

OECD standard for exchange of information – a focus on tax information exchange agreements signed by Andorra

## Introduction

### I. Exchanging information with Andorra

*Tax Information Exchange Agreements signed by Andorra*

*Information Exchange Agreements key features*

*The Global Forum “Peer review”*

*Probable amendments to Andorra’s legislation*

### II. Toward automatic exchange of information?

*EU saving directive*

*Foreign Accounts Tax Compliance Act*

*Convention on Mutual Administrative Assistance in Tax Matters*

*The Swiss case*

### III. Tax Treaty Policy

### IV. Update on French tax fraud policy

## Introduction

## Introduction

### *Moving toward a more transparent world*

- 1996-2008 : OECD focused on harmful tax competition (G7 summit of Lyon, 1996).
- 2008 : Liechtenstein tax fraud + financial crisis (tax transparency became the top priority of the G20)
- October 2, 2008 : OECD issue a new definition of tax havens that excluded States that have signed 12 or more TIEAs
- November 2008 (Washington summit) : bank secrecy is a priority of the G20
- March 12, 2009 : Andorra and Liechtenstein promised to lift bank secrecy
- April 2, 2009 : G20 issue a list of non cooperatives states (Andorra on the “grey list”)
- Mexico summit, September 2009 : Global Forum to assess the effectiveness of EOI (“Peer review”)
- First TIEA signed by Andorra in September 2009 – to date, (21) TIEAs have been signed by Andorra

## I. Exchanging information with Andorra

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### *Tax Information Exchange Agreements signed by Andorra*

Argentina <i>(not yet in force)</i>	Australia <i>(not yet in force)</i>	Austria <i>(10 Dec 2010)*</i>	Belgium <i>(not yet in force)</i>	Czech Republic <i>(not yet in force)</i>	Denmark <i>(13 Feb 2011)*</i>	Faroe Islands <i>(18 Jun 2011)</i>
Finland <i>(24 Feb 2011)*</i>	France <i>(22 Dec 2010)*</i>	Germany <i>(20 Jan 2012)*</i>	Greenland <i>(not yet in force)</i>	Island <i>(14 Feb 2011)*</i>	Liechtenstein <i>(10 Jan 2011)*</i>	Monaco <i>(16 Dec 2010)*</i>
Netherlands <i>(1 Jan 2011)*</i>	Norway <i>(18 Jun 2011)*</i>	Poland <i>(not yet in force)</i>	Portugal <i>(31 Mar 2011)*</i>	St Marino <i>(7 Dec 2010)*</i>	Spain <i>(10 Feb 2011)</i>	Sweden <i>(11 Feb 2011)*</i>

\* *date entered in force*

- TIEAs under negotiation : Italy, US, UK, South Korea, Ukraine, Canada, Brazil and Uruguay.

## I. Exchanging information with Andorra

### *Information Exchange Agreements key features*

- What information?
  - “**foreseeably relevant**” information for carrying out the provisions of the convention =
    - exchange of information in tax matters to the widest extent possible (i.e. even documents irrelevant for Andorran tax purposes), but it does not allow “fishing expeditions”
    - Information regarding the **ownership** of companies, partnerships, and other persons including shares or other interests in a fund or scheme, information on settlors, trustees and beneficiaries (for Trusts), founders, members of the foundation council and beneficiaries (for Foundations)

## I. Exchanging information with Andorra

### *Information Exchange Agreements key features*

- **Possible source of information :**
  - Information held **by banks, financial institutions, nominee or person acting as “agent”**(requested bank information includes account, financial and transactional information as well as information on the identity or legal structure of accounts holders and parties to financial transactions)
    - OECD Peer Review : the CA of Andorra must have the authority to obtain and provide ownership information from other source than banks ( and including beneficiaries of entities, managers of foundation, person with the right to share a gain...).
- **What matter for?**
  - Information relating to any existing taxes (i.e. wealth tax, income tax, registration duties...)
  - Exchange of information for both civil and criminal tax matters
  - Dual criminality principles not applicable: assistance may be sought even though the behavior would not have constituted a “crime” for penal law purposes in the requested country



## I. Exchanging information with Andorra

### *Information Exchange Agreements key features*

- **Procedure**

- The “requesting country” has to lay down :
  - The identification of the person does not require automatically personal name and address of the individual (for this matter, “identity” means “identifying information, to the extent sufficiently targeted such as an account number);
  - The taxable period for which the information is sought – information related to taxable periods closed / tax return established before the entry into force of the TIEA cannot be exchanged;
  - A statement of the information sought including its nature and the form in which the requesting country wishes to receive the information
  - The tax matter (audit; investigation etc) under which the information is sought
  - Grounds for believing that the information requested is “foreseeably relevant” to the administration and enforcement of the domestic tax law of the requesting country
  - Grounds for believing that the information requested is held in Andorra or is in possession/control of a person in Andorra (e.g. a French taxpayer withdraw cash from France, visits one bank in Andorra and returns with empty pockets ...)

## I. Exchanging information with Andorra

### *Information Exchange Agreements key features*

- **Procedure (con'd)**
  - Name / address of the person in possession of the information
  - A statement that the request is in conformity with the law and administrative of the requesting country
  - A statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would have give rise to disproportionate difficulties
- Upon the receipt of a request for information, Andorra should :
  - acknowledge the receipt
  - within 60 days notify the requesting country of any deficiencies
  - notify the requesting country if the information cannot be provided within 90 days – this notification specifies the reasons for not having provided the information (i.e. judicial / administrative process required to obtain the information has not yet been completed...)
  - OECD standards : 90 days – Andorra's experience will be assessed in Phase 2

## I. Exchanging information with Andorra

### *Information Exchange Agreements key features*

- **Once the request is received by Andorra :**
  - Authorities of Andorra shall obtain and provide the requested information – OECD asks for reforms to ensure that Andorra authorities have the power to obtain such information
  - Andorra cannot circumventing its domestic law limitations by requesting information it would not obtain under similar circumstances under its own law for the enforcement of its own law
  - Andorra is not obliged to provide information which would disclose any trade, business, industrial, commercial, professional or trade secret (financial information are not considered a trade secret), or any information covered by a “legal privilege”
  - Andorra is not obligated to provide information which is neither hold by its authorities nor in the possession or control of a person within its territorial jurisdiction

## II. Exchanging information with Andorra

### *Information Exchange Agreements key features*

- **Taxpayer's guarantees**
  - Andorran Right to be informed not prohibited in the TIEA (see however for urgent matter)
  - Procedural rights (challenge the EOI...) existing in Andorra will continue to apply to the extent that they do not unduly prevent effective EOI
  - All agreements concluded by Andorra meet the standards for confidentiality including the restrictions on the disclosure of the information received. Any information received shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the requesting party (i.e. cannot be disclosed to other States)
  - No retroactive effect : TIEA with France is in Force since December 22, 2010
    - Applicable immediately for criminal tax matters
    - Applicable as of 2011 for wealth tax matters
    - Applicable as of 2010 for income tax matters
    - Applicable for taxable periods beginning on or after this date

## II. Exchanging information with Andorra

### *The Global Forum “Peer review”*

- Global Forum Peer review
  - Andorra is under review by the Global Forum (i.e. peer review)
  - The process is undertaken in two phases :
    - Phase 1 review : assesses the quality of a jurisdiction’s legal and regulatory framework for the EOI. Three essential elements are assessed : availability of information, access to information and exchange of information
    - Phase 2 review : practical implementation of EOI
    - Phase 2 reviews will necessarily encompass to some degree the issues in Phase 1 and may help clarify the significance of any shortcoming identified in Phase 1
  - Phase 1 review completed in August 2011 – Phase 2 to be started mid-2013
  - A country may be considered an NCST should the review conclude that EOI is not effective

## II. Exchanging information with Andorra

### *The Global Forum “Peer review”*

- Andorra law requires that ownership information is maintained for all Andorran companies, partnership and foundations
- Andorran law requires all commercial entities (including financial institutions) to keep accounting records for at least 6 years
- For financial institutions, the combination of banking, accounting and anti money-laundering legislation ensure that all records pertaining to customers’ account as well as related financial and transaction information are maintained and available to the authorities
- The Minister of Finance has the power to access accountings information held by companies, partnerships, foundations and foreign branches as well as any information held in public register or by public bodies (including ownership information)
- No access to information held by entities / non governmental third parties (except ownership information held by financial institutions)

## II. Exchanging information with Andorra

### *The Global Forum “Peer review”*

- Global Forum Peer review comments on desirable revisions of domestic law :
  - Exclude prior notification of the taxpayer in urgent matters
  - Bring the TIEA with Liechtenstein in line with OECD standards
  - Continue to develop the EOI network with all relevant partners
    - Andorra has already signed agreements with its most relevant partners (France, Spain, Portugal) and is going to negotiate DTT with them (this is possible since Andorra has institute CIT and PIT)
  - Amendments to Andorran law

## I. Exchanging information with Andorra

### *Probable amendments to Andorran law*

- Provisions to ensure availability of ownership information (no sanction for not maintaining a register of shareholders / no sanctions for companies and partnership for not submitting changes in ownership to the company register) – new obligation to disclose the beneficiaries of a Trust administered in Andorra / with an Andorran Trustee
- Ensure availability of full ownership information for the 18 companies with bearers shares
- Administrators and Trustees of foreign trusts should be required to (i) maintain reliable accounting records for the trusts (including underlying documentation, i.e. receipts...) and (ii) kept those records for a minimum of 5 years
- No reform for banks / financial institutions (OECD standards are met since financial institutions are to keep detailed records and accounts regarding transactions with and for clients and to produce a balance sheet, a P&L account and a cash flow statement)



## I. Exchanging information with Andorra

### *Probable amendments to Andorran law*

- Authorities should be granted the power to access ownership information held by third parties (not only information held by public administrations, bank and on public register)

## II. Toward automatic exchange of information ?

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### *EU directives*

#### – EU Saving directive

- Provide for automatic exchange of information
- The scope of this Directive is limited to taxation of savings income in the form of interest payments on debt claims
- Treaties provided for measures equivalent to those laid down in the EU Saving directive have been concluded with Andorra, San Marino, Switzerland, Liechtenstein, Monaco and some territories depending of Member States (Jersey, Guernsey, Isle of Man, some Caribbean territories)
- Withholding tax (35%) instead of an automatic exchange of information
- Article 12 of the Treaty with Andorra provides for a limited exchange of information (limited to interests payment and to conduct consisting a fraud under the law of Andorra [**dual criminality principle**])

#### – New directive n°2011/16/EU

- Automatic exchange of information as of 2014 – professional income, director's fees, life insurance, pensions, immovable property (may be extended to Andorra)

## II. Toward automatic exchange of information ? *FATCA*

### – FATCA

- New withholding tax of 30% on payment to non-US entities
- WHT can be avoided by the conclusion of an agreement between the “Foreign Financial Investors” and the IRS providing for an automatic exchange of information on US customers
- Andorra’s banks (already considered as Q/s) are going to sign FATCA agreements with the IRS
- Specific FATCA agreement between the US and some EU countries (France, UK, Germany, Spain, Italy) will provide for automatic exchange of information
- Foreign Entities can avoid the WHT by disclosing their substantial US owners (holding more than 10%) to the IRS
- Those provisions are applicable to Andorra
- Broad definition of US customers and US payments

## II. Toward automatic exchange of information ?

### *Convention on Mutual Administrative Assistance in Tax Matters*

#### – Convention on Mutual Administrative Assistance in Tax Matters

- Developed jointly by the Council of Europe and the OECD and opened for signature by the member states of both organizations on 25 January 1988 – non-members countries can sign this convention as of June 2011
- Provides for all possible forms of administrative co-operation between States in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information, including automatic exchanges and the recovery of foreign tax claims
- Signed by **35** countries (including Andorra's top economic partners i.e. France, Spain and Portugal) – 16 new countries since June 2011
- US intends to put pressure on countries to sign this convention
- Andorra is not (yet?) a signing party to this convention

## II. Toward automatic exchange of information ?

### *The Swiss case*

- Swiss strategy to restore its credibility, tax enforcement, and competitiveness as a financial center :
  - The past tax contingencies of clients residing abroad whose assets have not been properly taxed should be resolved (avoid legal problems faced by Swiss banks)
  - New measures to ensure both international cooperation and taxation of investment income and capital gains. This will be achieved through the following three mechanisms:
    - Negotiation of tax treaties for tax withholding at the source based on the RUBIK model, i.e. an anonymous withholding at the source, replacing the automatic exchange of information between Switzerland and the country of residence of the owners of the deposits
    - Improved administrative assistance and judicial cooperation in accordance with international standards
    - Strengthening of anti-money laundering standards and enforcement thresholds to prevent banks from accepting funds related to tax evasion; in particular, this requires that clients declare that they are in good standing vis-à-vis their tax obligations in their country of residence by signing a declaration in which they swear that they have complied with all tax obligations in their country of origin

### III. Tax treaty policy

### III. Tax treaty policy

- New direct taxes in Andorra allow conclusion of DTT
- Negotiations with France, Spain and Portugal
- Article 26 of the OECD DTT model provides for the same EOI provisions as the TIEAs signed by Andorra



## IV. Update on the French anti tax fraud policy

## IV. Update on the French anti tax fraud policy

### *Foreign banking accounts*

- Article 1649 A FTC
  - French individual tax residents as well as some entities have to declare their foreign bank accounts. Failure to comply with those provisions is sanctioned by a annual fine of € 1.500 (€ 10.000 if the bank is registered in a NCST) or 5% of the deposits (for deposits exceeding € 50.000);
  - Exercise of the Request of Information procedure by tax administration vis-à-vis French banks to report outbound transfers (40.000 wires identified as “suspicious” by the FTA);
  - Undisclosed deposits may be considered as taxable income (40% penalty for fraudulent maneuvers);
  - “Evafisc” (October 31, 2011 : 94 565 information on foreign bank accounts held by French tax residents);
  - Three-year statute of limitation period extended to 10 years as of 2006 for accounts held in NCSTs.

## IV. Update on the French anti tax fraud policy

- International tax fraud : imprisonment up to 7 years, fine up to € 1.000.000
- Tax police (criminal instruction with no warning – house-searchs, phone-tapping...)
- Investigation on “foreign bank cards” : exercise of the information request procedure to spot “suspicious” withdrawals through ATMs(i.e. withdrawals carried out in France by French tax residents with a foreign bank card) lead to
  - 97 tax audits
  - 26 house-searchs (L16 B TPB)
  - 3 files to the “Tax police”
- “HSBC stolen files” : considered as illegally obtained and therefore not usable by the FTA against taxpayers (See HSBC, Cass com, 31/01/2012)
- Nicolas Sarkozy’s new measure (if elected) : income tax on a worldwide basis for French “tax” expatriates (capital income)

## IV. Update on the French anti tax fraud policy *NCSTs*

- First list of NCSTs:
  - To be regarded as a NCST, a country should :
    - not be a Member of the EU
    - have been examined by the Global Forum on Transparency and Exchange of Information
    - have failed to sign a tax information exchange agreement (“TIEAs”) with France
    - have failed to sign a TIEA with 12 other countries
  - First list released 12 February 2010 : Anguilla, Belize, Brunei, the Cook Islands, Costa Rica, Dominica, Grenada, Guatemala, Liberia, the Marshall Islands, Montserrat, Nauru, Niue, Panama, the Philippines, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines

## IV. Update on the French anti tax fraud policy

### NCSTs

- Under article 238-0 A-2 of the FTC, the NCST list is to be updated annually according to the following criteria
  - NCSTs that have concluded a TIEA with France are to be removed from the list as well as NCSTs considered as cooperative for exchange of information purposes by the Global Forum
  - NCSTs that have concluded a TIEA with France that does not allow effective exchange of information are to be added to the list as well as countries considered as non cooperative by the Global Forum
  - If France has made a proposal to a jurisdiction regarding the conclusion of a TIEA before 1 January of the preceding year and the TIEA did not enter into force as at 1 January, the jurisdiction is to be added to the NCSTs list
- List for 2011 : St. Kitts and Nevis and St. Lucia removed – Oman and the Turks and Caicos Islands added back
- Andorra should not be considered as a NCST should the exchange of information be considered effective

## IV. Update on the French anti tax fraud policy NCSTs

- Measures penalizing transactions by French residents with NCSTs have been introduced into the FTC.
  - Strengthening the anti-abuse measures provided in articles 209 B and 238 A FTC
  - Reinforced obligation to provide documentation with regard to transfer pricing in respect of transactions with entities located in a NCSTs
  - Non-application of the mother-company regime to payments made by entities in registered in NCSTs
  - Non application of long-term capital gains regime to disposals of securities of companies established in NCSTs
  - WHT of 50% on income streams paid to NCSTs and on capital gains on disposal of securities and immovable property by their residents
  - Monetary Code amended to impose the disclosure by French financial institution of their establishments and activities in NCSTs

**Q&A**

**Thank You / Gràcies**

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