A COMPARATIVE STUDY OF THE EXCHANGE OF INFORMATION TO ENHANCE TAX TRANSPARENCY IN THE UNITED STATES OF AMERICA, THE UNITED KINGDOM AND SOUTH AFRICA

by

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ABSTRACT

A COMPARATIVE STUDY OF THE EXCHANGE OF INFORMATION TO ENHANCE TAX TRANSPARENCY IN THE UNITED STATES OF AMERICA, THE UNITED KINGDOM AND SOUTH AFRICA

by

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The 2008 financial crisis shifted the focus of governments and their tax authorities and led to efforts to prevent base erosion and profit shifting through ‘tax transparency’. As a result, tax authorities are marking their territories and exhibiting determination to identify perpetrators who are seen to be benefiting from profits being shifted with the sole intention of avoiding, evading or even reducing their tax liability.

Organisations such as the OECD, governments and tax authorities have come together to combat the erosion caused by gaps that had been identified and used by taxpayers to their advantage. This has led to the drafting and implementation of legislation and standards, the signing of financial and tax information exchange agreements between countries, and an emphasis on the disclosing of information in reports, such as country-by-country reports or reports provided directly to tax authorities.

The aim of this study was to review the available literature on three precise techniques that can be used to aid the exchange of information; to identify the similarities and/or differences between the way in which these techniques are applied in the USA, the UK and SA; and to conclude on whether the methods that have been implemented to in fact enhance tax transparency in the USA, the UK or SA in any way, shape or form.

KEYWORDS:

Agreements

BEPS

Country-by-country reporting

Exchange of information

Legislation

South Africa

Tax transparency

United Kingdom

United States of America

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

DEFINITION OF KEY TERMS

Table 1: Definition of key terms used in this document

Key term	Definition
Act	A legislative act that applies to a particular person or jurisdiction.
Article 89	An article in the Capital Requirements Directive that requires all credit institutions and investment firms in the UK and European Union states to report on a country-by-country basis from 1 July 2014.
Automatic Exchange of Information	Standard information that was developed in the context of the Organisation for Economic Co-operation and Development and should be shared among tax authorities
Bilateral agreements	An agreement between two parties, agencies or national governments
Business entity	Entities that are either incorporated in, or are tax resident in the United States of America, and which specifically include permanent establishments
Constituent entity	A separate legal entity within a multinational group that is included in the consolidated annual financial statements for financial reporting purposes
Country-by-country reporting	The disclosure by a company to governments of tax figures and potentially other financial data, either publically or in confidence and on a country-by-country basis
Financial Stability Board	An international body that monitors and makes recommendations about the global finance system
Her Majesty's Revenue & Customs	Tax-collecting agent for the United Kingdom's government
Her Majesty's Treasury	The UK government's economic and finance ministry
Internal Revenue Services	Tax-collecting agent for the government of the United States of America
Legislation	A set of laws approved by government
Model Competent Authority Agreement	The administrative framework for participant jurisdictions to exchange information
Multilateral agreement	An agreement signed by three or more parties, agencies or national governments
Organisation for Economic Co-operation and Development	A forum in which 34 governments with market economies and more than 70 non-member economies work together to promote global economic growth, prosperity and sustainable development
Permanent establishment	A fixed place of business through which an enterprise is carried on either wholly or partly, and which generally gives rise to income tax liability and/or a value-added tax liability
Qualified Competent Authority Agreement	An agreement between authorised representatives who are party to an international agreement that requires the automatic exchange of country-by-country reports between parties who are signatories to that specific agreement

United States of America's definition of Revenue for Country by Country Reporting	All revenues from the sale of inventory and property, services, royalties, interest and premiums. However, it specifically excludes dividends received within the MNE-group imputed earnings, deemed dividends received within the group and revenue from partnerships and other transparent entities, as well as PEs that are seen as constituent entities.
South African Revenue Services	Tax-collecting agency for the South African government
Stateless entity	An entity that does not have tax residency for CBC purposes, such as a partnership that does not own or create permanent establishment presence in the country in which it is located, or in any other tax jurisdiction
Tax authority	Any government entity that is authorised by law to assess, levy and collect taxes on behalf of the government
Tax transparency	The way an organisation sheds light on the taxation of its profits and the amount of tax it actually pays to tax authorities
The Standard	Also known as the Common Reporting Standard developed by the Global Forum.
Ultimate parent entity	The highest entity within the corporate hierarchy with an unbroken chain of entities which it controls either directly or indirectly

LIST OF ABBREVIATIONS AND ACRONYMS

Table 2: Abbreviations and acronyms used in this document

Abbreviation	Meaning
AEoI	Automatic exchange of information
AEoI Group	Automatic Exchange of Information Group
AFS	Annual financial statements
b	Billion
BEPS	Base erosion and profit shifting
CAD	Capital Adequacy Directive
CBC	Country-by-country
CBCR	Country-by-country reporting
CDOT	Crown dependencies and overseas territories
CIT	Corporate income tax
CRD IV	Capital Requirements Directive IV
CRS	Common Reporting Standard
DC	Davis Committee
DTA	Double Taxation Agreement
EEA	European Economic Area
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FCA	Financial Conduct Authority
FFI	Foreign Financial Institution
FIs	Financial institutions
FSB	Financial Stability Board
G20	Group of 20
GAAR	General Anti-avoidance Rules
G-SII	Global Systemically Important Institutions
IGA	Inter-governmental agreement
IHT	Inheritance tax
IRS	Internal Revenue Service
ITA	Income Tax Act No. 58 of 1962
ITR14	Income tax return (South Africa)
k	Thousand
m	Million
HMRC	Her Majesty's Revenue and Customs
HMT	Her Majesty's Treasury
MCAA	Multilateral Competent Authority Agreement
MiFID	Markets in Financial Instruments Directive
MNE	Multinational entity
Model TIEA	Model agreement on exchange of information in tax matters
NFFE	Non-financial foreign entity
NP	Not provided
OECD	Organisation for Economic Co-operation and Development
PE	Permanent establishment

PRA	Prudential Regulation Authority
SA	South Africa
SARS	South African Revenue Service
SDLT	Stamp Duty and Land Tax
TAA	Tax Administration Act No. 28 of 2011
TIEA	Tax Information Exchange Agreement
TIN	Tax identification number
TP	Transfer pricing
UK	United Kingdom
USA	United States of America
USD	United States dollar
VAT	Value-added tax
WHT	Withholding tax

CHAPTER 1:
INTRODUCTION

'Aggressive tax avoidance is a serious cancer eating into the fiscal base of many countries' – Pravin Gordhan, South African Minister of Finance, 2009 (Tabb, 2012:148).

BACKGROUND

As it becomes less tedious for taxpayers to make, hold and manage investments outside of their country of tax residence, aggressive tax planning is often employed to minimise, avoid and/or evade taxes. Aggressive tax planning can be defined as the legal use of the tax law to allow one to pay the least amount of tax while pushing the boundaries (Beattie, 2015:1).

Aggressive tax planning may result in various assets – such as bank accounts, trusts and investments – being held offshore and going untaxed in the taxpayer's country of tax residence. Taxpayers' non-compliance with regard to the paying of taxes in their countries of residence has become a monumental concern for tax authorities all over the world. As a result, in an attempt to maintain the integrity of each country's tax system, tax authorities are looking to each other for assistance in fighting the loss to their fiscus as a by-product of offshore investments made by their residents (Tax Justice Network, 2015:3; Urinov, 2015:4). This collaboration between tax authorities occurs mainly through the exchange of financial and tax information, which has been expanded to include dividends received, bank account balances and interest received, to name but a few (OECD, 2014:5).

The exchange of information is one of the components of tax transparency. Other components are country-by-country reporting and the communication of corporate tax profiles, which includes information corporate approaches and the amounts of tax being paid (Dixon, Lester, Sanger & Steel, 2013:9). Since the constantly changing landscape of tax transparency is influencing countries across the globe, countries have changed their strategies around the collection and disclosure of taxes (Dixon *et al*. 2013:7-8).
The need to limit the aggressive tax planning and tax evasion by some taxpayers has led to the inception of committees such as the Organisation for Economic Cooperation and

Development (OECD) and the Global Forum, to name but two. Originally the OECD was a regulating body that dealt with harmful tax competition and tax havens (Spencer, 2006:91).

With more countries being open to the automatic exchange of tax information, tax authorities are hopeful that the exchange of such information will assist them in locating assets that have been hidden offshore by taxpayers in an attempt to evade taxes. This will result in both developed and developing countries being able to collect outstanding taxes owed to them (Ministry of Finance South Africa, 2013:1).

The Global Forum is the chief international body working on the implementation of the international tax transparency standards, while also monitoring the quality of transparency and the exchange of information between its 144 member countries and 15 organisations participating as observers (OECD 2016b:1).

The OECD and other similar institutions have influenced the implementation of practices and/or legislation in, for example, the United States of America (USA), the United Kingdom (UK) and South Africa (SA). However, the OECD has no legal right to impose any form of sanctions on countries that decide not to participate or to implement the standards recommended by them (Owens, 2009:7).

Globally, tax transparency has evolved since 1 September 2009, when the OECD took the decision to enhance tax transparency and the exchange of information. Prior to 2009, tax transparency focused only on combating fraud in specific industries, such as the oil, gas and mineral resources industry[1] (EY 2014:6). As a result of the decision made in 2009, countries like the USA and the UK began signing legislation into law[2]. Australia introduced a new tax bill[3] that required the Australian tax office to publicly report tax information where companies'

[1] Transparency initiative in the oil, gas and mineral resources industry where the disclosure around government payments was implemented under the Extractive Industries Transparency Initiative (EITI), which was followed by the USA's Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Dodd-Frank Act is discussed in detail in Chapter 3 of this study.
[2] The detail around the signing of legislation will be discussed in Chapter 3.
[3] One of the public tax transparency laws in Australia was enforced in December 2015. This realised the public publication of tax information of taxpayers who disclosed incomes exceeding A$100m in their tax returns. An exception to the rule is where the taxpayer is a privately owned Australian company, in which case the total income should be more than A$200m. The name of the entity, the Australian business number, total income for the year as per the tax return, taxable income and income tax payable need to be publicly disclosed (PwC Australia 2016:2).

annual income exceeded A$100m (Dixon *et al*., 2013:15; EY, 2014:4). The OECD has also put into place certain guidelines, such as the Base Erosion and Profit Shifting action steps (BEPS action plans[4]) to assist with the global reform around tax transparency (EY, 2014:8-9).

At this point in time, SA has not yet implemented new tax legislation. However, amendments have been made to the Tax Administration Act No. 28 of 2011 (TAA). In 2015, for instance, in an attempt to ensure that financial institutions comply with the international standards, amendments were made to section 26 of the TAA, which discusses third party returns, and also to section 46, which gives senior South African Revenue Service (SARS) officials the authority to request information on a South African taxpayer located outside SA (Lavinia, Van der Merwe & Visser, 2015:4; South Africa Treasury, 2011:44, 54 & 55).

Even though SA is not a member of the OECD or the Global Forum, it has adopted the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters. Reporting around the exchange of information for 2016 is expected to commence in 2017 (Lavinia *et al*., 2015:4).

This study seeks to compare contrasting and/or similar practices that have been implemented by the USA, the UK and SA, focusing specifically on how the exchange of tax information has altered and enhanced the world of tax transparency.

1.1 PROBLEM STATEMENT

With regard to tax transparency, the USA and the UK appear to be progressing in the same direction; however, it is important to note that initially two separate country models were used when reporting tax transparency. The English model (social impacts on sustainability and disclosure), which promoted transparency and disclosure rather than state involvement, and the American model (analysis of business), which placed less emphasis on information and reserved the right for the state to intervene when intervention was deemed necessary. This highlights the initial division regarding what transparency should be detecting

[4] The BEPS action plan was created to address the “flaws” in the international tax rules, which were perceived as aiding tax avoidance by taxpayers (Van Weeghel 2016:1).

(Cabezas, 2014:31). It should be clear that where the fundamental principles of tax transparency differed, different countries would favour different models.

Even though SA is not a member of the OECD, it demonstrates commitment by making amendments to tax legislation and following the OECD guidelines to enforce acceptable behaviour. SA is also prepared to collaborate with other countries and exchange information where necessary (OECD 2015b).

Several scandals have come to light and are still being uncovered around taxation issues, such as the Panama Papers scandal in which taxpayers, including politicians and multinational companies, had participated in tax haven schemes to evade tax (Italian Lawmaker, 2016). In the HSBC scandal, a Swiss subsidiary of the HSBC bank assisted wealthy clients to avoid tax and hide assets from tax authorities by using loopholes in the tax legislation (Pickard-Whitehead, 2015). In Ireland, a major scandal led to an investigation of Apple Inc.'s tax affairs and Apple was instructed to pay €13b in outstanding taxes (Centre of Research on Globalisation, 2016), while in the Netherlands the Starbucks Corporation (Starbucks) franchise was found by the European Regulator to owe €32.7m in unpaid taxes (Bodoni, 2016). The European commission is of the view that Starbucks negotiated with the Netherlands tax authority with the sole purpose of reducing the tax to be paid in the Netherlands. In response to these and other scandals, the global recession of 2008 and market calamities such as the collapse of Enron[5] due to a lack of transparency and fraud, the OECD and a large number of governments expanded the tax transparency framework by compiling guidelines and regulations (Cabezas, 2014:3; Wang, 2002).

The research problem underpinning this study resulted from the numerous changes made to tax transparency since inception and the regulations and practices that have been adopted and implemented. The recent focus on and implementation of the exchange of tax information has led to uncertainty about whether the different regulations and practices being implemented do in fact strengthen tax transparency (Dixon *et al*., 2013:9).

[5] Enron, the American Energy, Commodities and Services Company that falsified information relating to profits and as a result filed for Chapter 11 bankruptcy and ceased operations in 2001 (BBC News, 2002:1).

Figures 1 and 2 clearly highlight the focal points of tax transparency from June 2003 to July 2017.

Figure 1: Tax transparency key events from June 2003 to January 2013

Source: EY, 2014:4

Figure 2: Tax transparency key events from January 2014 to July 2017

Source: EY, 2014:5

1.2 PURPOSE STATEMENT

Aggressive tax planning, tax avoidance and tax evasion are putting tax authorities in countries like the USA, the UK and SA on the defensive as they feel that their countries are forfeiting much-needed funds that could be used to benefit their citizens. With various taxpayers perceived to be avoiding taxes, a greater burden is placed on the honest taxpayers who fully disclose all their income and assets and pay their fair share of taxes (HM Revenue and Customs, 2015:3).

The main purpose of this study is to better understand the regulations and practices relating to the exchange of tax information implemented in the USA, the UK and SA, and to compare these three countries with regard to how the exchange of tax information has enhanced the tax transparency in each one.

1.3 RESEARCH OBJECTIVES

1.3.1 Primary research objective

The primary research objective is to compare, with a specific focus on the exchange of tax information, how the different methods adopted by the USA, the UK and SA have improved the tax transparency in each country.

This will be accomplished by highlighting the similarities and differences between the USA, the UK and SA.

1.3.2 Secondary research objectives

The main research objective of this study is supported by the following secondary research objectives:

- To compare the main aspects of legislation that drives tax compliance with regard to the exchange of information

- To compile a detailed analysis of how multilateral agreements and bilateral agreements aid the exchange of tax information
- To compare the approaches adopted by the USA, the UK and SA with regard to country-by-country reporting

1.4 IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY

The exchange of tax information has been evolving since 2009, when the Global Forum suggested that the exchange of information be enhanced. In 2013 the Automatic Exchange of Information Group (AEoI Group) was established to work towards the enhancement of the automatic exchange of information. Between 2014 and 2015 the methodology for monitoring and implementing the automatic exchange of information was planned and was ready for roll-out (OECD 2012).

The importance of this study relates to the recent implementation of the exchange of information and the interpretation thereof. The available relevant literature does not deal adequately with the intricacies involved in the exchange of tax information. No existing literature deals with how the differences between the ways in which regulations and practices are implemented by different countries will affect SA, or how SA's implementation of the exchange of information standards will affect South African taxpayers. This study will therefore add to existing South African literature on the topics of exchange of tax information and tax transparency and could also be used as a benchmark for where SA currently is, so that progress can be assessed in the future.

1.5 LIMITATIONS AND ASSUMPTIONS

1.5.1 Limitations of the study

This study will focus exclusively on the policies and practices of the USA, the UK and SA. The comparison will focus only on the exchange of information and no other aspects of tax transparency will be investigated. Double Tax Agreements and the Extractive Industries Transparency Initiative (EITI) are specifically excluded from this study and will not be

considered in any detail. This study will also be limited to the literature available at the time during which the research is conducted.

1.5.2 Assumptions

- The signed multilateral agreements and bilateral agreements are final as of the date of the submission of this paper.
- The requirements set for disclosure for information will remain the same.
- The names of the legislation drafted into law will not be repealed and will remain unchanged.

1.6 RESEARCH METHODOLOGY

This study will follow a qualitative methodological approach guided by a pragmatic paradigm and a deductive method of reasoning. Pragmatism refers to where data may be collected because of one's personal beliefs and as a result the 'truth' may evolve over time (Stanford Encyclopedia of Philosophy 2008:8-9).

The detailed literature review and methodology strategy were used to draw a non-empirical comparison between the different regulations and policies that are being implemented by the USA, the UK and SA to promote tax transparency, and to discuss the findings identified.

Comparative research is research in which the focus is on the differences and similarities between two or more units (Lor, 2011:2). Therefore it will be appropriate to use a comparative research design to compare the ways in which the exchange of information, which is the topic of this study, is being implemented in the USA, the UK and SA.

Qualitative data collection methods will be employed whereby secondary data sources will be used. Secondary data is data that already exists (Clark 2005:2). The data to be collected will be of a secondary nature. Secondary data relating to the exchange of tax information will be sourced from draft legislation and implemented legislation, government publications, articles, journals, reports, books, dissertations and databases from the three countries. The

secondary data sources will be analysed using thematic data analysis, which is the process of analysing data to identify patterns within the data. The patterns thus identified are specifically linked to the research question (Vosloo, 2014:365).

1.7 STRUCTURE OF THE MINI-DISSERTATION

Chapter 1: Introduction

Chapter 1 provides an introduction and background to the current research. The research objective, the rationale for this study and the research design and methodology will also be explained and the delimitations will be discussed.

Chapter 2: Tax transparency and the exchange of information – an overview

In Chapter 2, the theoretical constructs that are relevant to the main objectives of the comparative study are identified and defined. Based on the literature review, the concept of 'exchange of information' is analysed to ensure that the correct construct is used for the conceptual framework and to provide clarity on exactly what will be evaluated in this study. This chapter forms part of the theoretical basis for the conceptual framework developed in the comparative study.

Chapter 3: A comparative study of the legislation, agreements and country-by-country reporting in the United States of America, the United Kingdom and South Africa

The theoretical constructs that are relevant to the secondary objectives of the comparative study are dealt with in Chapter 3. Based on the main themes chosen for the literature review, the relevant similarities and differences between the US, the UK and SA are analysed and compared. This chapter forms part of the body of the comparative study.

Chapter 4: Conclusion

Chapter 4 brings the comparative study to its conclusion with a summary of the findings and of the conclusions reached in the other chapters, explains the contribution and limitations of the current study and also offers suggestions for future research.

CHAPTER 2:
TAX TRANSPARENCY AND THE EXCHANGE OF INFORMATION – AN OVERVIEW

2.1 INTRODUCTION

The main purpose of this study is to better understand the regulations and practices that apply to the exchange of information implemented in the USA, the UK and SA, and to determine to what extent the exchange of information has enhanced tax transparency in each of the three countries. This study will also highlight the differences and/or similarities between the three countries. The purpose of this chapter is to explain how tax transparency came into being and why it is being implemented. This study will focus specifically on the exchange of information that is a direct result of the establishment of tax transparency, and on some of the methods currently used by tax authorities and countries to execute the exchange of information. This will be achieved by providing an overview of the background to tax transparency and how the concept of the exchange of information came into existence. The chapter will be concluded with a summary of the findings.

2.2 WHAT IS TAX TRANSPARENCY AND WHY IS IT IMPORTANT?

In ‘Promoting transparency and exchange of information for tax purposes’ (a background information brief dated 19 January 2010), it is stated that: ‘Tax avoidance and tax evasion threaten government revenues throughout the world.’ Country-by-country estimations of revenue losses run into billions. This ‘loss in revenue’ has been identified by governments as the ‘main culprit’ causing the reduced standard of living of their citizens and the shortage of resources for the improvement of infrastructure. The limitations listed above as a result of the ‘loss in revenue’ are the justification for tax transparency being used in both developed and developing countries (Owens, 2010:2).

By 2010, the focus of the OECD had been on tax transparency and the exchange of information for over 15 years. The idea of tax transparency was an outflow of globalisation,

which appeared to increase global wealth. This increase in global wealth appeared to increase the risk of taxpayers identifying safer jurisdictions (other than their country of tax residence) where they could generate / invest income, acquire assets and/or move their assets. As cross-border transactions increased, tax authorities realised that they would need the cooperation of taxpayers if they wanted to ensure that the correct amounts of tax were paid to the correct tax jurisdictions (Owens, 2010:2).

Countries all over the world want action taken against taxpayers who fail to comply with tax obligations in the countries in which they are deemed to be tax resident. An example of non-compliance would be when income sourced by a taxpayer in his or her country of tax residence goes untaxed in that country. This usually happens when the profits that are not taxed in the country from which they were generated are shifted to a jurisdiction where they will either be taxed at a lower rate, or will be deemed to be non-taxable. In this case the taxpayer may be able to altogether avoid paying taxes on the shifted profits. Countries want international tax avoidance and evasion to be addressed; therefore tax administrators are needed to join in the fight against tax evasion by supporting the exchange of information (Saint-Amans & Pross, 2016:2).

2.3 PROCEDURES USED TO SUPPORT TAX TRANSPARENCY

2.3.1 Bilateral and multilateral agreements

There are different legal bases for the exchange of information. Currently two main types of agreement, i.e. bilateral and multilateral agreements, can be signed in this regard (PwC Indonesia, 2015:2; Saint-Amans & Pross, 2016:3).

The most common bilateral agreements are the Double Taxation Agreement (DTA) and the bilateral agreement known as the Tax Information Exchange Agreement (TIEA). The DTA is based on Article 26 of the OECD Model Tax Convention, which is an agreement between two specific jurisdictions with regard to the prevention of double taxation,[6] while the TIEA, a concept that was introduced in 2002 and is based on Article 26 of the OECD Model Tax

[6] Double taxation occurs in international trade when the same income is **taxed** by two different jurisdictions (Investopedia 2017).

Convention, together with the Model Agreement on Exchange of Information in Tax Matters (Model TIEA), allows for a specific exchange of tax information between two jurisdictions (OECD 2015c:1; PwC Indonesia, 2015:2; Saint-Amans & Pross, 2016:3).

In the case of multilateral agreements (MCAAs), as the name indicates, there will be more than two jurisdiction signatories to the agreement. All signatories to an MCAA will be free to exchange information with any other jurisdiction within the scope of that particular MCCA (Saint-Amans & Pross, 2016:4; PwC Indonesia, 2015:2). On 4 June 2015, 61 jurisdictions, including 'tax havens' such as Switzerland and the Cayman Islands, had signed MCAAs (PwC Indonesia, 2015:2). Multilateral agreements are considered to offer more efficient ways of exchanging information than bilateral agreements (Saint-Amans & Pross, 2016:4).

Countries such as Argentina, China, India and South Africa have worked on negotiating tax information exchange agreements that will make the whole process a success. The global forum membership is now open to developing countries (Owens, 2010:3).

2.3.2 Automatic exchange of financial information

The main purpose of the exchange of information is to determine particular taxpayers' incomes and where their assets may or may not be located. The concept of the exchange of information led to the idea of the automatic exchange of information (AEoI), which relates specifically to the sharing of information between countries. AEoI assists tax authorities with exchanging information in a specified format during agreed-upon periods and through the established networks with a one-time agreement that allows for the extension of the scope without creating a tedious process (PwC Indonesia, 2015:2).

2.3.3 Country-by-country reporting

Country-by-country reporting (CBCR) is a measure put in place by the OECD in September 2014 in an attempt to try to confront base erosion and profit shifting (BEPS) by introducing Action 13. The reporting implementation package was released in June 2015. In total, fifteen action steps were created to reform international tax systems and tackle tax avoidance (OECD 2015a:10; Verlinden, Katz, Horton-O'Brien, Collier & Olson, 2015:52).

Action 13,[7] an action plan linked to CBCR, relates specifically to improving transfer pricing documentation. It also includes the new requirements for reporting income, tax and certain economic measures that will be country specific for each tax authority. The goal with CBCR is to help tax authorities to prioritise their resources when it comes to necessary activities, such as audits that may need to be performed. The template for CBCR will combine financial and economic factors, which will be country specific. Line items, such as turnover, profit, taxes paid and accrued, headcount and capital, should be expected in the CBCR template created (Deloitte, 2014:6).

2.3.4 Capital Requirement Directive IV

The European Union (EU) also introduced a public country reporting requirement for the banking and capital market under article 89 of the EU Directive, which is commonly referred to as the Capital Requirement Directive IV (CRD IV) (Deloitte 2014:6).

2.4 WHAT IS THE COMMON REPORTING STANDARD?

The Common Reporting Standard (CRS), also known as the Standard or Global Standard, was designed with what could be described as an extensive base in an attempt to prevent taxpayers from avoiding its implementation (Saint-Amans & Pross 2016:3).

The Standard for the exchange of information sets out:

- the financial account information that should be exchanged;
- the financial institutions that need to report on the information required;
- the different types of accounts;
- the different taxpayers in scope; and
- the due diligence procedures to be followed (Saint-Amans & Pross, 2016:3)

[7] Action 13 is the OECD and Global of Twenty (G20) guidance around the implementation of transfer pricing documentation and country-by-country reporting under the BEPS initiative (Penning *et al*., 2016:4).

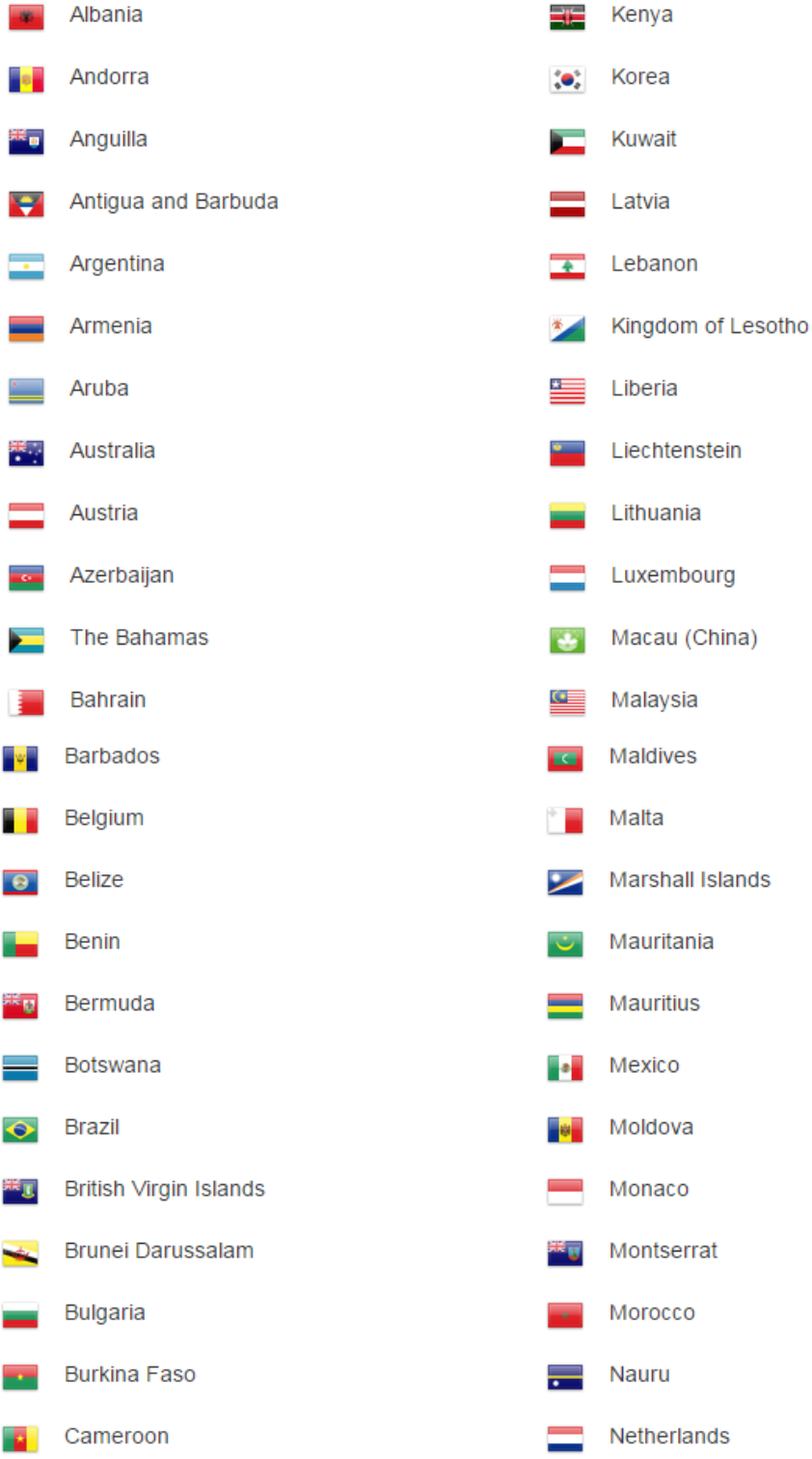
The Standard is split between reporting and due diligence procedures. The Model Tax Convention prescribes detailed rules applicable to the exchange of information and requires that only relevant information be requested by countries. Commentary on the Model Tax Convention and the CRS is also available (Saint-Amans & Pross, 2016:7). The information requested needs to be specific to the domestic law surrounding the tax administration and enforcement needs of the country requesting the information. Bank secrecy and/or a country's tax interests will not prevent information from being shared when required by a specific country. However, the rights of the taxpayers still need to be respected and confidentiality must be maintained on all information exchanged (Owens, 2010:4).

2.5 WHO INTRODUCED THE STANDARD USED TO IMPLEMENT THE EXCHANGE OF INFORMATION?

The Global Forum brought together more than 120 countries to work towards effectively implementing the Standard for the exchange of information. The timetable that was subsequently created to give countries an opportunity to publicly commit to the implementation of the Standard was also used as a device for monitoring the process of implementation (Saint-Amans & Pross, 2016:3).

Figure 3 lists the countries that form part of the Global Forum at the time of this study.

Figure 3: Countries that form part of the Global Forum



- Canada
- Cayman Islands
- Chad
- Chile
- China (People's Republic of)
- Colombia
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Curaçao
- Cyprus
- Czech Republic
- Denmark
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Estonia
- Faroe Islands
- Finland
- Former Yugoslav Republic of Macedonia (FYROM)
- New Zealand
- Niger
- Nigeria
- Niue
- Norway
- Pakistan
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Poland
- Portugal
- Qatar
- Romania
- Russian Federation
- Saint Kitts and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- Saudi Arabia
- Senegal
- Seychelles

France
Gabon
Georgia
Germany
Ghana
Gibraltar
Greece
Grenada
Guatemala
Guernsey
Guyana
Hong Kong (China)
Hungary
Iceland
India
Indonesia
Ireland
Isle of Man
Israel
Italy
Jamaica
Japan
Jersey
Kazakhstan
Singapore
Sint Maarten
Slovak Republic
Slovenia
South Africa
Spain
Sweden
Switzerland
Tanzania
Thailand
Togo
Trinidad and Tobago
Tunisia
Turkey
Turks and Caicos Islands
Uganda
Ukraine
United Arab Emirates
United Kingdom
United States
Uruguay
Vanuatu
The European Union fully participates in Global Forum work

Source: OECD, 2017b:1-2

Some people feel that certain ‘crimes’, such as tax evasion and money laundering, may be hidden in the absence of an automatic exchange of information, and that it will be easier to

detect and identify proceeds made from other crimes, for instance bribery, drug trafficking, human trafficking, insider trading and bankruptcy fraud (Tax Justice Network, 2015:5).

When considering the fundamental principles that needed to be implemented in the case of multilateral agreements specifically, the Standard on the exchange of information referred to anti-money-laundering standards and the US Foreign Account Tax Compliance (FATCA) (Saint-Amans & Pross, 2016:3).

2.6 HOW IS TAX TRANSPARENCY BEING ACHIEVED?

The new global standard for the automatic exchange of information, which was demonstrated at a meeting held in Paris on 6 and 7 May 2014, during which the Declaration on Automatic Exchange of Information in Tax Matters was adopted, is enjoying considerable support (Saint-Amans & Pross, 2016:2).

The OECD has highlighted the need for developing countries to obtain the necessary technical assistance to ensure that they too will benefit from the new global standard regarding the automatic exchange of information (Saint-Amans & Pross, 2016:2).

The Group of Twenty (G20)[8] agrees with the OECD and has highlighted the need for developing countries to also benefit from the changes in respect of tax transparency and the exchange of information. The OECD and the Development Assistance Committee are developing a programme to assist developing countries with the drive towards the exchange of information (Owens, 2010:3).

[8] The G20 is an international forum that consists of the world's twenty leading and emerging economies. The G20 accounts for 85% of the world's GDP and two thirds of the world's population (Mustafa 2017).

The flags of the countries that are members of the G20 are depicted below.

Figure 4: The G20 member countries

Source: Testi, 2017:20

2.7 WHO IS AFFECTED BY THE EXCHANGE OF INFORMATION?

Since the information to be reported on with regard to accounts includes all types of investment income, account balances and proceeds from sales, it affects more than one type of taxpayer (Saint-Amans & Pross, 2016:3-4).

2.7.1 Financial institutions, individuals and entities

Financial institutions (FIs), which include brokers, certain collective investment vehicles and insurance companies, need to report on accounts held by individuals and entities. A due diligence will need to be performed by these FIs to enable them to identify the accounts on which they have to report. Entities include trusts, foundations and 'look- through passive

income entities'. These entities will need to report on the individuals who control them (Saint-Amans & Pross 2016:3-4).

2.7.2 Corporations / Entities

The taxes paid by corporate entities (especially multinationals) are under scrutiny, even though the amount of tax paid by these entities account for only a minute piece of the pie when compared to the public contribution to state revenue (PwC, 2015:4). Because of the lack of transparency shown by corporates in the past, the amount of taxes that corporates actually pay seem to be shrouded in mystery (PwC, 2015:6). In the past, many countries provided tax relief to foreign corporations in order to increase foreign investment, which contributed to making those countries' tax environments more competitive or attractive (PwC, 2015:15).

The boards and audit committees of corporations have been given a mandate surrounding tax duties, and some corporations have actually gone so far as to create tax committees (PwC, 2015:20). The reputational risk associated with a lack of tax transparency is forcing multinational corporations to focus on tax transparency, especially with regard to cross-border transactions (PwC, 2015:21).

2.8 SUMMARY

Certain relatively new practices, such as the automatic exchange of information and multilateral agreements, were created in an attempt to mitigate the risks that governments identify with global wealth.

With regard to the exchange of information, it is important to note that a distinction is made between individual and entity accounts, as well as between pre-existing accounts and new accounts. It is also more expensive and difficult to obtain information on existing clients than on clients who are newly registered with FIs (OECD, 2014:10).

It is vital that the countries between which information is exchanged must have the correct controls in place to ensure the consistency of the information provided to all the countries that that have requested it (OECD, 2014:10).

The expected result for the exchange of information, whether related to finance or to tax, is to improve compliance within a country by utilising the information received from the countries with which agreements have been signed (OECD, 2014:7).

For the due diligence and the exchange of information to be effective, a common reporting standard needs to be met by all the participating institutions and entities, and subsequently shared with the countries involved. The common standard will ensure the overall alignment of the information exchanged with regard to the quality and the interests of the countries involved, and the countries exchanging information will know exactly what information to expect (OECD, 2014:7).

From the above it is evident that countries and tax authorities are constantly on the lookout for effective ways to combat tax practices that are robbing them of revenue. By countries working together, they are slowly eliminating jurisdictions that were once viewed as favourable tax jurisdictions.

The following chapter will provide a detailed comparison of how legislation, agreements and country-by-country reporting are used in the USA, the UK and SA.

CHAPTER 3:
A COMPARATIVE STUDY OF LEGISLATION, AGREEMENTS AND COUNTRY-BY-COUNTRY REPORTING IN THE UNITED STATES OF AMERICA, THE UNITED KINGDOM AND SOUTH AFRICA

3.1 INTRODUCTION

The OECD created a framework for tax transparency that has two main focal points. First, there is the exchange of information, which is split between the exchange of financial information and the exchange of tax information. The CRS governs the exchange of financial information while the TIEA governs the exchange of tax information. Both methods of sharing information are based primarily on formal agreements between countries. The CRS involves information that requires certain financial institutions[9] (FIs) such as banks to report to local tax authorities on all accounts that belong to foreign holders.[10] The local tax authorities then share the information with the tax authority in the country in which the identified foreign holder of those accounts is a tax resident (Burchner, Taylor & Dames, 2016:1; Deloitte LLP (UK), 2014:20).

Then there is CBCR, which was created to provide tax authorities with detailed data about a multinational entity (MNE) group that operates in various countries around the world. The data to be reported includes revenue, income, taxes and indicators of economic activities (i.e. the average number of employees). This report has to be submitted to the tax authority in which the ultimate parent entity is tax resident (KPMG (South Africa), 2017:1).

The tax authority that receives the initial CBC report from the MNE's ultimate parent entity would subsequently distribute the report to the tax authorities with whom there is an existing MCAA and with which the MNE also has dealings. This report would enable tax authorities to assess the transfer pricing (TP) risk of MNEs based in their country (KPMG - South Africa, 2017:1).

[9]A financial institution would be defined as a custodial institution, depository institution, investment entity or specified insurance company (Moore Stephens LLP - London, 2016:8).
[10] The local tax authority would be the tax authority where the bank reporting is physically located.

Tax authorities have come together and have signed certain agreements that will facilitate the exchange of information. Agreements such as the Qualifying Competent Authority Agreement will be used to exchange CBC reports (OECD, 2016a:14-15).

In order to ensure the effective sharing of this information, agreements need to be signed, which accounts for the increase in bilateral agreements. These agreements also determine the scope of the sharing and the procedures to be followed (Lough & Enniskillen, 2013:6-7).

The legislation that has been put into place, the agreements that have been signed between various countries and the CBCR requirements that need to be implemented to enhance tax transparency will be discussed below.

3.2 LEGISLATION

'The era of banking secrecy is over.' G20 Leaders in London, April 2009 (Neslund, 2009:2; Tax Justice Network, 2014:1).

With the spotlight being shone on tax transparency and the exchange of information, FATCA is being used as the point of reference for the exchange of information. This bill was signed into law in 2010 by the Obama administration (Deloitte LLP - UK, 2014:2).

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) determines when Securities Exchange Commission Companies[11] need to disclose payments made by those companies and their subsidiaries to foreign countries, specifically by country and by project (Alexander, 2013:546).

3.2.1 USA

3.2.1.1 FATCA

[11] Securities Exchange Commission Companies are companies that have been registered on the New York Stock Exchange.

FATCA was passed in an attempt to discontinue the practice of US citizens holding off-shore assets with the main objective of evading tax in the USA, and identifying persons opening off-shore accounts. FATCA requires FIs to identify accounts held by USA citizens in other jurisdictions and report them to the Internal Revenue Service (IRS). Non-compliance with regard to the reporting requirements would lead to a withholding tax of 30% of income sourced in the USA (Deloitte LLP - UK 2014:11; Zorea & Weiner, 2015:3).

With regard to FATCA, information that is reportable to the IRS on a USA citizen and a legally incorporated entity in the USA can be found below.

3.2.1.1.1 Reportable information for an individual

- Name of the USA citizen
- Address of the person
- Tax identification number (TIN) in the USA
- The closing balance as at 31 December or immediately before the account was closed
- Total gross amount paid or credited to the account during the year[12] (Zorea & Weiner, 2015:5).

3.2.1.1.2 Reportable information for a legally incorporated entity

A legally incorporated entity in the US will be required to disclose the information below:

- Name of the entity
- Address of the entity
- TIN of the entity
- The closing balance as at 31 December or immediately before closure of the account
- Total gross amount paid or credited to the account during the year[12] (Zorea & Weiner, 2015:5).

[12] The requirement applied from 2015 and onwards.

3.2.1.1.3 Reportable information for a controlling owner of passive non-financial foreign entities (NFFEs)

In the case of US owners known as controlling holders,[13] who are American citizens receiving passive income, the NFFE will be required to disclose the following information:

- Name of the controlling owner
- Address of the controlling owner
- The TIN of the controlling owner
- The TIN of the entity
- The closing balance as at 31 December or immediately before the account was closed
- Total gross amount paid or credited to the account during the year[12] (Zorea & Weiner, 2015:5).

Non-compliance may result in penalties and/or imprisonment. This is fully dependent on the rules of the country in which the non-compliance occurred (Zorea & Weiner, 2015:6).

3.2.1.2 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)

The Dodd-Frank Act was passed by the Obama administration in July 2010 to regularise the extractive industry.[14] As such it has put pressure on entities to be transparent with the annual disclosure of their tax information. Taxes could include payments such as withholding taxes on royalties and dividends, as well as other possible taxes on production (Deloitte, 2016:19; Dixon *et al*., 2013:9, 14; Penning, Schoeman, Smit, Steyn, & Stiglingh, 2016:3, 5).

[13] A controlling holder being an American citizen would be the holder holding more than 10% of the shares in an NFFE.

[14] The Dodd-Frank Street Reform and Consumer Protection Act requires entities that are subject to SEC rules and are in the oil, gas or minerals industry (extractive industry) to annually disclose the type and amount of payments (equal to or more than $100k in aggregate or alone) by project and by country (EY LLP, 2013:1).

Entities[15] are required to disclose all tax payments made or received alongside corporate income tax. Disclosures made include taxes paid to other countries and the disclosure of taxes for each project worked on (Dixon *et al*., 2013:27; Penning *et al*., 2016: 5, 7).

The information is publicly reported. The following information must be disclosed:

- The countries in which the firm operates
- Intercompany sales that take place within the group
- Corporate income tax (CIT) paid to other countries
- Other taxes resulting from income and profit[16] (Deloitte, 2016:19).

3.2.2 UK

3.2.2.1 Common reporting standards (CRS)

CRS, which is a reporting requirement for FIs[17] (i.e. banks) that have to report financial information to local tax authorities, was developed by the OECD. What needs to be determined is where the taxpayer is actually tax resident. Once it has been determined that the taxpayer is a UK tax resident who banks outside of the UK or has requested offshore services or advice, the details of that taxpayer's foreign bank account may be required by the foreign tax authority[18] in the jurisdiction where the bank account is held. The foreign tax authority who has obtained the information from the FIs may share the information with the Her Majesty's Revenue and Customs (HMRC), as the taxpayer is a UK tax resident (Zorea & Weiner, 2015:11).

Reportable information relating to the identified taxpayer:

- Name
- Address
- Date of birth

[15] The example used in this paragraph is specifically related to oil, gas or mineral entities (Penning *et al*., 2016:5, 7; Dixon *et al*., 2013:27).
[16] The income and profit being described specifically excludes corporate income tax (Deloitte, 2016: 19).
[17] An example of a Financial Institution (FI) would be a bank, which is the example regularly used in this study.
[18] The foreign tax authority would be in the jurisdiction where the UK tax resident has a foreign account.

- Place of birth
- TIN(s) and the country/countries of residence
- Account balance as at 31 December 31
- Total gross amount paid or credited to the account during the year[19] (Zorea & Weiner, 2015:11).

Information that is reportable for controlling owners of passive NFFEs:

- Name
- Address
- Jurisdiction(s) of residence
- TIN(s) of the entity
- TIN(s) of the controlling owner
- Date of birth of the controlling owner
- Place of birth of the controlling owner
- Account balance as at 31 December
- Total gross amount paid or credited to the account during the year[19] (Zorea & Weiner, 2015:11)

Non-compliance and/or the provision of false information may result in penalties being raised by governments and/or criminal prosecution (Zorea & Weiner, 2015:12).

CRS, which is the structure that was created by the OECD specifically for the automatic exchange of financial information, is typically in the form of a multilateral agreement model. The UK is one of 44 countries that committed to implementing this method of tax transparency. Tax authorities in the country from which the income is sourced will share taxpayer information with the taxpayer's country of tax residence. This will hopefully decrease tax evasion through tax planning schemes (Deloitte LLP - UK, 2014:18).

For countries that agreed to adopt the CRS, the scope includes accounts that were opened prior to 31 December 2015, known as pre-existing accounts, and new accounts, which include all accounts opened after 31 December 2015. When a new account is opened, the

[19] If the account has been closed, the balance as on the date of closing (Zorea & Weiner, 2015:11).

record of tax residence is determined upon creation of the account (Deloitte LLP - UK, 2014:19).

The process of performing a due diligence on the 'pre-existing accounts' that are deemed to be of a significant value would need to be completed by 31 December 2016. The deadline for accounts that are regarded as non-significant in value is 31 December 2017 (Deloitte LLP - UK, 2014:19).

It is expected that the first exchange of financial information on both new accounts and pre-existing accounts of significant value will take place at the end of September 2017, whereas the pre-existing accounts with non-significant value will first be exchanged either by the end of September in either 2017 or 2018. The timing will be altogether dependent on when these accounts are identified by the FIs (Deloitte LLP - UK, 2014:19).

3.2.2.2 The Internal Tax Compliance (Client Notification) Regulations 2016

The UK's International Tax Compliance (Client Notification) Regulations 2016 (the Regulations) require that certain FIs and advisers who have provided clients who are UK tax residents with advice or services around tax, legal and/or finance that relate specifically to a foreign jurisdiction, be reported. This Regulation became law on 20 September 2016 and non-compliance will result in penalties of up to £3k (Burchner *et al*., 2016:1).

In order to promote compliance, FIs will need to perform a due diligence in order to identify and notify the respective clients and provide them with information regarding the CRS before August 2017 (Burchner *et al*., 2016:1).

3.2.2.3 Disclosure of tax avoidance schemes (DOTAS)

The regulation[20] relating to disclosure provides a framework for the FIs with regard to their agreements around the exchange of information with the UK and the Isle of Man, Jersey, Guernsey and Gibraltar (HSBC, 2016:1).

[20] The regulation specifically mentioned in this section relates only to Disclosure of Tax Avoidance Schemes (DOTAS).

DOTAS was created to assist HMRC with identifying tax planning that provides a tax advantage to the client[21] and may be deemed to be tax-aggressive or tax-avoidance schemes. FIs[22] and any other entities that provide tax services qualify as promoters. Promoters are required to disclose details to HMRC around tax planning where a tax benefit is to be obtained by the client. The client is required to disclose information if the promoter is based outside the UK, the tax planning is done in-house, the promoter is a lawyer, or the promoter failed to make the required disclosure. In the case of such failure, the onus to make the necessary disclosure falls on the client.**Error! Bookmark not defined.** The required disclosure to HMRC needs to be lodged within five days from the first time the tax planning arrangement is made available to the client (RossMartin, 2016:1, 2).

Should the tax planning schemes highlighted to HMRC be considered aggressive or unfair, the arrangements will be terminated. Non-compliance would result in penalties being raised (RossMartin, 2016:1).

The taxes that fall within the disclosure net of DOTAS are all income taxes, national insurance, foreign and local stamp duty and land taxes (SDLT), value-added tax (VAT) and some settlements where lifetime inheritance tax (IHT) was avoided, thus creating a tax advantage (RossMartin, 2016:1).

3.2.2.4 CDOT (UK FATCA)

Automatic disclosures made to the HMRC by FIs with regard to reportable accounts held by UK taxpayers is known as Crown Dependencies and Overseas Territories (CDOT) or UK FATCA (Deloitte LLP - UK, 2014:3). The Crown dependencies are made up of the Isle of Man, Guernsey and Jersey, while the overseas territories are made up of the Cayman Islands, the British Virgin Islands, Bermuda, Anguilla, the Turks and Caicos Islands, Montserrat and Gibraltar (including other overseas territories) and was signed into law (HSBC, 2016:1; Pinsent Masons, 2016:1).

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[21] The user of what is defined as a “scheme” and/or tax planning who has used a promoter (RossMartin, 2016:1-2).

[22] Seen in relation to DOTAS, FIs would be banks, security houses and anyone providing services that meet the definition of a promoter (RossMartin, 2016:1-2).

Although in 2016 there is no withholding tax penalty for failure to comply in 2014 and 2015, fines may be imposed. As of 2017, CDOT will be phased out and will be replaced by CRS (Zorea & Weiner, 2015:7).

The CDOT agreements that were signed mimicked the inter-governmental agreements (IGAs) signed by the USA as a result of FATCA, with the following fundamental differences:

- UK FATCA impacts only FIs in the UK and CDs[23]/OTs[24].
- Reportable persons are defined with reference to residency rather than to citizenship and residency.
- The first reporting deadline was 31 May 2016.
- There is an alternative reporting regime for non-domiciled[25] UK residents.
- No concept of non-participating FIs or recalcitrant account holders exists.
- There are no withholding requirements.
- There is currently no additional registration requirement
- There is no definition for a holding company or a treasury centre (Deloitte LLP - UK, 2014:6).

3.2.3 SA

3.2.3.1 Common reporting standards (CRS)

The CRS scope and framework is the same in South Africa as it is in the UK. No amendments have been made in SA. Please refer to Figure 5 below for the comparison.

[23] Crown Dependencies, the CD from CDOT
[24] Overseas Territories, the OT from CDOT
[25] A non-domiciled UK resident would be a UK resident whose permanent home is located outside of the UK. Your domicile is the country your father considered to be his permanent home at the time you were born (HMRC, 2017:1).

Figure 5: CRS scope and framework in the UK and SA

Jurisdiction	Committed to first exchange in	Primary legislation	Secondary legislation	Guidance	List of low risk non-reporting FIs and excluded accounts	Domestic Reporting Format	Wider Approach
South Africa	2017	✓	✓	✓	✓	✓	✓
United Kingdom	2017	✓	✓	✓	✓	✓	✓

Source: OECD, 2017a:2

3.2.3.2 Tax Administration Act (TAA)

The TAA, which came into effect on 1 October 2012, was designed to provide South Africans with a better understanding of the Tax Administration Law and to align SARS with international best practices (Musviba, 2012:1).

In 2104, the TAA amended the definition of an international tax agreement, even though the amendment is deemed to have been implemented when the TAA came into effect in 2012. The amendment specifically mentions an agreement between tax authorities with a view to exchanging information (Tax Administration Act No. 28 of 2011).

The definition of the international tax standard was inserted in 2015. The International tax standard includes the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters, the CBCR Standard for MNEs that are specifically identified by the minister, as well as any other international standards for the exchange of tax-related information between countries specified by the Minister of Finance in SA (Tax Administration Act No. 28 of 2011).

The above shows how SA is using current legislation to embed tax transparency into SA's tax practices.

3.2.3.2.1 Third party returns (section 26)

In 2014, section 26 of the TAA was amended to include subsection 2, which was deemed to have been implemented as of 2012, when the TAA became effective. Subsection 2(c)

was included in 2015. Section 26(2)(c) makes specific mention of providing information required in tax returns that comply with due diligence requirements, international tax agreements or the international tax standard (Tax Administration Act No. 28 of 2011).

3.2.3.2.2 Reportable and excluded arrangements (sections 35 and 36)

A reportable arrangement is an arrangement that needs to be reported to SARS. Section 35, which specifically mentions the General Anti-avoidance Rules (GAAR) section in the Income Tax Act No. 58 of 1962 (section 80C), is a mechanism used by SARS to identify arrangements that may lack commercial substance. Other reportable arrangements are deductions that would be acceptable for tax purposes, but not for financial accounting purposes, or income that would not be included in taxable income, but is included in financial income that creates a tax benefit (Tax Administration Act No. 28 of 2011).

In 2016, the Commissioner for SARS[26] compiled a list of reportable arrangements from which certain arrangements were excluded. The following are the reportable arrangements listed in the Government Gazette Vol. 608, No. 39659 of 3 February 2016:

- A 'hybrid equity instrument'[27]
- Share buyback for one or more shareholders for an aggregated amount exceeding R10m on or after 3 February 2016. The company is required to issue shares within 12 months of entering into that arrangement.
- A contribution or payment made by a SA resident on or after 16 March 2015 to a non-resident trust in which he/she has or acquires a beneficial interest, and the amount of all contributions or payments, whether made before or after 16 March 2015, or the value of that interest that exceeds or is reasonably expected to exceed R10m, while specifically excluding any contributions of payments made to, or beneficial interest acquired in:

    - any portfolio comprised in any investment scheme defined in the definition of a company as per the Income Tax Act No. 58 of 1962 (ITA); or

[26] TS Moyane, who was the Commissioner for SARS in 2016, signed off the Government Gazette Vol. 608, No. 39659, dated 3 February 2016.
[27] A hybrid equity instrument is any share other than an equity share if the issuer of the share is obliged to redeem that share in whole or in part; or that share may, at the option of the holder, be redeemed in whole or in part (Income Tax Act No. 58 of 1962).

- any foreign investment entity defined in the ITA.

- Where one or more individuals acquire a controlling interest (including acquisition of shares, voting rights or a combination of both) in a company on or after 3 February 2016 and that interest:
  - has or is expected to carry forward an assessed loss balance in excess of R50m from the year of assessment immediately preceding the year of assessment in which the controlling interest is acquired, or an assessed loss of R50m in the year of assessment is obtained or expected in the year of assessment when the controlling interest is acquired; or
  - a direct or indirect interest is held in a company (as referred to above).
- Where an amount that exceeds or is expected to exceed R5m has been paid or becomes payable to a foreign insurer by a SA resident and the amount payable on or after 16 March 2016 in any form to any beneficial owner is held by a third party on behalf of the foreign insurer
- Where a SA resident or non-resident who has a PE in SA that relates to the arrangement, and that arrangement relates to consultancy, construction, engineering, installation, logistical, managerial, supervisory, technical or training services in terms of which:
  - a non-resident, an employee, an agent or a representative person was or is physically present in SA or is anticipated to be physically present in SA in connection with or to specifically render those services, and the expenditure that was incurred by those services on or after 3 February 2016 and exceeds or is expected to exceed R10m in aggregate and does not qualify as remuneration in terms of the Fourth Schedule in the ITA (South African Revenue Services 2016:4-7).

Section 36 mentions arrangements that are specifically out of scope (Tax Administration Act No. 28 of 2011).

An arrangement that would ordinarily be included under s35 in the TAA is specifically excluded if the aggregated tax benefit does not exceed R5m. With regard to an arrangement where a deduction applies for tax purposes, but not for accounting purposes, or where an amount would be considered income for accounting purposes and not for tax purposes, i.e. where the tax benefit is not the main benefit obtained from the arrangement, it will not be reportable (South African Revenue Services, 2016:8).

3.2.3.2.3 Request for relevant material (section 46)

This section gives SARS the authority to obtain information[28] from the taxpayer, a third party or a connected person who can be located outside SA either by name or by SARS identity number. If SARS has requested the information from a third party for administrative purposes, it should be provided within a reasonable[29] time. However, should the information be requested from a connected person, the information requested should be submitted within 90 days in a format as request by SARS and the connected person should only provide information that would normally be expected to be in the possession of that connected person (SARS, 2015:1).

SA has not drafted new legislation specifically to incorporate tax transparency; however, it has amended and continues to amend current legislation by adding subsections and incorporating new definitions. Section 26 of the TAA instructs FIs to comply with international standards, and Section 46 gives a senior SARS official the authority to contact a non-resident party connected to a SA taxpayer to obtain information necessary for administrative purposes (Lavinia *et al*., 2015:4; South African Treasury, 2011:44, 54, 55).

3.3 AGREEMENTS

Information-sharing agreements 'will bring about an end to the era of offshore accounts … being used for tax evasion' (Timothy Geithner (Neslund, 2009:2)).

Current agreements for the exchange of information between parties can be either bilateral or multilateral. The first bilateral agreements would be the DTAs[30] (also known as income tax treaties). Then we have the TIEA, which is a bilateral agreement between two countries to exchange types of information specified in the agreement. Information will be provided only upon request, and such request must specify the nature of the information required, the

[28] Information from SARS can be obtained orally or in writing (SARS, 2015:1).
[29] The term reasonable refers to actions that are justifiable under certain circumstances and in connection with a specific matter when dealing with administrative fairness. This is effected in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) from the right to administrative justice documented in the Constitution of the Republic of South Africa, 1996 (SARS - Legal and Policy Division, 2013:10).
[30] DTAs are not within the scope of this study and will not be discussed in detail.

individual involved and evidence to support the request. The shared information should be limited to tax information that may be of a criminal or civil nature and the country requesting the information must provide evidence that attempts have been made to locate the information through other avenues (Higgs & Johnson, 2014:3; Neslund, 2009:2; Tax Justice Network, 2009:1; Tax Justice Network - Tax Justice Briefing, 2009:1; UK Government, 2014:1).

TIEAs are intended for countries where the creation of a DTA is not considered appropriate, mainly because they have no or low tax on income or profits. While TIEAs are much narrower in scope than DTAs, they are more detailed on the topic of the information to be exchanged. TIEAs cover between 20 and 30 pages detailing the scope, the timing and the process that will be followed to exchange the agreed-upon information. Currently TIEAs are based on an OECD Model Agreement published in 2002 by the Global Forum on Taxation, an institution established in 2001 as a result of the OECD's Harmful Tax Practices Project (Deloitte - Russia, 2016:3, 4; Tax Justice Network, 2009:2).

Another type of bilateral agreement being signed is the FATCA. These agreements, also known as IGAs (inter-governmental agreements, i.e. between the USA government and another government) refer to when another country has agreed to exchange information on off-shore accounts held by USA citizens. The IGAs are split into two models: Model 1 is structured so that foreign financial institutions (FFIs) will report information directly to the local tax authorities, who will then share it directly with the IRS. Model 2 is where the FFI will report directly to the IRS (The Investement Association, 2014:1; Thomson Reuters, 2013:1).

Although multilateral agreements have been around since 1988, they were initially only available to a select few, such as the OECD and EU members. However, on 1 June 2011 this category of agreement was made available for use by all countries (Panayi, 2015:2). A Multilateral Convention on mutual assistance provides the basis for the exchange of information through multilateral agreements. This convention explains the scope of the information that should be shared, the timing with regard to sharing and the confidentiality treatment of the information being shared (Panayi, 2015:24).

Since the worldwide introduction of MCCA and the release of CRS, more than 40 countries have committed to this form of agreement (Deloitte LLP - UK, 2014:3).

3.3.1 United States of America

3.3.1.1 Multilateral agreements (MCCAs)

The USA has committed to the multilateral exchange of information that falls within CRS, as announced by the OECD on 6 May 2014 (Deloitte LLP - UK, 2014:3). However, at the time this research was conducted, no literature could be found to confirm the signing by the USA of any multilateral agreements.

3.3.1.2 Bilateral agreements

3.3.1.2.1 Tax information exchange agreements (TIEAs)

Table 3 below contains a list of countries with which the USA has signed TIEAs, which may or may not be in force, as well as the dates of signature (where available).

Table 3: List of countries that have signed a TIEA agreement with the USA

Country	Date of signature and/or coming into force
Antigua and Barbuda	6 December 2000
Aruba	21 November 2003
Bahamas	25 January 2002
British Virgin Islands	3 April 2002
Cayman Islands	27 November 2001
Cyprus	NP*[31]
Dominica	NP*
Gibraltar	31 March 2009
Guernsey	19 September 2002
Isle of Man	2 October 2002
Jersey	4 November 2002
Latvia	NP*

[31]NP* - no dates provided in the information obtained for this study

Liechtenstein	8 December 2008
Luxembourg	NP*
Marshall Islands	NP*
Monaco	8 September 2009
Netherlands Antilles	17 April 2002
Panama	30 November 2010

Source: GWS Group, 2017:3-4; OECD, 2015d:5-6; OECD, 2017e:1

Key: NP* – Not provided

3.3.1.2.2 FATCA – IGAs with the USA

All IGAs will involve FFIs[32] locating and identifying accounts that belong to American citizens and/or foreign entities in which American citizens own a substantial interest. This information has to be reported back to the USA. An IGA does not affect any other agreements, such as DTAs or TIEAs that have been signed with the USA (IRS, 2017:1; US Department of the Treasury, 2017:1).

Table 4 below contains the names of countries that have signed IGAs with the USA, which may or may not be in force.

[32] FFIs will only be required to locate and identify accounts if they meet the definition as per the FATCA legislation.

Table 4: Countries that have signed IGAs with the USA

Country	Country	Country	Country
Algeria *	Czech Republic *	Jamaca *	Qatar *
Angola *	Denmark *	Japan ^	Romania *
Anguilla *	Dominica *	Jersy *	San Marino ^
Antigua and Barbuda *	Dominican Republic *	Kazakhstan *	Saudi Arabia *
Armenia ^	Estonia *	Kosovo *	Serbia *
Australia *	Finland *	Kuwait *	Seychelles *
Austria ^	France *	Latvia *	Singapore *
Azerbaijan *	Georgia *	Liechtenstein *	Slovak Republic *
Bahamas *	Germany *	Lithuania *	Slovenia *
Bahrain *	Gibraltar *	Luxembourg *	South Africa *
Barbados *	Greece *	Macao ^	South Korea *
Belarus *	Greenland *	Malaysia *	Spain *
Belgium *	Grenada *	Malta *	St. Kitts and Nevis *
Bermuda ^	Guernsey *	Mautitus *	St. Lucia *
Brazil *	Guyana *	Mexico *	St. Vincent and the Grenadines *
British Virgin Islands *	Haiti *	Moldova ^	Sweden*
Bulgaria *	Holy See *	Montenegro *	Taiwan ^
Cabo Verde *	Honduras *	Monserrat *	Thailand *
Cambodia *	Hong Kong ^	Netherlands *	Trinidad and Tobago *
Canada *	Hungary *	New Zealand *	Tunisia *
Cayman Islands *	Iceland *	Nicaragua ^	Turkey *
Chile ^	India *	Norway *	Turkmenistan *
China (People's Republic of) *	Indonesia *	Panama *	Turks and Caicos Islands *
Colombia *	Iraq ^	Paraguay ^	Ukraine *
Costa Rica *	Ireland *	Peru *	United Arab Emirates *
Croatia *	Isle of Man *	Philippines *	United Kingdom *
Curacao *	Isreal *	Poland *	Uzbekistan *
Cyprus *	Italy *	Portugal *	Vietnam *

Source: US Department of the Treasury, 2017:1–3

Keys: * – IGA under Model 1

^ – IGA under Model 2

3.3.2 United Kingdom

3.3.2.1 Multilateral agreements (MCAAs)

On 27 January 2016, the UK signed the MCAA on the exchange of CBC reports, as well as the MCAA on the automatic exchange of financial account information.[33] The first exchange was intended to take place in September 2017 (OECD - CBC, 2017:1; OECD 2016c:3).

3.3.2.1.1 CBC Reports Multilateral Agreement

Table 5 below contains a list of signatories (as on 26 January 2017) that decided to participate in the MCAA on the exchange of CBC reports. Signatory dates are included.

Table 5: Signatories of the MCCA on the exchange of CBC reports

[33]To avoid duplication, refer to the corresponding table (Table 7) on page 45 in the SA section of this chapter to avoid duplication.

Country	Date of signature	Country	Date of signature
Argentina	30 June 2016	Italy	27 January 2016
Australia	27 January 2016	Japan	27 January 2016
Austria	27 January 2016	Jersey	21 October 2016
Belgium	27 January 2016	Korea[34]	30 June 2016
Bermuda	15 April 2016	Latvia	21 October 2016
Brazil	21 October 2016	Liechtenstein	27 January 2016
Canada	11 May 2016	Lithuania	25 October 2016
Chile	27 January 2016	Luxembourg	27 January 2016
China (People's Republic of)	12 May 2016	Malaysia	27 January 2016
Cost Rica	27 January 2016	Malta	26 January 2017
Curacao	30 June 2016	Mauritius	26 January 2017
Cyprus	1 November 2016	Mexico	27 January 2016
Czech Republic	27 January 2016	Netherlands	27 January 2016
Denmark	27 January 2016	New Zealand	12 May 2016
Estonia	27 January 2016	Nigeria	27 January 2016
Finland	27 January 2016	Norway	27 January 2016
France	27 January 2016	Poland	27 January 2016
Gabon	26 January 2017	Portugal	27 January 2016
Georgia	30 June 2016	Russia Federation	26 January 2017
Germany	27 January 2016	Senegal	4 February 2016
Greece.	27 January 2016	Slovak Republic	27 January 2016
Guernsey	21 October 2016	Slovenia	27 January 2016
Hungary	1 December 2016	South Africa	27 January 2016
Iceland	12 May 2016	Spain	27 January 2016
India	12 May 2016	Sweden	27 January 2016
Indonesia	26 January 2017	Switzerland	27 January 2016
Ireland	27 January 2016	United Kingdom	27 January 2016
Isle of Man	21 October 2016	Uruguay	30 June 2016
Israel	12 May 2016		

Source: OECD, 2017d

3.3.2.1.2 European Union Savings Tax Directive

[34] Korea refers to South Korea

The EU Savings Tax Directive[35] is an agreement between EU member countries to share information around interest earned by EU residents in EU countries other than those in which they reside. This directive came into effect in July 2005 and will apply to all countries that decided to participate[36] in this initiative. The information that is exchanged relates to the interest that has been paid in any EU or other participating country[37] to a person who is a resident[38] of a different EU country. The exchange of information takes place between tax authorities and makes it possible for them to reconcile the interest declared by the EU resident. Tax authorities rely on the paying agent[39] to verify the residency of the person receiving the interest (NatWest, 2011:2; Tax Justice Network, 2008:1-2).

3.3.2.2 Bilateral agreements

3.3.2.2.1 Tax information exchange agreements (TIEAs)

Table 6 below contains a list of countries with which the UK has signed TIEAs, as well as the dates of signature (if available). These agreements may or may not be in force.

Table 6: List of countries that have signed TIEA agreements with the UK

Country	**Date of signature and / or coming into force**
Anguilla	20 July 2009
Antigua and Barbuda	18 January 2010
Aruba	5 November 2010
Bahamas	29 October 2009
Belize	25 March 2010
Bermuda	4 December 2007
British Virgin Islands	29 October 2008
Cayman Island	NP*[31]
Cyprus	NP*

[35] Even though the UK has decided to exit the EU, it was still part of the EU at the time this study was undertaken and therefore EU tax transparency initiatives are included in this study.
[36] Some countries that decided to participate in the European Savings Directive are Switzerland, Jersey, Guernsey and the Isle of Man (NatWest 2011:2).
[37] Not necessarily an EU member country.
[38] A person is generally understood to be an individual (excluding legal entities and trusts) who earns interest from cash deposits or investments in his/her own name. However, dividends, equity shares, salary and pension payments are exempt (NatWest 2011:2-3; Tax Justice Network 2008:2)
[39] In the case of the EU Savings Tax Directive, the paying agent is usually a bank (Tax Justice Network 2008:2).

Dominica	31 March 2010
Gibraltar	27 August 2009
Grenada	31 March 2010
Guernsey	20 January 2009
Hong Kong	NP*
Isle of Man	29 September 2008
Jersey	10 March 2009
Latvia	NP*
Liberia	1 November 2010
Liechtenstein	11 August 2009
Luxembourg	NP*
Marshall Islands	NP*
Mauritius	NP*
Netherlands Antilles	10 September 2010
Panama	NP*
San Marino	16 February 2010
Singapore	NP*
Saint Lucia	18 January 2010
St Kitts& Nevis	18 January 2010
St. Vincent and Grenadines	18 January 2010
Turks & Caicos Islands	23 July 2009

Source: GWS Group 2017:2–6; OECD 2015d:2, 4-6

Keys: NP* – Not provided

3.3.3 South Africa

3.3.3.1 Multilateral agreements (MCCAs)

SA signed the MCAA[40] on the exchange of CBC reports[41] and the MCAA on the automatic exchange of financial account information on 27 January 2016. The first exchange was to take place in September 2017 (OECD - CBC 2017:1; OECD 2016c:3).

The signatories to the MCCAs relating to the automatic exchange of information (AEoI), which are agreements that fall under the CRS, are listed in Table 7 below.

[40] Refer to the corresponding Table 5 on page 42 in the UK section of this Chapter to avoid duplication.
[41] Refer to section 3.4 of this study for more information on CBCR.

Table 7: Signatories of the MCAA for the AEoI

Country	Country	Country	Country
Albania ^	Croatia *	Isle of Man *	Poland *
Andorra ^[42]	Curacao *	Italy *	Portugal *
Anguilla *[43]	Cyprus *	Japan ^	Romania *
Antigua and Barbuda ^	Czech Republic *	Jersey *	Russian Federation ^
Argentina *	Denmark *	Korea *[34]	St Kitts and Nevis ^
Aruba ^	Estonia *	Kuwait ^	St Lucia ^
Australia ^	Faroe Islands *	Latvia *	St Vincent and the Grenadines ^
Austria ^	Finland *	Liechtenstein *	Samoa ^
Barbados *	France *	Lithuania *	San Marino *
Belgium *	Germany *	Luxembourg *	Saudi Arabia ^
Belize ^	Ghana ^	Malaysia ^	Seychelles *
Bermuda *	Gibraltar *	Malta *	Sint Maarten ^
Brazil ^	Greece *	Marshall Islands ^	Slovak Republic *
British Virgin Islands *	Greenland *	Mauritius ^	Slovenia *
Bulgaria *	Grenada ^	Mexico *	South Africa *
Canada ^	Guernsey *	Monaco ^	Spain *
Cayman Islands *	Hungary *	Montserrat *	Sweden *
Chile ^	Iceland *	Nauru ^	Switzerland ^
China (People's Republic of) ^	India *	Netherlands *	Turkey[44]
Colombia *	Indonesia ^	New Zealand ^	Turks and Caicos Islands *
Cook Islands ^	Ireland *	Niue *	United Kingdom *
Costa Rica ^	Israel ^	Norway *	Uruguay ^

Source: OECD 2016c:1–3; OECD 2017c:1–3

Keys: ^ – Information will be exchanged for the first time in September 2018.

* – Information will be exchanged for the first time in September 2017.

[42] Countries that expect to be included in the exchange of financial account information for the first time in September 2018, as on 2 November 2016

[43] Countries that expect to be included in the exchange of financial account information for the first time in September 2017, as on 2 November 2016

[44] Turkey became a signatory in April 2017.

3.3.3.2 Bilateral agreements

3.3.3.2.1 Tax information exchange agreements (TIEAs)

Table 8 below contains a list of countries with which SA has signed TIEAs, which may or may not be in force, as well as the date of signature (if provided).

Table 8: List of countries that have signed a TIEA agreement with the SA

Country	**Date of signature**
Bahamas	14 September 2011
Barbados	19 January 2015
Belize	23 May 2015
Bermuda	6 September 2011
Cayman Islands	23 February 2012
Cook Islands	8 January 2015
Cyprus	NP*[31]
Dominica	NP
Gibraltar	21 July 2013
Grenada	10 March 2017
Guernsey	26 February 2012
Jersey	29 February 2012
Liberia	7 July 2013
Liechtenstein	23 May 2015
Luxembourg	NP
Mauritius	NP
San Marino	28 January 2012
Seychelles	NP
Singapore	NP
St. Kitts and Nevis	18 February 2017

Source: GWS Group, 2017:2–6; SARS, 2017a:3

Keys: NP* – Not provided

Although SA has already signed the multilateral agreement for CBC reports, it still needs to finalise bilateral agreements with the three countries listed in Table 9 below (SARS 2017b:1).

This table seems somewhat strange to me. Could one not delete it and simply state: SA intends to conclude bilateral agreements regarding CBC reports with three countries, namely Panama, Singapore and the United States of America (SARS 2017b:1).

3.4 COUNTRY-BY-COUNTRY REPORTING (CBCR)

'Increased transparency regarding the activities of institutions, and in particular regarding profits made, taxes paid and subsidies received, is essential for regaining the trust of citizens of the Union in the financial sector' (European Parliament, 2013:6).

The creation of Action 13 and the inclusion of the master and local files was an attempt by the OECD to enhance tax transparency for administrative purposes, specifically TP documentation (PwC - Global Tax Insights, 2015:1).

The master file provides detailed information on the MNE group as a whole, while the local file is more detailed and describes the various intercompany transactions one would expect to find within the MNE group per country (PwC - Global Tax Insights, 2015:4). The detail assists with the analysis of intercompany transactions that take place within the MNE group (PwC - Global Tax Insights, 2015:4).

The master file will contain details on:

- the organisational structure;
- the business description;
- intangible assets;
- financial activities;
- financial and tax positions; and
- information on PEs within the group (PwC - Global Tax Insights, 2015:4).

3.4.1 USA

On 21 December 2015 the USA's revenue authority, known as the IRS, and the Treasury department[45] released the proposed CBCR regulations template, and the final CBCR regulations were released on 29 June 2016. The effective date was set retrospectively as 30 June 2016 (EY - Global Tax Alert, 2011:1).

Since the OECD's period began on 1 January 2016 and the USA's effective implementation was 30 June 2016, voluntary CBC reporting was allowed between those dates (EY - Global Tax Alert, 2016:1).

The minimum reporting threshold for an ultimate parent entity that is tax resident in the USA has been set at $850m of the annual revenue for the preceding financial and tax year end. Once the minimum reporting threshold has been reached, the ultimate parent company is required to do CBCR. The CBC report[46] must be filed simultaneously with the annual income tax return (EY - Global Tax alert, 2015:1; EY - Global Tax Alert, 2016:1).

The numerical information must be made available in United States dollars (USD). The information obtained to prepare Form 8975 must be the same as the financial information used to prepare the audited annual financial statements (AFSs) (EY - Global Tax Alert, 2015:3).

To date no CBCR-specific penalties have yet been implemented with regard to late submission of Form 8975. The general penalties associated with reporting are the same as those that will be implemented in the case of CBCR (EY - Global Tax Alert, 2015:4).

3.4.1.1 Form 8975 template to be included for each tax jurisdiction

The ultimate parent entity is required to report on income and tax information, as well as economic activity within the MNE group (EY - Global Tax Alert, 2015:2).

Form 8975 has three specific sections that must be completed:

[45] In this section of Chapter 3, the word Treasury will be used when referring to the Department of Treasury in the USA.
[46] The CRC report that needs to be filed together with the annual tax return is called Form 8975 (EY-Global Tax Alert, 2015:1; EY - Global Tax Alert, 2016:1).

- The constituent entity information
- The financial and employee information by tax jurisdiction
- Any additional applicable information (EY - Global Tax Alert, 2016:3).

3.4.1.2 Constituent entity template for each tax jurisdiction

Constituent information will be completed by the ultimate parent entity for each constituent in the MNE group and will include:

- the complete legal name;
- the country of tax residence;
- the country where the entity is managed or incorporated if different from country of tax residence;
- the tax identification number used by the tax authorities in the entity's tax jurisdiction;
- the main business activities;
- the financial information by tax residency; and
- the employee information by tax residency (EY - Global Tax Alert, 2016:3).

3.4.1.3 Template for stateless entities

The ultimate parent entity will need to report the following information on stateless entities:[47]

- The revenues generated from intercompany transactions
- The revenues generated from third party transactions
- Profit / loss before tax
- The total income tax paid in cash to all tax jurisdictions
- The withholding taxes levied as a result of intercompany transactions
- The total accrued tax expense recorded on taxable profits or losses (only for the period being reported on and excluding deferred taxes or provisions for uncertain tax liabilities)
- The stated capital – (excluding a PE's stated capital, which should be reported in the jurisdiction in which the PE is tax resident)

[47] A stateless entity is an entity that does not have a tax jurisdiction of residence(i.e. a partnership) and does not own or create a PE for CBCR in either the country where it is incorporated, or another country (EY - Global Tax Alert, 2016:3).

- The total accumulated earnings - (excluding a PE's accumulated earnings, which should be reported by the legal entity of which it is a PE)
- The total number of employees on a full-time equivalent basis
- The net book value of tangible assets, excluding cash or cash equivalents, intangibles or financial assets (EY - Global Tax Alert, 2016:3, 4)

3.4.1.4 Template for additional information

The template will contain a section for additional information. This information could include a description of the data sources, information on any changes that were made during the financial and tax year, as well as possible reasons for the changes made (EY - Global Tax Alert, 2015:3).

The USA's regulations do not provide any opportunity for a foreign ultimate parent entity to delegate the reporting requirements to a USA entity. However, an ultimate USA parent entity can delegate the reporting requirements to a foreign constituent entity over which it has direct or indirect control within the MNE group. The entity that files the CBC report needs to maintain all records to support the information provided to the tax authorities (EY - Global Tax Alert, 2016:5).

3.4.1.5 Confidentiality of shared CBC reports

The USA has implemented rules surrounding confidentiality when it comes to the information shared with other tax authorities. Although the USA government is willing to sign bilateral agreements with certain governments to enable the exchange of CBC reports, the information that is shared needs to be treated with the utmost confidentiality and may not be used for any purposes other than to improve the administrative processes concerned with tax. Should this code be violated, the USA government will stop all exchange of information (EY - Global Tax Alert, 2016:5).

3.4.2 UK

In February 2013, data associated with finance and tax was required to be disclosed for each country in which the credit and investment firms operated. This eventually became what is now known as Article 89 of CRD IV (PwC - England, 2014:2).

The UK's economic and finance ministry[48] introduced CBCR requirements through Article 89 of the EU Directive 2013/36/EU. The EU Directive is known as the Capital Requirements Directive IV (CRD IV), which became effective on 1 January 2014 (Investec Bank Plc, 2015:1; PwC - England, 2014:2).

CRD IV was created to gain access to the activities implemented by credit institutions and to simultaneously supervise both the credit institutions and investment firms. The CBCR requirements aim to achieve financial tax transparency for banks and investment firms (Itau BBA International plc, 2014:1).

When the focus shifted to MNEs and cross-border transactions within a MNE group, the UK government issued the draft CBC regulations on 5 October 2015. CBCR became effective on 1 January 2016 (KPMG - London, 2016:5).

A MNE or a group whose revenue exceeded €750m in the previous financial year needs to comply with CBCR. For reporting to be required in the UK, the entity has to be the ultimate parent entity and must be tax resident in the UK (KPMG - London, 2016:4-5).

3.4.2.1 CBC template to be included for each tax jurisdiction

Regarding the CBC report, the ultimate holding entity of the MNE is required to include the following information for each country where it has an enterprise, excluding cash and cash equivalents (Muyaa, 2016:1-2):

- Revenues (split between related and unrelated parties)
- Profit (loss) before income tax
- Income tax paid (including WHT)
- Income tax accrued for the current year
- Stated capital

[48] The UK Finance Ministry is known as HM Treasury (Investec Bank Plc, 2015:1; PwC (England), 2014:2).

- Accumulated earnings
- Number of employees
- Tangible assets other than cash and cash equivalents (KPMG - London, 2016:5).

3.4.2.2 Mandatory additional disclosure

The following has to be disclosed for each tax jurisdiction:

- Name of constituent entities resident in each tax jurisdiction
- Tax jurisdiction of incorporation if different from tax jurisdiction of tax residence
- Business activities for each constituent entity (KPMG - London, 2016:5)

Additional space is provided for entities that feel that they need to further explain figures in the report.

3.4.2.3 Secondary requirements for CBCR and timing

In cases where the ultimate parent entity is not tax resident in the UK, a UK tax resident would need to comply with CBCR and the following criteria will apply:

- The country where the ultimate parent entity for the MNE group does not have the mandate to file a CBC report in the country where the ultimate group entity is tax resident
- No MCAA exists between the UK and the country in which the ultimate parent entity is tax resident, therefore there is no exchange CBC reports.
- A MCAA has been signed where the exchange of CBC reports is not being used effectively.
- The UK allows the ultimate parent entity of the MNE group the option to file the CBC report in the UK (KPMG - London, 2016:5).

The CBC report has to be filed within 12 months after year end. HMRC will share the CBC report with the relevant jurisdictions if a MCAA to exchange CBC reports was signed prior to the report being drafted by the ultimate parent entity.

3.4.2.4 Template for CRD IV entities in scope and timing

Institutions that are within the CBCR scope will need to collate the following information:

- Name(s) of subsidiaries and/or branches
- Nature of activities of subsidiaries and/or branches
- Physical location of subsidiaries and/or branches
- Turnover
- The average number of employees on a full-time basis
- Profit or loss before tax
- Tax on profit or loss
- Public subsidies received (KPMG - London, 2016:11).

Disclosure of specifically the names, nature, physical location, turnover and employees needed to be completed by 1 July 2014, with the exception of the Global Systemically Important Institutions[49] (G-SIIs), which needed to disclose all the information required in the CBCR regulations. By 1 July 2015, looking prospectively, all entities within the scope of the CBCR regulations were required to disclose all information (PwC - England, 2014:2).

I'm not sure that the previous sentence makes sense. Suggestion: The UK was given an opportunity to interpret certain terms in the legislation and increase the scope to suit their economy. However, the UK revenue authority decided to adopt a practical approach in an attempt to ease the foreseen compliance burden for entities while still keeping the essence of what the government was trying to achieve with the introduction of CBCR. As a result no additional requirements were added to the CRD IV requirements when compared with Action 13, which specifically deals with the TP documentation for CBCR. Entities are given the option to add additional disclosure notes to provide more clarity around the main information required (PwC - England, 2014:2&4).

Institutions defined as Capital Requirement Regulation entities are required to comply with the CRD IV reporting obligations. The types of entities that fall within the scope of CRD IV are:

- Prudential Regulation Authority ('PRA')-authorised

[49] An example of a G-SII would be an entity with insurance operations. Certain insurance entities have been identified and put on a list that is annually amended by the Financial Stability Board (FSB) (Financial Stability Board - Press release, 2015:1).

- Banks
- IFPRU investment firm, authorised by the Financial Conduct Authority (FCA)
- Investment firms that offer only basic investment services (such as investment advice, portfolio management, broking and execution of orders) (KPMG - London, 2016:11; PwC - England, 2014:5).

Investment firms that do not hold client money may qualify for exemption from CRD IV. Furthermore, investment firms that are Capital Adequacy Directive (CAD)-exempt or MiFID-exempt and were not covered by the previous CRD legislation are also exempt from CRD IV and therefore fall outside the scope insofar as CBCR is concerned.

To prevent duplication, a UK entity with an ultimate parent entity that has already complied with the CBCR in the UK or European Economic Area (EEA) is not required to file a CBC report (PwC - England, 2014:6).

If the ultimate holding company is located outside the UK and the EU and publishes the CBC report, the UK entity will still be required to report since the information was not reported in the UK (PwC - England, 2014:6).

CBCR relates to reporting for subsidiaries or branches that are located in different countries (PwC - England, 2014:13).

3.4.3 SA

SA has been making gradual strategic changes to implement CBCR. It commenced with the appointment of the Davis Committee (DC) by the Finance Minister in 2013 to assist with tax reform (Camay, 2015). Next on SA's agenda was the amendment of the definition of 'international tax standard' in the TAA in 2015 (PwC - South Africa, 2016:1). The Multilateral Competent Authority Agreement on the exchange of CBC reports was signed in January 2016, and on 11 April 2016 the draft regulations around CBCR for multinational entities were issued (PwC - South Africa, 2016:1).

On 23 December 2016, SA issued the final CBCR filing statutory regulations for an ultimate parent entity that is tax resident in SA (Muyaa, 2016:1). A threshold of R10b (approximately €750m) was put in place, which effectively means that if the consolidated revenue of the MNE group does not exceed this amount, it will not be required to file a CBC report in SA (Muyaa, 2016:3). The CBCR regulations became effective for tax years on or after 1 January 2016. The first deadline for entities that need to file a CBC report will therefore be 31 December 2017 (PwC - South Africa, 2016:1).

3.4.3.1 CBC template for each tax jurisdiction

For each country in which the ultimate holding entity of the multinational has an enterprise, not including cash and cash equivalents, the CBC report has to include the following information:

- Revenue
- Profit/loss before tax
- Income tax paid
- Income tax accrued
- Stated capital
- Accumulated earnings
- Number of employees
- Tangible assets
- Tax residence for each subsidiary within the group (Muyaa, 2016:1-2).

3.4.3.2 Mandatory additional disclosure

SA requires the following additional information that would not typically be disclosed by MNEs:

- The identity of each constituent entity within the group
- Each constituent entity's country of tax residence if different from where the entity is incorporated
- The nature of each constituent's main business activities (PwC - South Africa, 2016:2)

SA has even made amendments to the Income Tax Return (ITR14). These amendments are specifically related to the recommendations by the DC (Brodbeck, 2016:1). Since the ITR14 falls outside the scope of exchange of CBC reports, SARS does not have to share this specific information with other tax authorities and it should be used locally (Lavina, 2016:2).

3.4.3.3 Secondary requirements for CBCR and timing

A constituent entity would not ordinarily be required to file a CBC report unless the ultimate parent entity's profit exceeds the €750m threshold, and if the following conditions are met:

- The ultimate parent entity of the multinational group is not required to file a CBC report in the country in which it is tax resident.
- At the time filing has to be done in SA, no Qualifying Competent Authority Agreement is in place with the ultimate parent entity of the MNE group and the SA subsidiary.
- The SA entity has been notified by SARS to report as a result of failure to obtain information from the country where the ultimate parent entity of the MNE group is tax resident, or the SA entity has been nominated to report within the MNE group (Muyaa, 2016:2; PwC - South Africa, 2016:1).

It is important to note that filing must be done within 12 months from the multinational group's last reporting financial year (Muyaa, 2016:2). If the ultimate parent entity of the MNE group is not tax resident in South Africa and it has been decided that the ultimate parent entity of the MNE group will be submitting the CBC report, the South African constituent entity must notify SARS of the decision made (PwC - South Africa, 2016:1).

3.4.3.4 Use of CBC reports

The CBC reports should be used only to assess high-level TP and BEPS risks. No transfer-pricing adjustments should be made based on information provided in CBC reports. CBC reporting should maintain the same level of confidentiality as a multilateral agreement (PwC (South Africa), 2016:2). The regulations that were finalised in December 2016 state that the CBC report must apply the definitions and instructions provided in final report BEPS TP

documentation and the CBCR Action 13, which was released on 8 June 2015 (KPMG - South Africa, 2017:2).

3.5 SUMMARY

As shown above, with regard to the exchange of financial and tax information, the USA, the UK and SA, using similar methodology, have adopted their own methods to implement tax transparency.

Initially it seemed as if forceful tactics would need to be used to persuade different governments to warm up to the whole concept. For instance, the G20's initial agenda with regard to the TIEAs was to have countries sign at least 12 agreements. Governments that failed to do so would have to suffer the consequences of their 'nonconformity' (Bilicka & Fuest, 2014:177).

Unlike the USA, SA and the UK both signed the MCAA on the exchange of CBC reports as from 2 November 2016 (OECD, 2017d). However, all three countries have made use of bilateral agreements in some or other form.

With regard to CBCR, SA is one of the many countries (which do not include the UK) that have requested the disclosure of information additional to the mandatory information as per Article 13. The disclosure relates to cross-border intercompany transactions and royalties, interest and service fee payments that will be included in the CBC reports by jurisdiction. This recommendation was specifically requested by the Davis Committee and implemented by the SA government. The additional disclosure is not required to be shared with other tax authorities as per the MCAA with regard to CBCR (Brodbeck, 2016:1). CBCR will help tax authorities to improve transparency by improving their understanding of how different MNEs operate, which will assist them in identifying TP risks at a high level (Camay, 2015).

We can only wait to see how the Brexit decision will affect the UK with regard to the tax transparency agreements and legislation that were signed and adhered to by the UK as a member of the EU.

The final chapter will provide a summary the matters dealt with in the preceding chapters.

CHAPTER 4:
CONCLUSION

4.1. INTRODUCTION

The study analysed the developing concept of tax transparency, with specific focus on three themes within the main topic, i.e. the exchange of information. A detailed comparison was performed between the methods used by the USA, the UK and SA, with the emphasis on the legislation implemented, agreements signed and the use of CBCR.

This chapter brings the comparative study to a close by summarising the findings and conclusions arrived at in the previous chapters. The contributions made by this research and the limitations identified during the study will also be highlighted.

4.2. ADDRESSING THE RESEARCH OBJECTIVES

The focus of this study was a review of existing literature dealing with the exchange of information between the USA, the UK and SA under the tax transparency umbrella, which enables the research to identify the strategies developed by bodies such as the OECD, which were then implemented by governments with tax authorities re-enforcing the practice by:

- enforcing compliance by creating legislation and implementing standards; and
- signing agreements that contractually create an obligation for information to be shared.

The findings of the comparative study are summarised below.

4.3. SUMMARY OF FINDINGS

4.3.1 Legislation

During this study, the similarities and differences between the USA, the UK and SA that relate to the research topic were identified. While these three countries have a similar

objective when it comes to the exchange of information, their approaches in this regard may differ.

Legislation or a standard is drafted to set a precedent around a certain subject or topic. Usually legislation will contain the law, instructions about how it should be applied, and an indication of how failure to comply with the law will be dealt with, whereas a standard explains what is deemed customary, should one opt to be included in the 'group' for which that particular standard was created.

The USA and the UK have both drafted and introduced legislation and regulations to promote tax transparency, while SA has focused on amending its current tax legislation to incorporate the tax transparency initiative and has also published detailed public legal notices, which should be read in conjunction with the law in the Government Gazette.

The three countries all focus on off-shore accounts[50] and transactions with offshore entities, but while the USA focuses on offshore accounts held by people who are US citizens, the UK and SA focus on the offshore accounts of individuals with tax residence in their states.

The UK focuses on FIs disclosing information to the local tax authority.[51] Such disclosures may relate to offshore activities[52] or to aggressive tax practices and tax avoidance schemes that are in use in the UK. The exception is when HMRC receives information from another tax authority under the agreement signed under the CRS.

The USA makes use of a mixture of reporting methods. FATCA offers two options: FIs report either directly to the local tax authority[53], or the FI uses the USA government as an agent to report the information to the IRS. The Dodd-Frank Act determines that information disclosed by entities[14] should be made public.

[50] These offshore accounts can belong either to an individual, or an entity incorporated in a country.
[51] HMRC
[52] These offshore activities relate to accounts that have been created, advice sort for tax or legal purposes and services received.
[53] The IRS

4.3.2 Agreements

The UK and SA both signed the MCAA for CRS and the sharing of the CBC reports. So far it appears as if the USA has not yet signed any MCAAs, but has signed bilateral agreements relating to the IGAs for FATCA purposes, TIEAs and a CBC report-sharing agreement with SA. This bilateral agreement between SA and the USA is an exception to the MCAA, which SA and the UK had already signed with 63 other signatories. The bilateral agreements that the UK and SA have in common are the TIEAs signed with other countries and their individual IGAs with the USA.

4.3.3 CBCR

The UK and SA implemented CBCR on 1 January 2016, whereas the USA implemented it on 30 June 2016. However, in the USA it was voluntary between 1 January 2016 and 30 June 2016. The USA released a template to commence with the implementation of CBCR while the UK issued a regulation initiated from the CRD (IV). SA appointed a committee to assist with reform and the implementation of the regulation.

The threshold that should be exceeded by the ultimate parent company is fairly similar for all three countries. The slight difference is obtained from the exchange difference when one currency is converted to the other. For all three countries, the deadline for submitting the report to the local tax authority is 12 months after the financial year end. South Africa has made adjustments to the CIT returns to obtain additional information, while the USA wants Form 8975 to be filed with the CIT return and to be compiled using the same data as for the CIT return. The UK makes no mention of returns.

In SA, mandatory disclosure applies and has to be adhered to, while the USA has additional disclosure for purposes of clarity and the UK currently has no additional disclosures. With the exception of minor differences regarding disclosure, the information requested by the three countries is very similar.

4.4. FINAL CONCLUSION

'TIEAs don't work. Everyone knows it. As things stand, client funds can be moved out of a jurisdiction before an enquiry can develop, thwarting it before it really gets underway.' – Richard Murphy (O'Hare, 2011:3).

Although there are some differences between the USA, the UK and SA regarding how they implement certain aspects of tax transparency, most of the relevant concepts and approaches have been standardised (Saint-Amans & Pross, 2016:7). However, reporting by FIs may become very costly as, for instance, much more information will be required from FIs under CRS as no thresholds have been put in place (Parillo, 2015:727).

TIEAs are not perceived as an effective tool for use by developing countries that lack the leverage of developed countries, and there are instances in which the pertinent information is just not available to be shared (Tax Justice Network, 2009:3-4). In principle, all three countries should benefit from 'tax transparency' as a result of sharing information. Such a sharing of information will not benefit only 'influential' countries like the USA and the UK, but also developing countries like SA.

The USA and UK benefit from the exchange of information as they have signed many agreements and have a wide network. With regulations such as exchange control,[54] SA is already keeping a close eye on matters involving currency leaving the country. Who knows how much information SA would be able to obtain if the exchange control regulations were used in conjunction with the exchange of information agreements. SA has the potential to validate the use of currency that has been taken out of the country by SA taxpayers. Ultimate success will be dependent on the network SA has generated through the agreements signed over time. One can only hope that tax authorities will not abuse the authority granted to them by their respective governments. Tax transparency should not be used immorally to exponentially increase the tax paid by taxpayers.

With all the amendments that have been made from the initial concept and reasoning behind tax transparency, the impression given by tax authorities from time to time is that they have

[54] A restriction on the movement of currency between countries that is implemented by a government

become desperate for additional income and unfortunately look to the taxpayers to fund their desire.

4.5. FUTURE RESEARCH

The researcher recommends that further research be undertaken to:

- determine whether the cost of implementing the exchange of information exceeds the benefit gained; and
- analyse the agreements concluded and signed between developed and developing countries to determine which countries have more leverage.

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