Mutual Administrative Assistance to non-OECD and non-Council of Europe Member States, including all members of the Forum on Tax Administration not already signatories to the Convention.[33]

The amendments to the Convention on Mutual Administrative Assistance will encourage more countries to accede to it and transform the Convention into a very powerful instrument in the fight against offshore tax evasion and the prime instrument for multilateral joint audits. The Figure above illustrates the key benefits of the amended Convention. See Figure 1.

Figure 1. Key benefits of the amended Convention on Mutual Administrative Assistance

[32]OECD and Council of Europe, *Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters: Paris, 27.V.2010*, Strasbourg: Council of Europe Publishing, 2010, 17-21.

[33]OECD and Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol*, OECD Publishing, 2011, 87-101.



Source: OECD, Centre for Tax Policy and Administration

2.3 Bilateral legal sources. The OECD recognized early the need for a model tax treaty to avoid double taxation and to clarify, standardize and guarantee the fiscal situation of taxpayers in each OECD member country. The first attempts at such a model tax treaty caused much controversy and even resentment, but the OECD standard can now be categorized as "generally accepted".[34] In this respect, with regard to international tax cooperation**, Article 26** (Exchange of Information) **and Article 27** (Assistance in the Collection of Taxes) **of the 2010 OECD Model Tax Convention on Income and Capital** are relevant.

Article 26 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 Model Tax Convention. The text of the Article 26 makes it clear that the exchange of information is not restricted by Article 1 and 2, so that the information may include particulars about non-residents and may relate to the administration of taxes that are not covered with the Convention. The biggest changes of this article were made since 2005 in order to reflect current country practices. Many of the changes were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation. In 2005, Article 26, paragraph 4 and 5 were amended. Article 26, paragraph 4 states that the other state should use its information-gathering measures to obtain requested information, even though that other state may not need such information for its tax purposes. Article 26, paragraph 5 adds that a contracting party cannot decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency

[34]Musgrave P, *The OECD Model Tax Treaty: Problems and Prospects*, Columbia Journal of World Business, 1975, 29.

or a fiduciary capacity, or because it relates to ownership interests in a person.[35]

The matter of administrative assistance for the purposes of tax collection is dealt with in Article 27. This article provides the rules under which contracting states may agree to provide each other assistance in the collection of taxes. In some states, national law or policy may prevent this form of assistance or set limitations to it. Also, in some cases, administrative considerations may not justify providing assistance in the collection of taxes to another State or may similarly limit it. During the negotiations, each contracting state will therefore need to decide whether and to what extent assistance should be given to the other State based on various factors, including: the stance taken in national law providing assistance in the collection of other States` taxes; whether and to what extent the tax systems, tax administrations and legal standards of the two States are similar, particularly as concerns the protection of fundamental taxpayers` rights; whether assistance in the collection of taxes will provide balanced and reciprocal benefits to both States; whether each State`s tax administration will be able to effectively provide such assistance; whether trade and investment flows between the two States are sufficient to justify this form of assistance; and whether for constitutional or other reasons the taxes to which this article applies should be limited.

Article 27 should only be included in the Convention where each State concludes that, based on these factors, it can agree to provide assistance in the collection of taxes levied by the other State. This article, also, provides for comprehensive collection assistance. Some States may prefer to provide a more limited type of collection assistance. This may be the only form of collection assistance that they are generally able to provide or that they may agree to in a particular convention.[36]

In 2003, this article was amended with regard to administrative assistance for the recovery of taxes. The reasons why the amendment was necessary are the same that make mutual assistance in tax affairs necessary in general. On the one hand, globalization hampers the tax authorities in accurately determining the correct tax liabilities of taxpayers. On the other hand, globalization makes the collection of tax more difficult. Taxpayers may have assets scattered throughout the world, but the tax authorities cannot, in general, operate beyond national boundaries in collecting taxes, which is caused by the principle of formal territoriality.

The adoption of Article 27 of the OECD Model in tax treaties has not yet progressed far, as the provision is new. In this respect, mutual assistance on the basis of Article 27 of the OECD Model commits the treaty partners, on the one hand, to collect the tax claims of the treaty partner (Article 27, paragraph 3) and, on the other, to institute measures to secure these claims (Article 27, paragraph 4).[37]

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[35]OECD, *Model Tax Convention on Income and Capital – Full version*, OECD Publishing, July 2010, 1011-1078.

[36]Ibid, 1050-1078.

[37]Seer Roman, Gabert Isabel, *European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements,* Bulletin for International Taxation, IBFD, 2011, 91.

2.4 Unilateral legal sources. At the fourth level, unilateral rules regulate administrative assistance in tax matters. In this way, the administrative assistance in tax affairs is unilaterally integrated into national law.

3.Conclusion: difficulties and perspectives of the mutual legal assistance in tax matters.

The advantages of a multilateral treaty over a bilateral network long have been recognized. In contrast to the existing network of bilateral treaties, which has become ossified, the multilateral treaty provide a vehicle for continual renewal as problems arise with the functioning of the international tax system, allowing amendment or interpretation of its terms to affect all countries at the same time. To date, there has not been a lot of enthusiasm for multilateralism in the area of tax administration and it is striking that the international community should have failed to develop into a major forum of multilateral cooperation in the 20 years and more since the Directives and Conventions on mutual assistance were adopted.[38]

Until now, the envisaged procedures were applied systematically or regularly by the countries to a very limited extent. This is probably because by adapting to the general circumstances envisaged in the convention, the signing of multilateral agreements to strengthen administrative cooperation in tax collection requires a similar level of administrative development and compatible administrative structures between the countries, together with a similar level of cooperation. This makes the multilateral mechanism unsuitable for countries with scant experience in international taxation matters. In future, however, mutual assistance between national tax administrations will progressively become one of the key elements of control.[39]

The weak point of the OECD, Council of Europe, EU and other relevant organizations is that as executive organizations with no parliamentary representation, they are ill equipped for the essential task of schooling public opinion in the need to pull together. Nonetheless, they have consistently sought to promote mutual assistance. Many financial centers, both onshore and offshore, are making progress in improving transparency and international co-operation to counter offshore tax evasion, but some still fall short of international standards that have been developed over the last years. If all countries do not agree to impose sanctions in a co-ordinate fashion, the initiative of international organizations for mutual assistance in tax matters could unravel.[40]

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[38]Thuronyi V., *International Tax Cooperation and a Multilateral Treaty*, 26 Brook. J. Int'l L. 1641, International
Tax Policy in the New Millennium, 200.

[39]Dagan T., *The Costs of International Tax Cooperation*, Michigan Law and Economics Research Paper No. 02-007 U of Michigan Law, Public Law Research Paper No. 13, 2011, 157-158.

[40] http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm

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Mutual Legal Assistance in Tax Matters

(**summary**)

In today's increasingly borderless world, the countries are working more closely together to prevent abuses of the global financial system in the area of taxation. Therefore, the strengthening of mutual legal assistance as a mechanism for administrative cooperation between countries remains one of the outstanding issues in international taxation law. The basic legal framework for mutual assistance in tax matters is consisted of the multilateral Convention on Mutual Administrative Assistance in Tax Matters, the EU Mutual Assistance Directive from 1977 and the Directive on administrative cooperation in the field of taxation from 2011. In future, it is expected that the mutual assistance between national tax administrations will progressively become one of the key elements of control.

Key words: mutual assistance, exchange of information, tax co-operation.

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