Regional

Automatic Exchange of Information and BRICS: Why and How Does It Affect Emerging Economies?

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In this article, the author canvasses the procedure by which the new international automatic exchange of information mechanism was formulated, addressing the relative roles that powerful Western states and emerging economies (represented by BRICS countries) played in it. The article argues that automatic exchange of information has become a global standard without any significant participation by the developing world. Instead, the approach has been one of “lead and follow”, which has damaged the legitimacy of the process.

1. Introduction

One may be surprised by the rapid developments in recent years in the area of exchange of information (EOI) – how little time it took for EOI upon request (EOIR) to become an international standard, which was then followed by automatic exchange of information (AEOI).

Being one outcome of the harmful tax competition project launched by the OECD in the late 1990s, public awareness was raised in respect of EOIR, which gave rise to the establishment of the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) and the OECD’s Model Agreement on Exchange of Information on Tax Matters (the Model TIEA) in the early 2000s. The following decade witnessed amendments to article 26 of the OECD Model Tax Convention on Income and on Capital (OECD Model) and its associated Commentary, which was modified in order to reflect “the international trend”, as shown in the Model TIEA,[1] as well as a worldwide boom in negotiations of agreements on the Exchange of Information on Tax Matters (TIEAs), in the context of the 2008 global economic crisis.[2]

Fueled by the G20’s endorsement in 2013, the development of AEOI has been on a fast track – on a par with the ambitious Base Erosion and Profit Shifting (BEPS) Project, undertaken under the auspices of the OECD. This finally led to the establishment of a single global standard on AEOI by the OECD in 2014, featuring the involvement of jurisdictions across all continents. Accordingly, by the end of 2016 over 1,300 bilateral AEOI relationships had been made possible, thanks to the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (the CRS MCAA).[3] For some jurisdictions, in accordance with their commitments, the first EOI is due in 2017.

It could certainly be argued that in the early days of the EOI era, the global economic crisis, along with the Union Bank of Switzerland (UBS) and other high-profile tax evasion scandals, accelerated the whole process by making global transparency a pressing issue for most – and especially G20 – countries. Moreover, the United States Foreign Accounts Tax Compliance Act (FATCA) and cooperative measures adopted by the European Union (EU) provided a huge impetus during the formation of the AEOI framework.

Against the backdrop of AEOI having grown into a global consensus, or even “a new international tax norm”,[4] issues have emerged in different areas, which can be categorized into two different types. The first type refers to institutional issues; for example, those that arise from negotiations between countries – including rule makers, active participants and potential partners – with the purpose of establishing a coordinated AEOI framework. The second type includes issues caused by technical challenges posed by AEOI, which focus on taxpayers, financial institutions and other persons, whose rights and obligations are expected to be influenced by AEOI procedures. These two types require both international and domestic solutions.

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2. In March 2009, Switzerland withdrew its reservation on art. 26 OECD Model (2014), and the global EOI focal point gradually shifted to promoting AEOI, which has since been a prioritized way for exchanging information: see X. Oberson, International Exchange of Information in Tax Matters: Towards Global Transparency (Elgaronline 2015), p. 184.
This article focuses mainly on the issues that fall within the scope of the first type. By shedding light on the interplay between various efforts in advancing AEOI as an international standard in the domain of information exchange and the participation of emerging economies, the article addresses questions of the kind of role emerging economies have played in the newly-developed AEOI mechanism – reflected in the process of the development of the CRS MCAA – and its implications, and what emerging economies can do to address the consequential issues.

The article gives an overview of how the idea of AEOI has grown into a global standard officially endorsed by the G20, OECD and United Nations (UN). From the perspective of emerging economies, the article sheds light on the process of AEOI growing into a global standard without significant participation of the developing world, and how this affects the legitimacy of the mechanism that grew out of this process. BRICS countries are selected as representatives of emerging economies, due to their political and economic influence as a whole; therefore, their participation and effort in the AEOI process is discussed.

With regard to the status of the BRICS, Brauner and Pistone elaborate on the rationale for recognizing BRICS countries as a “loosely coordinated bargaining group” in international tax:

… the grouping of the BRICS countries together is not obvious and may even be considered arbitrary, as their economies are not necessarily complementary; their policies and politics diverge significantly; and their particular interests often conflict. Nonetheless, they share size and political importance; a grievance about the present and past dominance of the Western powers over the international agenda; and some important policy interests. These led to their current status as an emerging bargaining group that is feeling its way toward a modus operandi within the key existing international organizations. As such, they operate loosely with slow progress on the institutional side, without a central forum or a dispute resolution element.

The expression “BRICS” has been questioned and criticized, mostly due to the various and ever-increasing divergences among its countries. Nevertheless, when addressing issues which emerged during the formation of a new principle governing international taxation, it is appropriate to incorporate BRICS, due to its political influence. This is particularly necessary considering that the impact and negotiation power of economically developed countries is dominant in the realm of international taxation. Being engaged in dialogue, both politically and academically, is crucial for establishing rules that benefit all participants. In light of this, the BRICS countries serve the purpose of representing the emerging economies’ interests in the discussion below.

2. AEOI and Multilateralization

Like other forms of EOI, AEOI can be realized both through bilateral treaties and multilateral arrangements. This article focuses on the multilateral trend in the development of AEOI, and its influence on BRICS countries. In comparison to EOI, AEOI is “the most obvious field for the use of standardized forms, though they may also be appropriate for the transmission of requests or answers.” It is therefore assumed that a multilateral framework is able to ensure a swift and effective implementation of AEOI.

Multilateralism has never been an uncommon topic in international taxation discourse. The rules in bilateral tax treaty models developed by the OECD and UN, as well as the double tax treaties concluded based on them, form the basis of the international tax regime. However, multilateral tax treaties do not only exist, but also have been increasingly considered as the logical solution to global tax issues now facing governments and multinational enterprises.

5. The International Monetary Fund (IMF) classifies countries roughly into two categories: advanced economies, and emerging market and developing economies. The group of advanced economies consists of 39 economies, among which there are the G7 countries, Euro Area members, and other advanced economies, such as Hong Kong, Singapore and Norway. The rest of the countries are all “emerging and developing economies”: see IMF, World Economic Outlook – Too Slow for Too Long (Apr. 2016), at http://www.imf.org/external/pubs/ft/weo/2016/01/pdf/text.pdf., p. 148.


8. Y. Brauner & P. Pistone, Introduction, in Y. Brauner & P. Pistone (eds.), BRICS and the Emergence of International Tax Coordination p. 4 (IBFD 2015), Online Books IBFD. Similarly, while arguing the global convergence trend in the area of international taxation, BRICS countries have been addressed as a representative group example: see E.A. Baistrocchi, The International Tax Regime and the BRIC World: Elements for a Theory, 33 Oxford Journal of Legal Studies 4, p. 734 (2013).


10. See, for example, R. Sharma, Broken BRICs: Why the rest stopped rising, 91 Foreign Affairs 6 (2012), p. 4 and Owens, id., in which he warns that “care must be taken in treating these countries as a homogeneous group.”


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AEOI needs to be addressed in the context of multilateralization. Multilateralism has already become an imminent challenge faced by jurisdictions that have engaged (or will engage) in AEOI, considering that, following the release of the OECD’s single global standard in 2014, 92 jurisdictions have joined the CRS MCAA.\[17\]

In practice, the OECD has long advocated the idea of multilateralization on both the tax avoidance\[18\] and tax evasion fronts. With respect to EOI on tax matters, the Convention on Mutual Administrative Assistance in Tax Matters (the MAATM) and the CRS MCAA, together with the Multilateral Competent Authority Agreement on the Exchange of CbC Reports (the CbC MCAA),\[19\] are open to all countries, with the purpose of providing multiple legal frameworks for implementing AEOI in a multilateral way.

Scholars have reacted differently to the ever-increasing international efforts on multilateralization in the AEOI area. On the one hand, advocates argue that a multilateral system will benefit not only powerful states, but also emerging economies. For example, Grinberg makes the point that a multilateral AEOI system can not only address emerging economies’ concerns about offshore tax evasion, but also strengthen their “domestic mechanisms to tax portfolio income from capital”: uniform and multilateral AEOI can help them reduce the administrative and political costs brought about by taxing capital income.\[20\] The OECD has also been encouraging developing countries to join international agreements, such as the MAATM Convention, on the grounds that it will help developing countries build a broad network, which facilitate AEOI in a more efficient way.\[21\]

On the other hand, multilateralism is criticized from the standpoint of emerging economies. Under various circumstances, the OECD’s role as a major forum where most crucial multi bilateral initiatives, including the BEPS Project and AEOI, are discussed has been questioned.\[22\] In particular, Mosquera concludes that the current EOI multilateral instruments developed by the OECD lack transparency in terms of participation and agenda setting, and the new AEOI standard calls for an enhancement in respect of these inadequacies.\[23\] It is worth mentioning that, although the AEOI frameworks are of a multilateral nature, the actual exchange still takes place on a bilateral basis.\[24\] Considering this, as a multilateral AEOI legal framework the CRS MCAA ensures that a particular bilateral relationship will come into force if both jurisdictions have the agreement in force and submit their notifications accordingly,\[25\] in order to avoid the fuss of negotiating multiple bilateral agreements.\[26\] In this sense, the effectiveness of multilateralism cannot be fully achieved until all jurisdictions are actively engaged in the CRS MCAA.\[27\]

3. Lead and Follow: The New Era of AEOI

The first attempt to “create a global solution to the problem of acquiring extraterritorial tax information” appeared in 1927, in the Draft of a Bilateral Convention on Administrative Assistance in Matters of Taxation, which contained a provision on AEOI between the contracting parties.\[28\] Efforts to obtain cross-border information followed bilaterally, multilaterally and unilaterally\[29\] thereafter, which finally lead to AEOI being an established global standard today.

Section 3.1. aims to shed a light on the crucial factors that have contributed significantly during the formation of AEOI. The elaboration leads to the conclusion that, essentially, the process of AEOI being advanced as the global consensus can be translated as a series of “lead and follow” acts.

16. \[\text{Supra n. 13, pp. 189-190.}\] Lang points out that economic activities nowadays have become so international that economic relations between countries are intensified. In this context, the bilateral tax treaty network creates a lower level of legal certainty.
17. The number of the signatories is recorded at 22 June 2017. See \url{https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf}.
18. For example, according to the Final Report Action 15 BEPS Project, which elaborated on developing a multilateral instrument to modify bilateral tax treaties, the OECD fully recognized the desirability and feasibility of a multilateral instrument to address BEPS challenges: see OECD, \textit{Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 – 2015 Final Report}, pp. 18-23 (OECD 2015), International Organizations’ Documentation IBFD.
23. I.J. Mosquera Valderrama, \textit{Legitimacy and the making of international tax law: The challenges of multilateralism}, 7 World Tax Journal 3, sec. 5.4. (2015), Journals IBFD. See more of her discussion on legitimacy issues in sec. 3.2.2.
25. See \url{http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/}.
26. Although committing to the CRS, Bahamas was criticized for not participating in the CRS MCAA, but opting for the one-by-one bilateral approach, and negotiating AEOI agreements with its extant TIEA partners: see \textit{The holdout}, The Economist (8 Sept. 2016), at \url{http://www.economist.com/news/finance-and-economics/21706516-bahamas-cocks-snook-war-tax-dodgers-holdout}.
27. According to the OECD, up until June 2017, 101 jurisdictions have committed to the CRS, see \url{https://www.oecd.org/tax/transparency/AEOI-commitments.pdf}. On the other hand, only 93 jurisdictions have signed the CRS MCAA, permitting a real multilateral flow of the information among these signatories. This gap opens the door to opportunities where jurisdictions can avoid AEOI. See \url{https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf}.
29. FATCA is the only example of unilateral action: see \textit{sec. 3.1}.


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3.1. FATCA and its expansion

3.1.1. Overview: FATCA as a “game changer”[30]

The enactment of the United States Foreign Account Tax Compliance Act (FATCA) in 2010 is considered to be a turning point in the multilateralization process of AEOI.[31] In brief, FATCA is a unilateral act of the US government, which provides that foreign financial institutions (FFIs) are subject to reporting obligations in relation to financial account information of their US account holders. As an enforcement measure, recalcitrant FFIs (which do not comply with the reporting regime) are subject to a withholding tax impost.

FATCA was criticized because of its extraterritorial reach: concerns were raised about the possible conflicts between the requirements under FATCA and privacy rules of foreign jurisdictions, as well as the cost imposed on FFIs.[32] Facing intense lobbying and resistance from foreign countries and the banking industry,[33] the US Treasury adopted an intergovernmental (IGA) approach to resolve the issues arising from the enactment of FATCA. This approach turned out to be of great significance, not only in that it resolved practical implementation issues, but it also provided an inspirational model for future global cooperation in AEOI.[34]

Since 2012, two versions of model IGAs have been in place: Model 1 IGA and Model 2 IGA.[35] Up until January 2017, 113 jurisdictions have signed the model IGAs, reached agreement with the US government in substance, or have an agreement in force.[36] As predicted, this far-reaching legislation caused a “domino effect”, forcing other countries to react, which led to “an implementation and enforcement of multiple FATCA-like legislations”. [37]

Although the US Internal Revenue Service did not pay much attention to educating other countries about participating and leveraging the FATCA regime while designing the mechanism,[38] scholars envisaged it leading to a multilateral framework for AEOI from the beginning.[39] Within five years, it evolved into a global cooperative agreement on AEOI.[40] In 2012, when five European countries (France, Germany, Italy, Spain and the United Kingdom) pledged to negotiate a multilateral AEOI system with the United States for the purpose of implementing FATCA, a multilateral cooperative mechanism on AEOI gained real impetus and became imminent.[41]

3.1.2. Expansion of FATCA: Coercive power

Two factors that contribute significantly to the expansion of IGAs and FATCA-like regulations can be identified. The first is the coercion power manifested by FATCA. In order to address offshore tax evasion, it is crucial for tax authorities to find an effective way to cooperate with overseas financial institutions. The stronger an economy is, the more important its financial market will be to a foreign financial institution.[42] In this connection, FFIs are expected to be coerced into cooperating under the threat of denial of market access: state power therefore hinges on the relative size of financial markets.[43]

FATCA is a case in point. It arose in response to major offshore tax evasion scandals in which US residents were involved,[44] and aimed to impose transparency on US taxpayers’ overseas accounts through the FFI reporting requirement. However, the original design does not include a well thought-out cooperative system; on the contrary, the core mechanism in FATCA imposes a 30% withholding tax on non-participating FFIs and “passatru payments”. [45] The withholding tax, being the origin of the coercive

31. See, for example, Grinberg, supra n. 20, p. 330 and OECD Global Forum, supra n. 6, p. 3, where the intergovernmental implementation of FATCA is described as “a catalyst for the move towards automatic exchange of information in a multilateral context.”
33. See I. Grinberg, supra n. 20, p. 332. According to Grinberg, financial institutions were backing foreign governments during the lobbying, pushing them for negotiations.
35. In Model 1 IGA, there are reciprocal and non-reciprocal variations. In addition, various model IGAs are available depending on whether or not there are pre-existing bilateral income tax treaties or TIEAs between contracting parties. A detailed list of different IGA models is available at http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.
36. Id.
39. See, for example, Harvey, id.; I. Grinberg, The Battle Over Taxing Offshore Accounts, 60 UCLA Law Rev 2, pp. 382-383 (2012); and Mukadi, supra n. 37, who went further, to the extent of hoping that enforcement of a FATCA-like multilateral instrument would trigger the birth of a new international tax coordination body.
41. See Oberson, supra n. 2, p. 11, who describes the joint statement made by the five countries and the United States as “a turning point toward the global standard of automatic exchange of information.” The text of the joint statement is available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Fr-It-Sp-UK-02-07-2012.pdf. In this statement, the six countries committed to “working with other FATCA partners, the OECD, and where appropriate the EU, on adapting FATCA in the medium term to a common model for automatic exchange of information ...”.
42. It has been pointed out that, because financial institutions located in tax havens rely heavily on foreign capital, they are “very vulnerable” when large financial markets close on them. See L. Hakeilberg, Coercion in international tax cooperation: Identifying the prerequisites for sanction threats by a great power, 23 Review of International Policy Economy 3, p. 514 (2016).
43. Id.
44. Namely the Liechtenstein Global Trust (LGT) Bank and UBS scandals: see supra n. 38, p. 476.
45. 26 CFR §1.1471-5(h). In order to fulfil a FFI agreement, “a participating FFI is required to deduct and withhold a tax equal to 30 percent of any withholdable payment made by such participating FFI to an account held by a recalcitrant account holder or to a non-participating FFI”: 26 CFR §1.1471-4(a)(1).
force, targets a wide scope of FFIs, regardless of whether they are investing in the United States or not. When this broad reach is juxtaposed with the weight of the US financial market, FATCA is able to enforce its reporting system in a comprehensive way.

This coercive force is uncommon in other cross-border tax regimes. Different from the OECD and EU approaches to information exchange, the embedded coercion, or so-called “defensive measure”, is critical in ensuring wide compliance and turning FATCA into a real multilateral regime.

3.1.3. Expansion of FATCA: The EU’s cooperation

The EU’s cooperation can be considered as the second factor that helps expand FATCA’s global impact. As a supranational organization, the European Union not only affects its Member States’ policies, but it also plays an important role in the multilateralization process, especially in the early stage. The European Union’s commitment to cooperating with the United States in developing the IGA approach greatly helped expand the influence of the FATCA rules. This, in turn, accelerated Europe’s process of updating existing directives and undertaking new rounds of agreement negotiations, for the purpose of promoting AEOI as the new information exchange standard.

In addition, the most-favoured nation treatment (MFN), which is provided for in article 19 of the Directive on Administrative Cooperation in the field of taxation (the Directive on Administrative Cooperation), plays a pivotal role, by way of which the expansion of FATCA in Europe gained a momentum.

At EU law level, the Savings Directive (EUSD) introduced the AEOI to the European Union for the first time, and initially limited it to interest payments. Against the backdrop of the intensified global battle against bank secrecy and tax evasion, the European Union adopted the Directive on Administrative Cooperation in 2011, broadening the scope of AEOI to a further five categories of income and capital. This constituted another pillar in the European AEOI regime.

One major obstacle to developing a comprehensive AEOI mechanism in the European Union relates to the special arrangements concluded between the European Union and several jurisdictions, as shown in the transitional provisions stipulated in the EUSD: Belgium, Luxembourg and Austria were granted a transitional period for implementing AEOI, during which a withholding tax would be imposed instead. The withholding tax regimes created a significant loophole for a comprehensive implementation of AEOI in Europe, allowing tax evaders to reconstruct their investment portfolios and, most importantly, helping to protect anonymity and bank secrecy. With domestic banking secrecy rules in effect, Austria and Luxembourg were reluctant to engage in any offshore account information exchange. They claimed that the implementation of AEOI would threaten their status in tax competition, since other countries, such as Switzerland, would gain an advantage in terms of financial services, and insisted that a level international playing field should be a prerequisite for their participation in AEOI.

As an external force, FATCA provided an opportunity for the European Union to tackle bank secrecy, and to intensify its cooperation system. In its negotiations with the US Treasury, the European Union proposed cooperation with the US tax authorities, using the EUSD as the legal framework. The idea was rejected by the United States, on the grounds that the scope of the income and financial intermediaries covered by the EUSD was too narrow. Instead, the US Treasury came up with the IGA approach, which was welcomed by the European Union.

As already mentioned, this acceptance was underlined by the joint announcement made by the five Member States and the United States in February 2012. In April 2013, six Member States addressed their intention to exchange FATCA-type information among themselves, in addition to exchanging information with the United States.

47. According to the rules on “pass-thru payments”, participating FFIs are able to withhold payments that are made to non-participating FFIs, as long as the funding of such payments can be attributed to withholdable payments. This means that the 30% withholding tax rule will also have an effect on financial institutions that do not directly invest in the United States, but invest in or through participating FFIs: see Grinberg, supra n. 20, p. 331.
48. The United States has repeatedly been identified as the world’s biggest financial market: see Hakelberg, supra n. 42, pp. 515-516.
50. Id., p. 379. Nevertheless, according to the relevant texts in the IGA models, the coercive measure in FATCA (i.e. the withholding mechanism) will not be triggered immediately after non-compliance with the reporting requirements: see Panayi, supra n. 34, p. 20.
51. While envisioning a gradual approach to a multilateral treaty that is universally applicable, Thurnoy makes the point that EU countries could be the most likely candidates that are willing to accept a multilateral treaty developed upon the bilateral template: see V. Thurnoy, International Tax Cooperation and a Multilateral Treaty, 26 Brooklyn Journal of International Law 4, p. 1643 (2001).
52. A. Brodzka, The Road to FATCA in the European Union, 53 European Taxation 10, p. 520 (2013), Journals IBFD.
53. See below.
54. Art. 5 EUSD. The scope for AEOI includes income from employment, directors’ fees, life insurance products (not covered by other EU legislation concerning information exchange), pensions, and ownership and income from immovable property.
57. See Hakelberg, supra n. 56, p. 418 and Antón, supra n. 22, p. 193. This attitude is reflected in art. 10, para. 2 EUSD, which provides that the transitional period would end at the end of the first full fiscal year following the later of (i) the date of entry into force of the agreement between the European Union and the last of Switzerland and the other four European microstates (viz. Liechtenstein, San Marino, Monaco and Andorra) that provides for EOI concerning interest payments covered by the EUSD, and the withholding tax regimes provided for by the EUSD, and (ii) the date on which the European Union agrees unanimously that the United States is committed to EOIR concerning interest payments.
58. Brodzka, supra n. 52, p. 518.
59. Oberson, supra n. 2, p. 11.
Consequently, FATCA changed the dynamics of AEOI negotiations within the European Union. The attitude of major EU Member States towards FATCA, and a cooperative mechanism based thereon, greatly influenced the positions of Luxembourg and Austria.\footnote{61} Apart from this, the negotiation of IGAs between the United States and EU Member States triggered the application of the MFN clause provided for in the Directive on Administrative Cooperation, which reads:\footnote{62}

Where a Member State provides a wider cooperation to a third country than that provided for under this Directive, that Member State may not refuse to provide such wider cooperation to any other Member State wishing to enter into such mutual wider cooperation with that Member State.

The clause finally forced Luxembourg and Austria to switch their positions. Knowing that they could not lose the US finance market, the two countries had to give up their long-standing resistance towards AEOI under the EUSD.\footnote{63} Thus, by imposing AEOI bilaterally, FATCA changed the tax competition problem within Europe into a cooperation issue, which was easier to solve.\footnote{64}

Consequently, in December 2014, the European Union passed an amendment to its Directive on Administrative Cooperation, which allows a further automatic exchange of financial account information. According to the opening remarks in the Directive, this is partly due to the fact that certain Member States have concluded, or are in the course of concluding, IGAs with the United States, which will inevitably result in wider cooperation with other Member States.\footnote{65} In the author’s opinion, the current comprehensive AEOI framework within Europe could not be achieved without the coercive mechanism in FATCA, and a powerful economy like the United States behind FATCA/IGA negotiations.

That being said, the issue of reciprocity remains one problem not only concerning future implementation of IGAs in practice,\footnote{66} but it also triggers grave doubts about leveraging FATCA as a global AEOI framework. Although under Model 1 IGA there is a reciprocal version (namely Model 1A Agreement),\footnote{67} after a close look at its text, the so-called reciprocity committed to by the United States government seems to be quite difficult to achieve.\footnote{68} This then raises the concern that the IGA solution, even though it seems to be effective, might not be as sustainable a model as a global reporting system.

### 3.2. The OECD and the establishment of the first single global standard

The OECD claims that it “sets international standards on a range of issues”, which includes “access to bank information for tax purposes.”\footnote{69} Indeed, the OECD has long been engaged in various initiatives to promote AEOI.

#### 3.2.1. Treaty relief and compliance enhancement project

In 2006, the OECD set out to work on issues in relation to a cross-border information reporting system, and mandated an Informal Consultative Group (ICG) – which was made up of government representatives and experts from the business community – to address issues arising from the process whereby portfolio investors claim treaty benefits or benefits under domestic laws of source countries.\footnote{70}

In a report issued by the ICG in 2009, it was recommended that financial institutions claiming treaty benefits on behalf of their investors report information about the beneficial owner of investment income to the source country. By doing this, investors are motivated to comply with their reporting obligations in residence countries, in that information exchange is expected to happen between source and residence countries. In comparison to its inspirational model in the United States (the Qualified Intermediary (QI) system), the Authorized Intermediaries (AIs) system developed by the ICG is a pro-residence-country reporting system, again partly due to the tax evasion scandals in 2008.\footnote{71} Generally speaking, the AIs system is an attempt by the OECD to obtain cross-border information, using financial institutions as intermediaries.

Following that, a treaty relief and comparison enhancement (TRACE) group was set up by the OECD in 2010, and was mandated to further develop the draft implementation package pursuant to the ICG report. Three years later, the Implementation Package was officially

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\footnote{60}{George Osborne, the then UK Finance Minister, stated: “[w]ith the countries represented here taking it up and using it as the basis of a multilateral European system, we are turning what was a bilateral US agreement into something approaching a global standard, which we want to obviously see promoted in Europe, but also more widely than that.” (Emphasis added.) See supra n. 52, p. 520.}


\footnote{63}{See Hakelberg, supra n. 56, p. 423.}

\footnote{64}{Id.}


\footnote{66}{X. Oberson, supra n. 2, p. 158.}

\footnote{67}{Supra n. 35.}

\footnote{68}{See Panayi, supra n. 34, p. 19 and Grinberg, supra n. 20, pp. 333-335. Grinberg states that, “the US obligation to report is limited to those types of accounts on which the United States has authority to collect information under current US laws and regulations.” See also Tax Justice Network, Loophole USA: The vortex-shaped hole in global financial transparency, at http://www.taxjustice.net/2015/01/26/loophole-usa-vortex-shaped-hole-global-financial-transparency-2/, where a detailed comparison was made between German banks and United States banks under IGA Model 1A, revealing that German banks generally have far more reporting obligations.}


\footnote{70}{OECD, TRACE Implementation Package for the Adoption of the Authorised Intermediary System – A standardised system for effective withholding tax relief procedures for cross-border portfolio income (OECD, 2013), at http://www.oecd.orgctp/exchange-of-tax-information/TRACE_Implementation_Package_Website.pdf, p. 3.}

\footnote{71}{QI entered into force in 2001, and served the purpose of the United States requirement of protecting its withholding taxation. Under QI, anonymity of beneficial owners was protected: see Ginsberg, supra n. 39, p. 332.}

\footnote{60}{See Panayi, supra n. 34, p. 19 and Grinberg, supra n. 20, pp. 333-335. Grinberg states that, “the US obligation to report is limited to those types of accounts on which the United States has authority to collect information under current US laws and regulations.” See also Tax Justice Network, Loophole USA: The vortex-shaped hole in global financial transparency, at http://www.taxjustice.net/2015/01/26/loophole-usa-vortex-shaped-hole-global-financial-transparency-2/, where a detailed comparison was made between German banks and United States banks under IGA Model 1A, revealing that German banks generally have far more reporting obligations.}

\footnote{69}{See Panayi, supra n. 34, p. 19 and Grinberg, supra n. 20, pp. 333-335. Grinberg states that, “the US obligation to report is limited to those types of accounts on which the United States has authority to collect information under current US laws and regulations.” See also Tax Justice Network, Loophole USA: The vortex-shaped hole in global financial transparency, at http://www.taxjustice.net/2015/01/26/loophole-usa-vortex-shaped-hole-global-financial-transparency-2/, where a detailed comparison was made between German banks and United States banks under IGA Model 1A, revealing that German banks generally have far more reporting obligations.}

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released by the OECD.[72] In addition to the technical issues concerning implementing the recommended AIs system, the package stated that a certain level of AEOI between tax authorities of the source country and of the residence country should be ensured before AI is adopted.[73] More importantly, it made the point that, with the involvement of financial institutions (or intermediaries, in the context of the TRACE project), information technology systems should be developed in order to standardize the reporting procedure, making it easier for residence countries to use the information exchanged.[74] In this regard, an electronic format, the TRACE XML Schema, was developed. It facilitated the reporting of the information by intermediaries to source countries, as well as the EOI between source countries and residence countries.[75]

In respect of AEOI, some commentators considered the TRACE project comparable to two other emerging AEOI models, launched roughly around the same time; namely, the European Union’s EUSD and the United States’ FATCA.[76] Nonetheless, the recommendations and procedures in the package have never been really adopted by any country in practice.[77] Implementation of the OECD’s common reporting standard (CRS) might provide an opportunity for the TRACE project to actually contribute to the AEOI system.

Practitioners argue that implementation of the TRACE project will benefit governments in correctly applying treaty relief in a simplified way, cutting administrative costs and, therefore, offset the extra compliance burden brought about by the implementation of the CRS.[78]

### 3.2.2. Common reporting standard

In July 2014, the OECD presented its own solution in respect of automatic exchange, proposing the CRS as a single global standard for automatic exchange of financial account information. The standard was conceived against the backdrop of AEOI attracting a global focus, and the OECD receiving unprecedented political support from the G20 throughout the whole process.[79]

Overall, the full version of the Standard for Automatic Exchange of Financial Account Information in Tax Matters aims to set a minimum standard for information to be exchanged. It consists of four parts:

- a model competent authority agreement (the Model CAA), which lays down the legal basis for exchanging financial account information;
- the CRS, providing the reporting and due diligence standard applicable to reporting financial institutions;
- commentaries, which interpret the provisions; and
- in respect of technical solutions, the CRS XML Schema.[80]

Two distinctive features of the CRS merit elaborating here. Firstly, the standard has a multilateral feature.[81] Before the CRS was published, the idea of developing a global AEOI model was spelled out in an OECD report, issued at the G8’s request in July 2013, which aimed to answer the question of how to promote multilateral cooperation on AEOI based on recent developments.[82] In this report, the OECD made it clear that offshore tax evasion is a global issue which requires global solutions. It also went further to explain that a standardized multilateral AEOI model on financial information was preferred, in that standardization could simplify the process, promote effectiveness and lower the costs for all the stakeholders involved, while fragmentation of AEOI standards would lead to the opposite. The future AEOI model ought to have a global reach so that it can solve the global issue of tax evasion, instead of simply relocating it.[83]

Secondly, the CRS draws heavily on FATCA and the IGA approach developed thereon.[84] In a press release in July 2012, the OECD Secretary-General welcomed the Model IGA, saying[85]

>...
I warmly welcome the co-operative and multilateral approach on which the model agreement is based. … A proliferation of different systems is in nobody’s interest.

According to the OECD, reliance on Model 1 IGA takes place not only due to its effectiveness as an AEoi model, but also due to the fact that the governments and financial institutions have already been investing in its implementation.\[86\] In other words, the work that governments have done surrounding FATCA helps create a “natural environment” where they share wider concerns, and influence the detailed rules in a multilateral AEoi model.\[87\]

The success of the CRS hinges on a functional legal basis on which AEoi will be able to be implemented widely. Currently, the OECD has provided several options to enable the enforcement of the CRS: the MAATM, the CRS MCAA and bilateral agreements (income tax treaties and TIEAs) that have AEoi provisions in place.\[88\]

It is worth mentioning that the CbC MCAA, inspired by the CRS MCAA, has been developed to facilitate the exchange of country-by-country reports under action 13 of the OECD BEPS Project. The CbC MCAA sets out procedures and rules that are similar to the CRS MCAA in respect of wording, with occasional amendments which reflect the special guidelines for CbC reporting.\[89\]

3.3. “Lead and follow”: Pattern of development of AEoi

3.3.1. “Lead and follow”

When signing the protocol amending the European Union-Switzerland Savings Directive Agreement, Pierre Moscovici, the European Commissioner for Economic and Financial Affairs, Taxation and Customs, observed that:\[90\]

[t]he EU led the way on the automatic exchange of information in the hope that our international partners would follow. This agreement is proof of what EU ambition and determination can achieve.

This pattern of “lead and follow” can be observed throughout the whole path of AEoi developing into a global standard: FATCA and IGAs, EU directives and the CRS. In this connection, the whole process of advancing AEoi as the new global standard is actually a choice made by the great powers in international tax discourse, which has then been followed by the rest, including the developing world. The fundamental feature of this “lead and follow” pattern is not that emerging economies make the wrong choice by committing to AEoi – they do not. Nowadays, AEoi, as a well-established principle, should not be subjected to criticism.\[91\] However, by following the lead, these economies accept not only the principle, but also the design of the legal framework – as exemplified by the CRS promoted by the OECD. This, to some extent, costs them the opportunity to take part in the rule-making process. Therefore, when discussing the impact that the pattern has on developing countries, the question of legitimacy should be addressed.

3.3.2. Legitimacy of “lead and follow”

Within the domain of international taxation, legitimacy issues are under discussion from various perspectives in academia:\[92\] Essers\[93\] and Peters\[94\] referred to Habermas’ democracy theory when analysing the legitimacy of international tax law;\[95\] Stewart elaborates on the legitimacy of current tax information networks by applying Baldwin’s legitimacy theory in assessing governmental processes;\[96\] and...
Mosquera assesses the input and output legitimacy of OECD multilateral instruments in information exchange, referring to Scharpf’s legitimacy concept in the context of EU governance. These critics share a deep concern about the decision-making process in the current international tax discourse.

The pattern of “lead and follow” observed throughout the establishment of AEOI has a two-fold meaning. “Leading” is, in large measure, a combined process of the United States providing FATCA as a “circuit breaker that has helped resolve a longstanding diplomatic impasse” in AEOI, and the European Union and the OECD translating unilateral action into regional and global legal frameworks. “Following” means that the remaining actors, which include a large body of emerging economies, are left with the choice of either following or facing the adverse consequences of non-cooperation. This is yet another example of a small group of countries setting agendas in the realm of international tax law. As argued by Hakelberg, the United States, in this case, demonstrated that the great powers could enforce “regulatory preferences even in areas analysts have qualified as inherently resistant to international co-operation.” On the one hand, the pressure coming from the great powers has facilitated the birth of a new global mechanism; on the other hand, a rule-making process that lacks full discussion with, and participation of, developing countries has innate legitimacy problems. The question that needs to be answered is whether legitimacy can be compromised on account of the establishment of the new AEOI regime.

### 3.3.3. Between effectiveness and legitimacy: Can “lead and follow” be justified?

#### 3.3.3.1. Two justifications

Peters develops a perspective of “law and society” using Habermas’ theory, which emphasizes the need to combine a sociological analysis of factual law with a philosophical analysis of the normative core of law. Peters contends that, in the field of international tax law, a perspective “between positivist and natural law traditions of legal philosophy” should be introduced. Based on this, Peters gives two justifications for relinquishment of legitimacy in the realm of international tax law, in order to ensure “an objectivating attitude” towards international tax law:

- “opportunistic justification”, which applies in situations where the performative attitude of taxpayers who are not able to optimize their tax positions requires recuperation, and states need to focus on the effectiveness of international tax law in order to “respond to the uproar in civil society and in the media”; and

- “cynical justification”, which refers to the need to guarantee an objectivating attitude, “since taxpayers are not likely at all to take a performative attitude towards international tax law”.

Peters evaluates the BEPS Project by applying the opportunistic justification. Being an “action-driven” approach adopted by the OECD, in the short run BEPS intends to deal with the most urgent deficiencies in the current international taxation system. If the measures turn out to be effective, the legitimacy of the project should not be relinquished just because the decision-making process has not been appropriate. However, in the long run, these “quick fixes” provided by the OECD are not enough to safeguard the norms of international tax law in a real sense.

#### 3.3.3.2. Evaluation of “lead and follow”

Peters’ theory of opportunistic justification provides a way of thinking in analysing the current AEOI mechanism in terms of legitimacy, in that AEOI also appears to be a response to tax scandals, which have been unveiled, and the ever-increasing global awareness of offshore secrecy, during the last decade. Governments and the international community consider it a pressing problem, which calls for a quick solution. This solution includes a more transparent tax system, which enables an effective EOI mechanism; hence, an update on the existing administrative cooperation in relation to tax information was in great need. In light of this, FATCA successfully broke the deadlock over tax cooperation in AEOI within Europe, which consequently led to the global acceptance of the AEOI reporting regime and the publishing of the CRS. Judging from what has been achieved in the AEOI area, the pattern of “lead and follow” has no doubt been effective. Using the opportunistic justification, it seems proper to compromise the legitimacy of the AEOI mechanism for the sake of effectiveness.

Nonetheless, in the long run, the pressure of the great powers will probably continue in the implementation phase, be it on an international level or not. The OECD’s and European Union’s criteria for establishing a list of non-cooperative jurisdictions can be considered as cases in point. The OECD and G20 members reached an agreement on the criteria for non-cooperative jurisdictions in June 2016, consisting of three requirements:

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97. Mosquera analyses the input legitimacy of OECD multilateral instruments in terms of transparency and participation, concluding that the participation of the private sector and civil society should be enhanced in future. Concerning output legitimacy, Mosquera highlights the differences between developed and developing countries. She points out that, in order to ensure that multilateral instruments can benefit all, these differences should be addressed by the OECD: supra n. 23, sec. 5.


99. supra n. 56, p. 423.

100. Peters, supra n. 94, sec. 8.3.2.2.

101. According to Peters, when a taxpayer takes an objectivating attitude towards international tax law, the taxpayer is forced to comply. Id.

102. Peters, supra n. 94, sec. 8.3.2.4.

103. Id.

104. Peters, supra n. 94, sec. 8.6.1.4.
implementation of the EOIR standard;

- implementation of the AEOI standard; and

- joining the MAATM.

While two out of three of these requirements must be met, fulfilment of the second requirement means a commitment to implement the CRS, which ensures that the first EOI takes place in 2018 at the latest.\[100\] Five months later, the European Union published its own criteria on the same matter. By integrating the CRS commitment into the criteria and claiming to explore “defensive measures”,\[106\] the European Union put pressure on other jurisdictions, in order to strengthen AEOI implementation in Europe.\[107\]

As can be seen, implementation of the CRS has become critical in that failure to incorporate it could lead to sanction-like measures, from which countries that are reluctant to participate in the CRS would suffer. In this context, it is particularly important to ensure that coercion is imposed on the basis of legality instead of power.

3.4. Interim conclusions

The process of how the AEOI initiative incrementally developed into a multilateral one should be analysed critically. Reflecting on “lead and follow”, certain points arise.

Firstly, even though it leads to a breakthrough in the AEOI area, and can be justified under Peters’ opportunistic justification in the short run, this pattern should not be normalized in the future practice of developing new international tax norms, since it does not contribute to the improvement of legitimacy in international taxation law. In fact, according to Essers, the introduction of FATCA by the United States, together with the European Union’s endorsement of the legislation, is an example of “power play performed by the key actors”.\[108\]

Secondly, the imbalance of power between major economies and emerging economies, reflected by “lead and follow”, may have implications on the implementation of AEOI. While the OECD is working hard towards developing a multilateral AEOI framework based on the CRS, one of the leading powers, the United States, is now more engaged in developing its own AEOI network, derived from FATCA and IGAs, in parallel with the CRS. Moreover, the OECD’s ambiguous remarks on reciprocity\[109\] add uncertainties to the future of a multilateral AEOI framework, which it envisages. The fact that a powerful country like the United States is able to enforce its own AEOI standard and ignore the principle of reciprocity gives rise to concerns about whether or not the interests of emerging economies will be compromised in the implementation phase of AEOI.

4. BRICS Countries and AEOI

4.1. Overview of BRICS countries\[110\]

BRICS countries enjoy a relatively different status from other emerging economies in global matters: as a group, they are more economically and politically influential, and consequently have a significant impact on international matters. One could argue that, along with OECD countries, they can be considered “selected non-OECD countries” and the “market leader for the quasi-legal rules.”\[111\]

The agenda of tax transparency and information exchange has brought about “an unprecedented degree of coordination in international taxation”.\[112\] The cooperation of BRICS in AEOI takes place against the background that all BRICS countries have committed to the OECD’s CRS framework on a reciprocal basis, and have confirmed it in various circumstances.\[113\] In accordance with this, BRICS countries pledged to implement AEOI by 2017 or 2018, pursuant to the necessary legal requirements.\[114\] Moreover, apart from Russia, all of the other four countries have a Model 1 IGA in place.\[115\] As Brauner and Pistone explain, acceptance of the new AEOI standard was partly due to the five countries’ lack of a coordinated position in the matter of tax transparency and the battle against tax havens.\[116\]

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107. Id. In order to be considered as having “good tax governance” and, hence, excluded from the non-cooperative list, a jurisdiction has to fulfill the requirements of (i) tax transparency, (ii) fair taxation, and (iii) the implementation of BEPS measures. As to tax transparency, whether or not a jurisdiction commits to the CRS, has relevant domestic legislation in place, and is able to exchange information following the timeline provided by the European Union are decisive elements. Moreover, countries and jurisdictions that appear in the OECD’s non-cooperative list would be automatically included in the European Union’s list.

108. Essers, supra n. 22, p. 64.


110. Excluding China, which is discussed in sec. 4.2.

111. Baistrocchi, supra n. 8, p. 765.


113. See, for example, Eighth Summit: Goa Declaration, BRICS, http://brics2016.gov.in/upload/Goa%20Declaration%20and%20Action%20Plan.pdf, p. 10 and BRICS, Communique of the BRICS Heads of Revenue Meeting – Issued in Moscow on November 19, 2015 (BRICS 2015), at http://en.brics2015.ru/load/795871. Besides the fact that all five countries are CRS MCAA signatories, the MAATM has been signed, ratified and has taken effect in all BRICS countries.

114. BRICS, Communique of the BRICS Heads of Revenue Meeting, id., p. 2. The intended first information exchange dates for the BRICS countries are Sept. 2017 for India and South Africa, and Sept. 2018 for Brazil, Russia and China; see supra n. 17.


Apart from this, the nature of the EOI mechanism quite relevant. AEOI, by its very nature, is one form of tax administration cooperation. With the purpose of tackling tax evasion, it offers jurisdictions which have offshore problems a solution by empowering them. As Grinberg claims, in comparison to substantive international tax law cooperation (for example, the BEPS Project), the cooperation in respect of AEOI, where preferences are very much aligned, does not have distributional consequences.

Individually speaking, the five countries have different AEOI policies. In Brazil, for example, although AEOI is only directly provided for in the Brazil-Portugal Income Tax Treaty (2000), according to the peer review report issued in 2013, EOI is not the only form of information exchange in Brazil. The MAATM entered into force in Brazil in October 2016, meaning that Brazil now has a proper legal basis in place for it to implement AEOI with other contracting parties.

Like Brazil, Russia barely has any bilateral tax agreement explicitly providing for AEOI. Nonetheless, in order to facilitate the application of the FATCA rules by Russian financial institutions, the State Duma published Federal Law N 173-FZ in June 2014, which provides for financial institutions’ reporting obligations. The law also introduces the obligation for foreign financial institutions to report to the Russian Federal Tax Service details of financial accounts opened for Russian citizens and legal entities.

Unlike Brazil and Russia, India is the one BRICS country that has always been vocally supportive of a broad EOI framework. Besides bilateral AEOI agreements and tax treaties, the South Asian Association for Regional Cooperation (SAARC) Limited Multilateral Agreement also allows for India to engage in AEOI with other SAARC contracting parties.

South Africa also plays an active role in the area of tax transparency and EOI. Not only has it been working to expand its legal network for exchanging information, which allows for AEOI, but it is also engaging in Global Forum work with enthusiasm.

In general, BRICS countries have set out to prepare for implementation of domestic AEOI, as evidenced by their official commitments.

4.2. China: Closing the legal gap

4.2.1. Implementation of the CRS in Mainland China

Data shows that, in 2015, China was already among the top three source countries holding offshore wealth. According to a report published by the GFI, among developing countries China ranked first with regard to Illicit Financial Outflows during the period of 2004 and 2013.

According to the OECD, certain steps have to be followed in order to implement the CRS. First, domestic laws have to be put in place concerning due diligence and reporting. Second, the participating country has to join a competent authority agreement in order to trigger the actual automatic exchange process. Accordingly, China has been putting effort into establishing its domestic legislation.

At the international level, China’s signing of the MAATM and CRS MCAA provides the multilateral legal foundation for its implementation of the CRS. In accordance with its commitment, China will start to exchange the first batch of financial information in an automatic manner in September 2018. In addition, China became a signatory to the CbC MCAA in May 2016.
China has also been speeding up the process of promulgating new domestic rules. In October 2016, China issued a discussion draft called Measures for the Administration of the Due Diligence Requirements for Financial Institutions on Non-Residence Financial Account Information on Tax Matters (the Discussion Draft). Once adopted, these measures will be the most relevant and crucial piece of domestic legislation that enables implementation of the CRS in China.

There are several points that deserve to be highlighted here. First, several important deadlines are set out in the Discussion Draft: due diligence for new individual and entity accounts started on 1 January 2017; due diligence for higher-value pre-existing individual accounts should be completed by 31 December 2017; and due diligence for lower-value pre-existing individual accounts and all pre-existing entity accounts should be completed before 31 December 2018.

Second, in comparison to the CRS, the Discussion Draft provides for simplified due diligence rules, which are apparently under consideration in the context of the practical situation of financial institutions in China. For example, with regard to the due diligence for lower-value pre-existing individual accounts, article 19 of the Discussion Draft provides two ways of determining whether or not the individual account holder is a resident of the jurisdiction in which the financial institution is located: (i) residential address based on documentary evidence, and (ii) electronically searchable data, which resembles section III.B of the CRS. With respect to the latter, instead of specifying the possible indicia of the data, as the CRS does, the article simply defines such data in an abstract way as an "electronic record based on existing information system". Consequently, the article does not address the situation in which the individual account holder might be identified as a resident in more than one jurisdiction pursuant to multiple indicia applicable to electronically searchable data.

### 4.2.2. Hong Kong

Before 2014, according to Hong Kong's EOI policy, tax information could only be exchanged upon request. This was in line with Hong Kong's income tax treaties and TIEAs, which it concluded with other jurisdictions. Domestically, EOIR was enabled by an amendment to the Inland Revenue Ordinance in 2010, which was amended twice subsequently.

In September 2014, Hong Kong declared its support for AEOI on a reciprocal basis with "appropriate partners", and committed to its first exchanges by the end of 2015. In contrast to Mainland China, Hong Kong has not committed to the MAATM or MCAA. Quite strikingly, the Hong Kong government has made it clear that it would conduct AEOI only with countries with which it has bilateral tax treaties or TIEAs. To put it another way, Hong Kong does not subscribe to a multilateral AEOI framework; hence, the international legal basis for Hong Kong's AEOI remains its bilateral tax treaties. In this connection, Hong Kong needs to conclude competent authority agreements with its treaty partners before entering into bilateral CRSs.

Inland Revenue (Amendment) (No. 3) 2016 (IRO 2016) was enacted in June 2016, which enables Hong Kong to implement the CRS. While following the core rules of the CRS, IRO 2016 also includes certain rules that accommodate the practicalities and existing regulations in Hong Kong. For example, the definition of "non-reporting financial institution" in IRO 2016 is a localized specification of its CRS counterpart.

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134. Id., art. 14. Based on China's first exchange date commitment, the split between new and old accounts is 31 Dec. 2016.
135. See http://www.chinatax.gov.cn/n810219/n810724/c2285504/content.html.
136. Supra n. 133, art. 19.2.
137. Sec. III.B.4 lists six indicia for the electronic data search, including identification, mailing address and telephone numbers. This provides important guidance to financial institutions during their due diligence. It also deals with the possible conflict caused by the indicia: "If any of the indicia listed in subparagraph B(2)(a) through (e) are discovered in the electronic search, or if there is a change in circumstances that results in one or more indicia being associated with the account, then the Reporting Financial Institution must treat the Account Holder as a resident for tax purposes of each Reportable Jurisdiction for which an indicium is identified, unless it elects to apply subparagraph B(6) and one of the exceptions in such subparagraph applies with respect to that account." Supra n. 79, p. 33.
138. Notwithstanding being deemed "compliant" with the international standards on tax transparency in its peer review report, Hong Kong is considered to be a "secret jurisdiction" by the Tax Justice Network, mainly due to its wide range of offshore services and various types of financial secrecy. For the ratings of Hong Kong given by the Global Forum, see Global Forum, Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Hong Kong, China 2013: Phase 2: Implementation of the Standard in Practice (OECD 2013), pp. 121-125.
139. The Inland Revenue (Amendment) 2010 Ordinance enabled EOIR under Hong Kong's tax treaties, while TIEA-type exchanges were provided for in Inland Revenue Ordinance (Amendment) (No. 2) 2013: see Inland Revenue Department Hong Kong, Departmental Interpretation and Practice Notes No. 47 (Revised): Exchange of Information (Jan. 2014), at http://www.ird.gov.hk/en/pdf/prp/dpi47.pdf, pp. 2-4.
141. Id.
142. Id.
143. For example, Hong Kong recently signed competent authority agreements with Japan and the United Kingdom, committing to commence AEOI with the two jurisdictions in 2018. The two countries are, accordingly, listed as the first two "reportable jurisdictions" under IRO 2016: see "Hong Kong to commence automatic exchange of financial account information in tax matters with Japan and UK in 2018", news release, 2016, at http://www.ird.gov.hk/en/english/prp/16102601.html.
144. IRO 2016, Preamble.
145. Id., part 2. The definition of this term raised great concern in Hong Kong during the drafting process of IRO 2016. The final rule lists 13 types of financial institutions that are exempted from reporting obligations, which is more than the 8 types provided in the CRS: X. Zhu, Impact of the AEOI Standard on Tax Havens: An analysis of Hong Kong Inland Revenue (Amendment) Bill 2016, Notes on Global Tax Events 4, p. 38 (2016). In addition, both the definition of "depository institution" and "investment entity" integrate under Hong Kong law. According to IRO 2016, "depository institution" includes "an authorized institution, as defined by section 2(1) of the Banking Ordinance (Cap. 155)", besides the type provided for in the CRS; and "investment institution" refers to the rules of the Hong Kong Securities and Futures Ordinance: IRO 2016, part 8, sec. 50A (1).
It is also worth mentioning here that Hong Kong adopts the territorial principle of taxation, meaning that tax is imposed only on profits that arise in, or are derived from, Hong Kong.\[146\] Hence, during an EOI the Hong Kong tax authority is concerned only with offshore financial account information of its resident taxpayers that relates to the profits that arise in, or are derived from, Hong Kong. In this sense, it may appear that the Hong Kong tax authority will not obtain much valuable information from AEOI pursuant to the CRS. Moreover, it is argued that implementation of the CRS might pose serious challenges to the Hong Kong financial service industry, with regard to the cost of administering the legislation, as well as the possible loss of clients. This is of great importance in Hong Kong’s case, given that financial services has traditionally been one of its core competitive industries.\[147\]

5. Navigating the Future of AEOI

As discussed in section 3., the development of AEOI shows the pattern of “lead and follow”, which reflects the power imbalance that exists in the rule-setting phase of international taxation. In light of this, BRICS countries, as the pre-eminence group of developing countries, might influence international tax discussions by helping to bring back legitimacy in the implementation of AEOI: the group should do more than just cooperate, it should also co-steer the discussion.

Being actively engaged in activities of the Global Forum is one way to achieve this. With 137 members and 15 observers,\[148\] the Global Forum has been carrying out work in the area of tax transparency and information exchange. In response to the new AEOI initiative, an AEOI group was established in the Global Forum, which all BRICS countries joined, aiming to create “a mechanism for monitoring and reviewing the implementation of the new standard”.\[149\] including a forthcoming peer review process.\[150\] The prevailing peer review mechanism developed by the Global Forum only refers to EOI. Although the Global Forum claims that the purpose of peer review is to ensure that EOI is implemented effectively,\[151\] the mechanism is criticized for not adding value to developing countries; instead, it imposes costs on them.\[152\]

Apart from that, as revealed in the 2015 IFA report,\[153\] several jurisdictions reported that the existing procedures for notifying taxpayers, and for taxpayers to challenge information requests, had been removed, due to pressure coming from the Global Forum.\[154\] In order to improve the effectiveness of EOI, the Global Forum threatened to give a lower peer review rating to the countries concerned.\[155\] The OECD and Global Forum were therefore heavily criticized for causing a reduction in the protection of taxpayers’ rights.\[156\] In this context, there is space for BRICS countries to participate in the formulation of the AEOI peer review process to make emerging economies’ voices heard more to accommodate their interests.

In addition, BRICS countries can play a leading role in identifying issues that are of special interest to emerging economies, as well as formalizing consensus and developing consistent strategies accordingly. For example, as a report issued by the International Bar Association’s Human Rights Institute Task Force claims,\[157\] according to its consultation with developing countries concerns were raised with respect to two aspects; viz. the relevant tax information may:

- be misused by governments or officials in order to harass or persecute political opponents or dissidents; and
- be used by criminals in kidnapping or corruption.\[158\]

AEOI may exacerbate these potential problems, given, compared to EOI, the huge volumes of information that will be exchanged regularly under AEOI. Misuse of taxpayer information under the AEOI mechanism can be devastating, which necessitates strengthened administrative capacity. BRICS should therefore pay particular attention to, and help address, these special concerns during the implementation process in emerging economies, and form concrete plans accordingly.

These efforts can be realized with the support of BRIC’s own cooperation mechanism. As stated on the BRICS’s official website:

BRICS cooperation has two pillars – consultation on issues of mutual interest through meetings of Leaders as well as of Ministers of Finance, Trade, Health, S&T [Science and Technology], Education, Agriculture, Communication, Labour, etc. and practical


\[147\] Zhu, supra n. 145, p. 39.


\[149\] See http://www.oecd.org/tax/transparency/about-the-global-forum/.


\[154\] Supra n. 91.

\[155\] Id., p. 81. Mosquesra also points out that, due to the high level of corruption and kidnapping, the exchange of tax information with some Latin American and African countries should be handled carefully, in order to ensure the confidentiality: see Mosquesra, supra n. 23, sec. 5.3.2.2.


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cooperation in a number of areas through meetings of Working Groups/Senior Officials. Regular annual Summits as well as meetings of Leaders on the margins of G20 Summits are held.[159]

The challenge now is to place the AEOI discussion on the political agenda, as well as on the agendas of various relevant professional groups set up under the BRICS mechanism.

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