

## **Jersey & Guernsey Law Review – October 2013**

### **RECENT INTERNATIONAL TAX INITIATIVES**

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*There has been a plethora of international tax initiatives as part of a general response to the global financial crisis. These initiatives have been promoted by the G8, G20, OECD, EU and individual jurisdictions. Since 2009 the Global Forum on Transparency and Exchange of Information for Tax Purposes has led a successful programme in promoting compliance with the international standard of information exchange on request. However, the G20's declared objective is now to promote automatic exchange of information as a new single global standard, building on the US FATCA, to be implemented through the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters which all jurisdictions are being encouraged to join. Jersey, and the other Crown Dependencies, have been asked by the UK to join them in supporting various of the international initiatives, such as the preparation of Action Plans to enhance transparency on beneficial ownership. There also EU tax initiatives to which a response has been required.*

#### **Introduction**

1 2013 has seen a plethora of international tax initiatives under the auspices of G8, G20, OECD, EU and individual jurisdictions. These are part of a general on-going response to the global financial crisis which started in 2007/2008. With the difficult financial conditions experienced, most clearly reflected in the trials and tribulations of the euro-zone, governments of many countries have been faced with the need to adopt austerity measures to lower public expenditure and increase taxation in order to reduce borrowing and to correct excessive debt burdens. This has resulted in rising unemployment, falling real incomes and cuts in public services.

2 Not surprisingly, governments have accordingly been attracted to the idea of increasing their tax revenues by combating tax evasion and aggressive tax avoidance. However, in order to avoid an adverse impact on their competitiveness, governments have sought an international approach to ensure the global application of the standards set and the avoidance of fiscal arbitrage. Also of appeal to

governments has been to suggest to their electorate that the ills befalling them are in large measure due to the activities of so-called “tax havens” or “non-cooperative secrecy jurisdictions”.

3 Jersey, as an international finance centre with a close and complementary relationship with the City of London, has been affected by the political and media hostility towards the finance sector in general. The popular view has been that international finance centres have allowed financial institutions to hide their assets and riskier business activities through opaque structures. One result of this view has been an added focus on the importance of enhancing transparency.

4 For the Channel Islands and the other Crown Dependencies (the CDs), these international pressures manifest themselves in particular through their close relationship with the United Kingdom. The latter has sought to protect its competitive position by lowering corporate tax rates while at the same time leading international action to combat tax evasion and aggressive tax avoidance. This leadership role within G8, G20, and OECD is a more difficult one to advance if the UK can be accused of not practising what it preaches through a failure to take appropriate steps to bring into line those jurisdictions believed by the international community to be controlled by the UK because of their “dependency” status.

## **Background**

5 The recent initiatives have their roots in an OECD report *Harmful Taxation* published in 1998.<sup>1</sup> This focused on factors to identify tax havens and harmful preferential tax regimes. Tax havens were defined by reference to four main factors—

- no or nominal taxation;
- lack of effective exchange of information;
- lack of transparency
- no substantial activities.

The harmful tax regimes in OECD member and non-member countries were identified by reference to a number of features which included the second and third bullet points above and also focused on the issue of the “ring-fencing” of tax regimes.

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<sup>1</sup> OECD, *Harmful Tax Competition: an Emerging Global Issue*, approved by the OECD Council in April 1998. See also Powell “Harmful tax competition and the challenge for Jersey” (1999) 3 JL Rev 22.

6 Progress reports were published by OECD in 2000<sup>2</sup> and 2001.<sup>3</sup> The 2000 report listed 35 jurisdictions, which included Jersey and the other CDs, which were considered to meet the definition of a “tax haven”. Both reports sought, among other things, to further advance the idea of a list of uncooperative jurisdictions against which coordinated defensive measures would be mounted. However the USA was not happy that OECD should have a role that would interfere in the right of jurisdictions to set their own tax rates, and so the definition of “uncooperative jurisdictions” focused on a lack of transparency and a failure to engage in tax information exchange. As a result all jurisdictions on the tax haven list were called upon to enter into a political commitment by February 2002 to negotiate bilateral tax information exchange agreements (TIEAs) to an OECD “Model” standard.<sup>4</sup>

7 These good intentions hit an obstacle in the argument advanced by many non-OECD jurisdictions that there was not a global level playing field. The result was that, by 2008, relatively few bilateral tax information exchange agreements had been signed. Faced with the argument that part of the cause of the financial crisis was a lack of transparency, the G20 meetings in Washington in November 2008 and in London in April 2009 decided that further action was called for. OECD duly published a list of jurisdictions that had substantially implemented the internationally agreed tax standard (the so-called “white list”), which included Jersey and the other CDs, with the remainder being put into a “grey” list of jurisdictions that had committed to the standard but had not yet substantially implemented it, or a “black” list of jurisdictions that had not committed to the standard.<sup>5</sup>

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<sup>2</sup> OECD, *Towards Global Tax Co-operation—Progress in Identifying and Eliminating Harmful Tax Practices* (2000); see also Powell “EU and OECD proposals on harmful tax competition” (2000) 4 JL Rev 46;

<sup>3</sup> OECD, *The OECD’s Project on Harmful Tax Practices: The 2001 Progress Report* (2001).

<sup>4</sup> OECD “Model” *Agreement on Exchange of Information on Tax Matters and Commentary* (2002).

<sup>5</sup> OECD *Progress Report on the Jurisdictions surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard—Progress Made as at 2 April 2009*.

## **Global Forum on Transparency and Exchange of Information for Tax Purposes**

8 In April 2009, G20 called for all countries to adopt the international standard for information exchange.<sup>6</sup> To help achieve this, and to deal with the accusations of the lack of a level playing field, the OECD brought together OECD and non-OECD countries in Mexico in September 2009 under the umbrella of the Global Forum on Transparency and Exchange of Information for Tax Purposes with a view to promoting the signing of TIEAs and establishing an objective peer review process for assessing compliance with the international standard. It was agreed that this process should be managed by a peer review group made up of 30 jurisdictions under French chairmanship and with four vice-chairs (India, Japan, Jersey and Singapore). That group proposed, and obtained, the Global Forum's agreement to an assessment process made up of two phases—Phase 1, which is an assessment of the quality of a jurisdiction's legal and regulatory framework for the exchange of information; and Phase 2, which is an assessment of the effectiveness of the practical implementation of that framework. In the first three-year period of the assessment programme (2010–2012) most jurisdictions were subject to Phase 1 assessments, and in the programme's second three-year period (2013–2015) they will be subject to Phase 2 assessments. However, there were some jurisdictions that agreed in the first period to have a combined Phase 1 and Phase 2 assessment.

9 The progress made since 2009 is described in a report presented by the Global Forum to G20 Finance Ministers and Central Bank Governors in July 2013.<sup>7</sup> The Forum now has some 120 members and there are some 800 bilateral TIEAs worldwide. The Global Forum has ten separate elements covering whether the required information is available, accessible and able to be exchanged. Of the 862 determinations in the published reports, 618 elements were in place, 171 were in place but in need of improvement, and 73 were not in place.

10 Jersey was one of the first countries to be assessed, and was one of only a few non-OECD countries to volunteer for a combined Phase 1 and Phase 2 assessment. It therefore had less time than others to adapt

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<sup>6</sup> G20 *Declaration on Strengthening the Financial System*, London Summit, 2 April 2009.

<sup>7</sup> OECD *Secretary General's Report to G20 Finance Ministers in July 2013—Part 1 Progress Report by the Global Forum on Transparency and Exchange of Information for Tax Purposes*.

legislation to meet the standards. Nevertheless, of the nine elements assessed, six were in place and three were in place but with certain aspects in need of improvement. In the assessment report<sup>8</sup> it was stated “Overall, this review of Jersey identifies a legal and regulatory framework for the exchange of information which generally functions effectively to ensure that the required information will be available and accessible”. Jersey has asked for a supplementary report so that the action that has been taken to respond to the recommendations in the published report can be assessed and the three elements that were considered to be “in place, but”, reassessed to be “in place”.

11 Jersey’s policy for the signing of TIEAs has been to give priority to agreements with G20, OECD and EU member jurisdictions. 31 TIEAs have been signed, of which 27 are in force, and another 13 are in the process of being negotiated of which seven have been initialled. Eight Double Tax Agreements (DTAs)<sup>9</sup> have also been signed, which include exchange of information provisions to the international standard. Seven of those are in force, and another five DTAs are in the process of being negotiated. Taken together, all G20 countries are covered bar one (Russia), all OECD member countries are covered bar one (Israel), and all EU Member States are covered bar one (Croatia, which joined the EU only in July 2013).<sup>10</sup>

12 The next step to be taken by the Global Forum is to start to rate jurisdictions according to the quality of the laws and regulations in place and the effectiveness with which they are being applied. Some 50 jurisdictions, including Jersey and the other CDs, will be rated in respect of the individual elements and overall, and the results will be proposed for adoption by the Global Forum at its plenary meeting in November 2013. Jurisdictions will be rated as compliant, largely compliant, partially compliant or non-compliant.

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<sup>8</sup> OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Jersey 2011: Combined: Phase 1 + Phase 2*, OECD Publishing (2011).

<sup>9</sup> There are full Double Taxation Agreements (DTAs) with Estonia, Guernsey, Hong Kong China, Isle of Man, Luxembourg, Malta, Qatar and Singapore. In addition there are a number of jurisdictions where partial DTAs have been entered into in conjunction with the signing of a TIEA covering, for the most part, avoidance of the double taxation of personal incomes such as employment income and pensions.

<sup>10</sup> An up-date on the TIEA/DTA negotiations, and details on the agreements signed, is available on the States of Jersey website: [www.gov.je/TaxesMoney/InternationalTaxAgreements](http://www.gov.je/TaxesMoney/InternationalTaxAgreements)

## **OECD/Council of Europe Multilateral Convention on Administrative Assistance in Tax Matters**

13 While the Global Forum has made good progress in improving compliance with the current international standards on transparency and exchange of information, G20 and \*\*OECD are concerned that many countries (and particularly developing countries) do not have the capacity to engage in a comprehensive programme of negotiating bilateral tax information exchange agreements. In 2011, OECD, together with the Council of Europe, amended their Multilateral Convention on Mutual Administrative Assistance in Tax Matters so that it could be signed by non-members.<sup>11</sup> As at end August 2013 the amended Convention had been signed by 55 countries of which 27 had brought the Convention into force (six of which are non G20, OECD or EU Members). The Convention includes the current international standard of tax information exchange on request but, in addition, it covers automatic and spontaneous exchange of information. Furthermore, provision is made for a country to assist another country in the recovery of that latter's tax claims. Those joining the Convention may enter reservations from participation in these latter provisions.<sup>12</sup>

14 In June 2013, G8 and, in July 2013, G20 Finance Ministers, called for more jurisdictions to sign the Convention.<sup>13</sup> The UK, holding the Presidency of G8, asked the CDs and Overseas Territories (OTs) to commit to joining the Convention which they duly did. However, the Convention can only be signed by Sovereign States, and adoption of the Convention by the CDs and the OTs requires the extension to them of the UK's ratification.<sup>14</sup> The paradox for the CDs is that under a Letter of Entrustment issued by the UK they can negotiate bilateral tax agreements in their own right but, if the same jurisdictions come together under the umbrella of a multilateral convention, they cannot sign that convention in their own right. However, in requesting the extension of the UK's ratification, the CDs have asked the UK to include in the required Letter of Declaration appropriate emphasis on

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<sup>11</sup> *OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters*—text amended by the provisions of the Protocol amending the Convention, which entered into force on 1 June 2011. [www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm](http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm)

<sup>12</sup> OECD/CoE Convention art 30.

<sup>13</sup> The Saint Petersburg G20 Leaders' Declaration (September 2013) called on all countries to join the Convention “without further delay”.

<sup>14</sup> OECD/CoE Convention art 29.

their autonomy in domestic affairs (including fiscal matters). The CDs also have requested a separate seat on the Coordinating body for the Convention, which body manages the implementation and development of the Convention.<sup>15</sup>

### **US Foreign Account Tax Compliance (FATCA)**

15 With the focus on combating tax evasion and aggressive tax avoidance, many in the international community have felt that the current international standard of tax information exchange on request is insufficient and that a new standard of automatic exchange of information (AEOI) is called for. They are not stating that the present standard and all the bilateral agreements that have been signed are no longer required. Many expect that, with AEOI, jurisdictions will then be in possession of more information and that that will trigger more specific requests. AEOI is covered by the OECD/CoE Multilateral Convention but it is for the parties to agree to automatic exchange bilaterally. The USA have led the charge for AEOI on a global basis with the passing of the Hiring Incentives to Restore Employment Act 2010 (HIRE) which contained the Foreign Account Tax Compliance (FATCA) provisions aimed at reducing tax evasion by US citizens. It requires all financial institutions outside the US to pass information about their US customers to the US tax authorities with the threat of a 30% withholding tax on US source income of any financial institution that fails to comply. The initial intention that financial institutions would report direct to the US tax authorities raised potential difficulties, and as a result the US were persuaded by the UK and four other EU Member States (France, Germany, Italy and Spain) to adopt an alternative arrangement whereby financial institutions would report to their own domestic tax authorities. Those authorities would then pass the information on to the US tax authorities under an intergovernmental agreement (IGA). The latter also offered an opportunity for a reciprocal flow of information from the US.

16 The US then offered such IGAs to countries generally. The financial institutions in Jersey and the other CDs considered that an IGA along the lines of that between the UK and the US would be preferable to direct reporting, and such an arrangement also better met data protection requirements. Because the US FATCA requirements are global in their application, the relative competitive position of Jersey and the other CDs was also unaffected by the negotiation of an IGA with the USA.

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<sup>15</sup> OECD/CoE Convention art 24(3).

17 To comply with the IGA all financial institutions in Jersey will be required to report the required information to Jersey's Competent Authority<sup>16</sup> which will then transmit the information to the US tax authorities. Information must be exchanged between the authorities within nine months after the end of the calendar year to which the information relates. Thus the information required in respect of 2014, the first year of reporting, must be exchanged by September 2015.

18 For 2014, the information required in respect of each US Reportable Account of each Reporting Jersey Financial Institution is the name, address and US TIN (taxpayer identifying number) of each Specified US Person<sup>17</sup> that is an Account Holder; the account number; the name and identifying number of the Reporting Jersey Financial Institution; and the account balance or value as of the end of the calendar year or other appropriate reporting period (or if the account was closed during the year immediately before closure).

19 For 2015, the same information as for 2014 is required plus in the case of a Custodial Account the total gross amount of interest, the total gross amount of dividends, and the gross amount of other income generated with respect to the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the calendar year or other appropriate reporting period. In the case of a Depository Account, the information required is the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period. In the case of any account not covered by the foregoing, the total gross amount paid or credited to the Account Holder with respect to the account during the calendar year or other appropriate reporting period with respect to which the Reporting Jersey Financial Institution is the obligor or debtor, including the aggregate amount of any redemption payments made to the Account Holder during the calendar year or other appropriate reporting period.

20 For 2016 and subsequent years, the same information as for 2014 and 2015 is required plus the total gross proceeds from the sale or

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<sup>16</sup> The Minister for Treasury and Resources, acting through the Comptroller of Taxes.

<sup>17</sup> The term "US Person" means a US citizen or resident individual, a partnership or corporation organised in the United States or under the laws of the United States or any State thereof, a trust if (i) a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust, and (ii) one or more US persons have the authority to control all substantial decisions of the trust, or an estate of a decedent that is a citizen or resident of the United States.



redemption of property paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the Reporting Jersey Financial Institution acted as a custodian, broker, nominee, or otherwise as an agent for the Account Holder.

21 The main body of the IGA has attached to it an annex outlining the due diligence obligations for identifying and reporting on US reportable accounts and on payments to certain non-participating financial institutions. A second annex lists entities that are treated as exempt beneficial owners or deemed compliant foreign financial institutions and accounts that are excluded from the definition of “Financial Accounts”. These are all entities which are considered to present a low risk of being used by US persons to evade US tax. Included among the exempt beneficial owners are governmental entities, certain retirement funds, financial institutions with a local client base or a local bank satisfying certain requirements, and a qualified credit card issuer. Importantly, included among the deemed compliant financial institutions is a trust established under the laws of Jersey to the extent that the trustee of the trust is in a qualifying category and, as a sponsoring entity, reports all the information required to be reported under the terms of the IGA. Similar arrangements apply to investment funds where the reporting responsibility can be placed on the investment manager as the sponsoring entity. These arrangements in respect of trusts and investment funds significantly reduce the administrative burden to industry of FATCA.

22 Guidance on the provisions of the US FATCA IGA and their application has been prepared by the government of Jersey in concert with the authorities in Guernsey and the Isle of Man. The implementation of the provisions will be subject to the States of Jersey ratifying the IGA and adopting the necessary Regulations to put the IGA into effect.

### **Intergovernmental Agreement with the UK**

23 Towards the end of 2012 the UK Government expressed the view that it would not be acceptable for Jersey and the other CDs to be providing the US authorities with more information on an automatic basis than they were providing to the UK. Accordingly, the UK requested an IGA equivalent to that being negotiated with the US and indicated that they would want the two agreements to be progressed in parallel. The desire to ensure that the US and UK IGAs are matched as closely as possible also reflects the fact that it is expected that the US FATCA will be used as the basis for development by OECD of a single standard for the global application of enhanced provisions for the automatic exchange of information. G20 Finance Ministers in July

2013 fully endorsed the OECD proposal for a truly global model for multilateral and bilateral automatic exchange of information. They also committed to AEOI as the new, global standard and fully supported the OECD work with G20 countries aimed at setting such a new single global standard for AEOI, and asked OECD to prepare a progress report for their next meeting, including a timeline for completing this work in 2014.<sup>1819</sup>

24 However there is an important distinction to be drawn between the US and UK IGAs that arises from the UK Government's policy of encouraging foreign nationals (the so-called "Res Non-Doms"<sup>20</sup>) to work and live in the UK by exempting from tax their foreign source income if it is unremitted to the UK. This policy is seen by the UK government as a major contributor to the UK's attraction as an international finance centre and as a destination for foreign investment in manufacturing and other business. As a result of this policy, and supportive of it, many of those benefitting from the exemption hold bank accounts in Jersey into which their foreign source income is placed and is unremitted to the UK. The problem this posed was that if the "Res. Non-Doms" were to be subject to the requirements of the IGA, which calls for information to be provided to the UK tax authorities which the latter presently do not seek to collect in their own tax returns, there would be a movement of accounts to a jurisdiction that did not have an IGA with the UK. Not only would this be a significant cost to the Jersey economy, but there would also be a significant cost to the UK economy if the funds involved moved to a jurisdiction where they were unlikely to be upstreamed by the banks concerned to the City of London. The importance of this business to Jersey, and thereby to the UK, is shown clearly in the report prepared by Capital Economics on the value of Jersey to the UK economy published in July 2013.<sup>21</sup>

25 With this in mind the CDs persuaded the UK government that there should be alternative reporting requirements for the "Res Non-Doms". In addition, in order to produce a level playing field, the UK

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<sup>18</sup> Communique issued following the meeting of G20 Finance Ministers and Central Bank Governors in Moscow, 19–23 July 2013.

<sup>19</sup> The G20 endorsed the development of a new global tax standard for automatic exchange of information at the Saint Petersburg Summit (September 2013); see the Tax Annex to the G20 Leaders Declaration.

<sup>20</sup> Those resident in the UK but who are non-domiciled for tax purposes.

<sup>21</sup> *Jersey's value to Britain—evaluating the economic, financial and fiscal linkages between Jersey and the United Kingdom*: Capital Economics, 2 July 2013.

government has been informed that it is expected that it will amend its own tax returns to require the same information as that being sought from the “Res Non-Doms” under the alternative reporting requirements. The information requested from the CDs would then allow the UK tax authorities to check the accuracy of their own tax returns. This would be in line with the US practice whereby information reported by Jersey financial institutions under the terms of the IGA will match that provided on the tax returns required of US Persons by the US Internal Revenue Service (IRS). It will also mean that there will be less incentive for the “Res Non-Doms” to move their Jersey accounts to a jurisdiction that does not have an IGA with the UK.

26 As with the US IGA the UK IGA has an annex which exempts certain entities or products from the reporting requirements on the grounds that they present a low risk of being used by Specified UK Persons<sup>22</sup> to evade UK tax. As with the main body of the IGA, the aim is to match the US and UK annexes. Because of this matching, the Guidance Notes prepared by the government of Jersey in concert with Guernsey and the Isle of Man cover both IGAs. There will also be a need for Regulations to provide for the implementation of the UK IGA. As with the US IGA, implementation of the UK IGA will be dependent on the States of Jersey ratifying the IGA and making the necessary Regulations to put the IGA into effect.

#### **Other commitments sought by the UK**

27 Because of the close geographic and economic relationship between the CDs and the UK, the latter has sought a number of commitments from the CDs, in addition to the signing of an IGA, designed to further limit their use by UK residents for tax evasion and aggressive tax avoidance. The government of Jersey for its part has

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<sup>22</sup> The term “Specified United Kingdom Person” means a person or Entity who is resident in the United Kingdom for tax purposes, and includes a person or Entity who is resident in both the United Kingdom and Jersey under the respective domestic law of each Party, other than: (i) a corporation the stock of which is regularly traded on one or more established securities markets; (ii) a corporation that is a member of the same affiliated group, as defined in s 1471(e)(2) of the US Internal Revenue Code, as a corporation described in (i) above; (iii) a Depository Institution; (iv) a broker or dealer in securities, commodities, or derivative financial instruments (including notional principle contracts, futures, forwards and options) that is registered as such under the laws of the United Kingdom; or (v) an exempt beneficial owner as defined in Annex II.

made it clear that it has no wish to accommodate those engaged in tax evasion or aggressive tax avoidance.<sup>23</sup>

28 In addition to the IGA, a Memorandum of Understanding (MoU) with the UK has been signed concerning a Disclosure Facility which gives relevant UK residents an opportunity to come forward voluntarily to regularise their tax affairs prior to information on their accounts in Jersey being subject to automatic exchange under the provisions of the IGA. The MoU includes the agreement by the government of Jersey that it will require financial intermediaries in Jersey to contact their current clients who are relevant persons to advise them of the Facility, and to remind them of the Facility in the six months prior to its withdrawal in September 2016. This has been done by the making of Regulations.<sup>24</sup> How the financial intermediaries contact their current clients will be for each intermediary to decide, and each client will decide for himself or herself whether to take advantage of the Facility. Assistance in making that decision is provided by the UK HMRC.<sup>25</sup>

29 On aggressive tax avoidance, other action by the government of Jersey has included—

- consultation with the finance industry in 2012 on the adoption of what was described as the ‘sniff’ test to identify aggressive tax avoidance schemes that, if associated with, would be detrimental to the good reputation of the Island;
- the setting up of a Sound Business Practice Committee (with the Director of Financial Services, the Director General of the Jersey Financial Services Commission and the Chief Executive of Jersey Finance Limited as members) which will seek to identify business practices which conflict with Jersey’s aim to be a well regulated international finance centre and will recommend action to address activity that is inconsistent with this aim.

30 **EU Pilot Project for enhanced AEOI:** the UK in seeking to advance the international agenda initiated a pilot project with four other EU Member States (France, Germany, Italy and Spain) to promote enhanced AEOI based on the US FATCA model. The UK also joined in pressing OECD to develop a single standard for AEOI that would have global application. The CDs were asked to join the pilot and have agreed to do so, together with twelve more EU Member

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<sup>23</sup> [www.gov.je/News2012/Pages/StatementAggressiveTax/jersey.htm](http://www.gov.je/News2012/Pages/StatementAggressiveTax/jersey.htm)

<sup>24</sup> Taxation(Implementation) (Disclosure Facility) (Jersey) Regulations 2013.

<sup>25</sup> *Jersey Disclosure Facility—Making a Disclosure*, HMRC, [www.hmrc.gov.uk/offshoredisclosure/jersey.htm](http://www.hmrc.gov.uk/offshoredisclosure/jersey.htm)

States. In May 2013 the Chief Minister of Jersey, Senator Ian Gorst, wrote to the Secretary General of OECD, Angel Gurría, and said that “Jersey is fully supportive of automatic exchange of information based on the US FATCA model gaining global application as a new international standard. Furthermore, that Jersey wants to be an active participant with the OECD, as the international standard setter, in the successful pursuit of this objective. We look forward therefore to hearing what are to be the OECD’s proposed next steps and what form it is considered Jersey’s participation might best take”.

**31 Action Plans to enhance transparency on beneficial ownership:** another aspect of the international agenda on which the UK has led through its presidency of G8 is a call for Action Plans to enhance transparency on the beneficial ownership of companies. G8 members, with the exception of Germany and Russia, produced Plans for the G8 summit at Lough Erne in June 2013, and in July 2013 the UK Department for Business Innovation and Skills issued a Discussion Paper on “Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business”<sup>26</sup> inviting views on specific proposals that had been flagged by the UK in its Action Plan for G8.

32 The UK asked the CDs and OTs to produce Action Plans for the G8 Summit. In its Action Plan, Jersey highlighted its existing strong record on the transparency of the ownership of companies and trusts, a record recognised both by the IMF in its assessment in 2008 of Jersey’s compliance with the recommendations of FATF,<sup>27</sup> and by the World Bank in their inclusion of the Jersey “model” in their StAR project report “the Puppet Masters”.<sup>28</sup> In the Jersey Action Plan it is stated—

“Should international agreement be reached that steps should be taken to allow tax authorities and law enforcement agencies to have access to beneficial ownership information held on a central registry, Jersey will comply with any new international standard in this respect that has global application covering G8, G20, OECD and EU member jurisdictions plus other major financial centres. Because of the quality of the beneficial ownership information already held in the Island such compliance will

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<sup>26</sup> Published 15 July 2013, [www.gov.uk/government/consultations/company](http://www.gov.uk/government/consultations/company)

<sup>27</sup> Published September 2009, [www.jerseyfsc.org/the\\_commission/international\\_co](http://www.jerseyfsc.org/the_commission/international_co)

<sup>28</sup> *World Bank StAR project*, <http://star.worldbank.org/star/publications/puppet-masters>

present far less of a challenge for Jersey than for most if not all other jurisdictions.”

33 Included in the Jersey Action Plan is a commitment to undertake a general review of corporate transparency, having regard to the development of international standards and their global application, starting with the publication of a pre-consultation paper before the end of 2013. In the preparation of this paper regard will be had for the outcome of the UK consultation referred to in para 30 above.

34 **Base Erosion and Profit Shifting (BEPS):** the UK has welcomed the OECD report prepared for G20 Finance Ministers meeting in July 2013 on “Addressing Base Erosion and Profit Shifting, Tackling Tax avoidance, Promoting Automatic Exchange of Information, and Fighting Non-cooperative Jurisdictions”. The Communique issued following the meeting included the following statements—

“Tax avoidance, harmful practices and aggressive tax planning have to be tackled . . . We fully endorse the ambitious and comprehensive Action Plan submitted at the request of G20 by the OECD aimed at addressing base erosion and profit shifting (BEPS) with a mechanism to enrich the Plan as appropriate. We welcome the establishment of the OECD/G20 BEPS project and encourage all interested countries to participate. We look forward to regular reporting on the development of proposals and recommendations to tackle the 15 issues identified in the Action Plan and commit to take the necessary individual and collective action with the paradigm of sovereignty taken into consideration.”

“We commend the progress recently achieved in the area of tax transparency and we fully endorse the OECD proposal for a truly global model for multilateral and bilateral automatic exchange of information. We are committed to automatic exchange of information as the new, global standard for automatic exchange of information. We ask the OECD to prepare a progress report by our next meeting, including a timeline for completing this work in 2014. We call on all jurisdictions to commit to implement this standard.”

35 It will be difficult to analyse the impact on Jersey of the proposed Actions until they are further developed. The OECD is hoping that its Action Plan will largely be completed in a two-year period. What is unclear is how the Plan is going to be extended to non-OECD/G20 countries. The last of the 15 Actions in the Plan is “Develop a multilateral instrument” which it is said will enable jurisdictions that

wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties.<sup>29</sup>

36 Some points of interest in the Action Plan are as follows—

- Action 1—Address the tax challenges of the digital economy. The OECD calls for the development of detailed options to address the difficulties that the digital economy poses for the application of existing international tax rules. In the actions to be delivered in 12–18 months is “a report identifying the issues raised by the digital economy and possible actions to address them”;
- Action 5—Counter harmful tax practices more effectively, taking into account transparency and substance. In its report, OECD states that “no or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it”. The Action called for is to “Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime”.
- Action 6—Prevent Treaty abuse. In its report, OECD states “Existing domestic and international tax rules should be modified in order to more closely align the allocation of income with the economic activity that generates that income”.
- Action 11—Establish methodologies to collect and analyse data on BEPS and the actions to address it. Recommendations are to be developed regarding indicators of the scale and economic impact of BEPS and ensure that tools are available to monitor and evaluate the effectiveness and economic impact of the actions taken to address BEPS on an on-going basis.
- Action 12—Require taxpayers to disclose their aggressive tax planning arrangements. Recommendations are to be developed regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules.

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<sup>29</sup> A G20/OECD BEPS Project has been established through which all non OECD G20 countries will participate on an equal footing to develop proposals and recommendations to tackle the 15 issues identified in the Action Plan—see the Tax Annex to the Saint Petersburg G20 Leaders Declaration.

## **European Union initiatives**

37 As an adjunct to the international agenda, there are also specific European Union initiatives which, while primarily concerned with action required of the Member States, are not without impact on Jersey and the other CDs. Through its good neighbour policy, Jersey voluntarily supports the EU in the application of the Code of Conduct on Business Taxation and the EU Directive on the Taxation of Savings Income. Jersey has satisfied the Code criteria in the application of its current zero/ten corporate tax structure.<sup>30</sup> On the Directive, Jersey has agreements with each of the Member States which provide for the parallel application of the Directive. In 2005, when the agreements came into force, Jersey took advantage of the transitional arrangements in the Directive and followed Austria and Luxembourg in adopting a withholding/retention tax in place of automatic exchange of information.

38 The government of Jersey took the view that a move to AEOI would be taken when the position of Austria and Luxembourg was clarified. Having had regard to the outcome of the European Council Meeting in June 2013, and the call of the G20 Finance Ministers at their meeting in July 2013 on all jurisdictions to commit to AEOI, the government of Jersey decided that the time was right to make a change from the retention tax. The States of Jersey will be asked to make Regulations to make it mandatory, from 1 January 2015, for Jersey paying agents under the terms of the savings tax agreements to exchange tax information automatically. The Regulations will repeal the present retention tax provisions. They will also enable those who wish to do so to change over to AEOI in advance of its becoming mandatory. As a significant majority of those subject to the retention tax have already taken advantage of the voluntary disclosure option in the agreements, the effect of the change proposed is expected to be limited.

39 The European Council of Finance Ministers (ECOFIN) at their meeting on the 14 May 2013 agreed a mandate for the European Commission to open negotiations with Switzerland, and with Andorra, Liechtenstein, Monaco and San Marino, on extending the scope of the present Savings Directive to cover companies and trusts. The European Council at its meeting on 22 May 2013 called for the adoption of the revised Directive by the end of 2013. Negotiations with Jersey and the other CDs on the extended scope will follow those with Switzerland. Jersey has indicated that, in accordance with its good neighbour policy, it would follow the EU and the non-EU

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<sup>30</sup> Press Release, [www.gov.je/News/2013/Pages/ZeroTenStatement.aspx](http://www.gov.je/News/2013/Pages/ZeroTenStatement.aspx)



European sovereign jurisdictions in adopting the extended scope. What is not yet clear is whether this would be achieved through an amendment to each one of the 28 separate agreements with the Member States or whether the European Commission would be given a mandate to negotiate a new agreement between the EU and each of the CDs.

40 The European Commission in December 2012 published a Communication on an Action Plan to strengthen the fight against tax fraud and tax evasion.<sup>31</sup> At the same time it published recommendations on aggressive tax planning<sup>32</sup> and regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters.<sup>33</sup> The Commission, in its Communication of December 2012, proposed the formation of a Platform for Good Governance. This held its inaugural meeting on 10 June 2013. It is essentially an advisory group for the Commission to call upon, comprising Member States' representatives, and 15 representatives from NGOs and tax professionals, with a remit to help the Commission monitor implementation of its December 2012 recommendations on aggressive tax planning and good governance.

41 In May 2013, the Committee on Economic and Monetary Affairs of the European Parliament published a report "on the Fight against Tax Fraud, Tax Evasion and Tax Havens".<sup>34</sup> Among other things, this report urges the Commission to compile and create a public European blacklist of tax havens by 31 December 2014, and calls for action to be taken against those included on the list. That action includes "to prohibit EU financial institutions and financial advisers to establish or maintain subsidiaries and branches in blacklisted jurisdictions . . ." It is suggested that the definition of a tax haven be based on the OECD standards of transparency and exchange of information as well as the EU Code of Conduct principles and criteria. Both are standards that Jersey meets. On any objective basis, therefore, Jersey should not be included in any such blacklist if it should ever be adopted.

42 The report of the Committee also "calls on the proposal for a revision of the EU Anti-Money Laundering Objective to be complemented by introducing the obligation to create publically available government registers of the beneficial ownership of companies". This is a matter being addressed by the Action Plans called for by G8 for the enhancement of transparency for beneficial

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<sup>31</sup> (COM(2012)0722).

<sup>32</sup> (C(2012)8806).

<sup>33</sup> (C(2012)8805).

<sup>34</sup> (2013/2060(INI)).

ownership. While there is general support from G8, the OECD and the EU for improvements in this respect there is no present consensus on what form greater transparency should take. Many take the view that information on beneficial ownership should be on a central register, but that access to that register should be limited to law enforcement and tax authorities. Reflected in the interest of the Committee of the European Parliament in the EU Anti-Money Laundering Directive is an increasing tendency for the EU to link transparency and exchange of information on tax matters to financial services directives, particularly when judging third country equivalence and possible greater access to EU financial markets. This has been Jersey's experience in seeking to satisfy the EU on equivalence in the application of the standards in the EU Third Anti-Money Laundering Directive.<sup>35</sup>

43 The EU has stated that it will link market access for financial services firms based in non-EU countries to compliance with the EU's definition of a "co-operative jurisdiction" as outlined in the good governance action plan. This is evident in the Alternative Fund Managers Directive<sup>36</sup> and the Regulation on European Venture capital Funds<sup>37</sup> both of which include requirements that an acceptable third country is one that is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force on Anti-Money Laundering and Terrorist Financing and fully complies with the standards laid down in art 26 of the OECD Model Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multi-lateral tax agreements.

44 The EU agenda also includes proposals for a Financial Transactions Tax supported by 11 Member States which, if it should come to pass, would impact upon third countries. However there is every indication that the proposals will not survive in their present form. Also on the table is the Common Consolidated Corporate Tax Base where the general view is that if progress is to be made, it should be on establishing a "common" base rather than on "consolidation" aspects.

45 The EU, in pursuing its own agenda, is also giving full support to the international agenda of G20 and OECD. European Tax Commissioner Semeta on 20 July 2013 warmly welcomed G20 Finance Minister's commitments on concrete measures to better tackle

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<sup>35</sup> For a history of earlier exchanges on AMF, see Powell, "Money laundering—some recent developments" (2006) 10 JL Rev 180.

<sup>36</sup> Directive 2011/61.EU, art 35(2).

<sup>37</sup> Regulation (EU) No. 345/2013, art 3(d)(iv).

tax evasion and corporate tax avoidance worldwide.<sup>38</sup> He expressed the view that the OECD's *Action Plan to Tackle Base Erosion and Profit Shifting* was the right approach to curbing corporate tax avoidance worldwide and that it complements the measures put forward by the Commission to tackle aggressive tax planning in the EU, which European leaders endorsed in May 2013. He also welcomed G20 Finance Ministers' endorsement of AEOI as the global standard and said—

“For some time now, the EU has been the fore-runner in this field. The international consensus to follow our lead, with more openness and greater transparency, gives credence to our approach. It also creates the perfect environment for us to press ahead with expanding the scope of automatic exchange of information within the EU, and seeking the same from our closest neighbours.”

This last remark reinforces the view that for Jersey there is a need to keep abreast of EU tax initiatives as well as those of G20 and OECD.

## Conclusion

46 In summary, Jersey's response to the many recent international tax initiatives includes the following—

- negotiating an intergovernmental agreement with the USA on the application of FATCA;
- negotiating an intergovernmental agreement with the UK based on the US FATCA model;
- joining in the EU pilot project on enhancing automatic exchange of information based on the US FATCA model;
- agreeing to join the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters;
- producing an Action Plan for G8 on improving transparency on beneficial ownership;
- giving public assurances of commitment in letters to OECD, EU and the UK Government;
- making public statements on the commitment to combat tax evasion and aggressive tax avoidance.

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<sup>38</sup> Press Release, [europa.eu/rapid/press-release\\_MEMO-13-711\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-711_en.htm)

47 The Secretary General of the OECD, Angel Gurría, in a letter<sup>39</sup> to the Chief Minister, has congratulated Jersey on the action taken and has expressed pleasure at Jersey's commitment to advancing in the areas of tax transparency and taking a leading role in many of the developments.

48 Jersey has seen no conflict between entering into such commitments and ensuring the Island's continued success as an international finance centre, providing the commitments are part of a global application of the standards to which they relate.

*Colin Powell, CBE was Economic Adviser to the States of Jersey between 1969 and 1992, and was Chief Adviser to the States of Jersey until December 1998. In 1999 he was appointed Chairman of the Jersey Financial Services Commission, from which he retired in 2009. He is currently Adviser on International Affairs in the Chief Minister's Department in which capacity he represents Jersey as one of the Vice-Chairs of the Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review Group.*

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<sup>39</sup> Press Release 29 July 2013—[www.gov.je/News/2013/Pages/OECDLetterChiefMinister.aspx](http://www.gov.je/News/2013/Pages/OECDLetterChiefMinister.aspx)