

REGIONAL ACTIVITY: Regional Data Exchange on Asset Disclosure and Conflict of Interest

**Explanatory notes to the  
International Treaty on Exchange of Data  
for the Verification of Asset Declarations**

Final Draft

The views expressed in this document do not necessarily reflect the views of the Austrian Development Cooperation.

Sarajevo, March 2019

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## *The Treaty: overview*

### *Why is this Treaty necessary?*

Many corrupt public officials spend their actual wealth **abroad**: they buy real estate, own businesses, or deposit money on foreign bank accounts. They also further their private interests by using foreign companies as intermediaries. For example, public officials may apply for a tender at their own ministry through a company they own abroad. However, today integrity bodies in charge of verifying the veracity of asset declarations can only access **domestic** state databases. So far, no mechanism exists for integrity bodies to exchange data internationally for their administrative checks.

### *How does the Draft Treaty work?*

As a basic rule, integrity bodies of two State parties may exchange data if **both** integrity bodies use this category of data for their verification purposes. Integrity bodies can also provide additional data which only the requesting State party uses for the verification of declarations. The wording of this Draft Treaty is by and large based on the Convention on Mutual Administrative Assistance in Tax Matters, developed jointly by the **Council of Europe** and the **OECD**.

### *Is administrative exchange of data in line with international standards?*

More than **100 countries** have for many years exchanged data “relevant to the determination, assessment and collection of [...] taxes”.<sup>1</sup> The Draft Treaty has a much narrower scope of data and only concerns public officials and their family members. The **European Court of Human Rights** approved in a case of 2005 the online publication of asset declarations.<sup>2</sup> Furthermore, the Court approved in 2015 an international administrative exchange even of banking data for tax verification purposes.<sup>3</sup>

### *How was this Draft Treaty developed?*

This document is the result of a series of three workshops held in 2015 and 2016 and two negotiation meetings in 2018 (International Anti-Corruption Academy, Laxenburg, Austria) and 2019 (Podgorica, Montenegro) with representatives of **integrity bodies** and representatives of Ministries of Justice and Ministries of Foreign Affairs from South-Eastern Europe, and with representatives of **international stakeholders** (Basel Institute of Governance, RCC, UNODC, UNDP and World Bank). The European Commission also provided written input for this Draft. Delegations from Albania, Bosnia and Herzegovina,

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<sup>1</sup> OECD [website](#) on the Model Agreement.

<sup>2</sup> Wypych v. Poland, Application no. [2428/05](#), decision of 25 October 2005.

<sup>3</sup> G.S.B. v. Switzerland, Application no. [28601/11](#), Judgment of 22 December 2015.

Bulgaria, Montenegro, North Macedonia, and Serbia, as well as observers from Kosovo\* and Moldova, finalised the Draft Treaty at the two negotiation meetings in 2018 and 2019, while representatives from Croatia and Romania provided support to the formulation of earlier drafts in 2015 and 2016.<sup>4</sup>

### *Preamble*

A. The first paragraph of the Preamble is taken from the UNCAC and embeds the Treaty in the larger context of fighting corruption. One of the tools in this fight are “**asset declarations**”: Most countries of this world require that public officials disclose their income, assets, and financial interests.<sup>5</sup> Asset declarations are intended for a variety of purposes, most fundamentally to prevent and to detect the abuse of public office for private gain. Declarations also help to build a climate of integrity by providing guidance to officials about the principles and behaviours of ethical conduct in public office and by reminding public officials that their behaviour is subject to scrutiny. To this end, in many countries various integrity bodies compare the declarations with data contained in domestic land and vehicle registries, private firm registries, bank account information, or tax databases. Such monitoring serves as an incentive for complying with integrity rules.

B. However, many corrupt public officials spend their actual wealth **abroad**: they buy real estate, own businesses, or deposit money on foreign bank accounts. Hiding this wealth is relatively easy. The public officials simply abstain from disclosing these foreign assets, even though declaration of wealth held abroad is mandatory under most if not all declaration systems.<sup>6</sup> Similar is true for private interests. Thus, integrity bodies in charge for verifying the veracity of asset declarations need access to information held by foreign authorities. This Treaty shall facilitate such international exchange of data.

C. At this point, the UNCAC promotes “**international cooperation** [...] in civil and administrative matters relating to corruption” (Article 43 paragraph 1). By contrast, other provisions of the UNCAC on international cooperation are not relevant, as they are mostly tailored around criminal cases (Chapter IV, Articles 44-50). For example, Article 48 paragraph 1 lit. f UNCAC reads as follows: States Parties shall, in particular,

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

<sup>4</sup> RAI is grateful for the advice and input of the following persons who commented on earlier versions of this draft Treaty: Ádám Földes, Advocacy Advisor, Conventions Unit, Transparency International Secretariat; Pedro Gomes Pereira, Senior Asset Recovery Specialist, Basel Institute on Governance; Constantine Palicarsky, Crime Prevention and Criminal Justice Officer, UNODC; Ivana Maria Rossi, Senior Financial Sector Specialist, World Bank; Tilman Hoppe (anti-corruption expert, Berlin) developed the first draft of the Treaty and the Explanatory Notes; Bardo Fassbender (Professor of International Law, University of St. Gallen, Switzerland) reviewed and amended the draft, in particular regarding mechanisms of international treaty law and compliance with constitutional and human rights standards.

<sup>5</sup> See for example: World Bank a.o., *Public Office, Private Interests: Accountability Through Income and Asset Disclosure* (2012).

<sup>6</sup> OECD, *Asset Declarations for Public Officials – A Tool to Prevent Corruption* (2011): all country cases include declaration of income and assets “abroad”.

take effective measures “to exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.” By all appearances, one could argue that verifying asset declarations is an “administrative measure [...] for the purpose of early identification” of illegal enrichment and other offences covered by the UNCAC. However, the explicit criminal focus of this Article 48 (see Article 43 paragraph 1) speaks against referencing it in the Preamble, as this Treaty focuses on administrative verifications. Another Article, 52, explicitly mentions asset declarations and even international exchange of data. According to Article 43 paragraph 1 it is one of several Articles that are not confined to the criminal sphere, but also embraces administrative and civil measures of asset recovery. However, the wording of its paragraph 5 probably relates mainly to criminal offences: “Each State Party shall consider establishing [...] effective financial disclosure systems for appropriate public officials [...]. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.”

D. **Resolution 6/4** of the sixth Conference of the States Parties to the UNCAC (November 2015) is highly relevant in this context. It invites State Parties “to consider the possibility of concluding multilateral, regional or bilateral treaties, agreements or arrangements on civil and administrative matters relating to corruption, including international cooperation, in order to promote the legal basis for granting mutual legal assistance requests concerning natural or legal persons in a timely and effective manner”; “to inform the Secretariat about designated officials or institutions appointed, where appropriate, as focal points in the matter of the use of civil and administrative proceedings against corruption, including for international cooperation”; “to work with the Secretariat and other international anti-corruption organizations, donors, assistance providers and relevant civil society organizations, as appropriate, to promote bilateral, regional and international activities to strengthen the use of civil and administrative proceedings against corruption, including workshops for the exchange and dissemination of relevant experiences and good practices”;<sup>7</sup>

E. More than 100 states so far have used the **OECD Model** “Agreement on Exchange of Information on Tax Matters” in order to formally exchange data “relevant to the determination, assessment and collection of [...] taxes” among others.<sup>8</sup> Tax authorities verifying the veracity of tax declarations use data such as from real estate, business, or bank account registers. Similar is true for the **Convention** on Mutual Administrative Assistance in Tax Matters, developed jointly by the OECD and the Council

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<sup>7</sup> *Resolution*, *ibid*, numbers 6, 8, and 9.

<sup>8</sup> OECD *website* on the Convention.

of Europe in 1988 and amended by Protocol in 2010 (ETS 127).<sup>9</sup> It allows for the exchange of information inter alia for the “assessment, examination, collection” of taxes.<sup>10</sup> This is exactly the same information which integrity bodies use for monitoring the veracity of asset declarations by public officials. In fact, information declared in tax and asset declarations largely overlaps as far as it concerns financial information (income, assets).<sup>11</sup> In effect, for this reason it is sometimes the tax authorities that are in charge of verifying asset declarations by public officials. For example, Latvia or North Macedonia use this model in line with international recommendations.<sup>12</sup> The Council of Europe/OECD Convention and the OECD Model Agreement are therefore prime reference points for any instrument on international data exchange by integrity bodies. For this reason, this Treaty largely uses **verbatim** the same provisions that the Council of Europe and OECD foresee in the area of taxes. However, this Treaty is much narrower in its scope and reach than tax agreements. For example, under tax agreements banking data of all citizens are automatically exchanged, including “account number” and “account balance or value”,<sup>13</sup> whereas under this Treaty this would only concern public officials and only to the extent their declarations are in effect verified.<sup>14</sup> This Treaty thus operates well within the chartered territory of international agreements on cooperation of tax administrations. The comments in the Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters are a source of reference complementing the Explanatory Notes for this Treaty.<sup>15</sup>

F. The Treaty is based on five **fundamental principles**:

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<sup>9</sup> Council of Europe *treaty website*; OECD *treaty website*.

<sup>10</sup> *Explanatory Report* to the Convention on Mutual Administrative Assistance in Tax Matters as Amended by the 2010 Protocol, 1 June 2011, No. 14.

<sup>11</sup> OECD, *ibid*, page 43: “To the extent public officials’ declarations serve the purpose of wealth monitoring, the function of such systems overlaps with those of the tax administration. In fact the tax administration should be the most competent body to monitor income and prevent enrichment from illicit, hence untaxed, sources.”

<sup>12</sup> OECD, *Asset Declarations for Public Officials*, *ibid*, page 43 and 37: “Tax authorities: It is common to entrust tax authorities with the collection and processing of public officials’ declarations where at least one of the purposes is to monitor wealth. The rationale is obvious: the monitoring of all income, not just that of public officials, is generally one of the main tasks of tax authorities.”, page 38 (example of Latvia); ReSPA, *Comparative study – Income and asset declarations in practice* (2013), at page 103 (example of Macedonia); Western Balkan *Recommendation* on Disclosure of Finances and Interests by Public Officials (ReSPA 2014), Recommendation E.3: “For reasons of efficiency, existing financial expertise such as in the tax administration can be used for financial audits.”

<sup>13</sup> Article 2 (2) d, Council of the European Union, *Amending Protocol* to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, 21 May 2015.

<sup>14</sup> Not all countries use banking information for verification purposes, see for example ReSPA, *Comparative Study*, *ibid*, page 12.

<sup>15</sup> *Explanatory Report*, *ibid*.

- Administrative exchange of data being **limited** to **purposes** of verification of asset declarations (Article 1);
- **Voluntary** cooperation (Article 5);
- Applicability to a diverse range of **disclosure systems** (Article 2);
- Data exchange being confined to the **legal limits** of both the requesting and the requested Party (Article 3 paragraph 2 (c), Article 5 paragraph 1);
- Data protection and **confidentiality** (Article 8).

### *Chapter I: General provisions*

#### *Article 1: Purpose and scope of the Treaty*

A. Paragraph 1 Sentence 1 makes it clear that the Treaty is a matter of **administrative** cooperation, as is, for example, the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters according to its Article 1.

B. Paragraph 1 Sentence 2 is taken from Article 1 of the OECD Model Agreement. It narrows down the application of this Treaty to the administrative verification of disclosures of finances and interests by public officials.

C. All **tax** systems of this world differ regarding as to whom they tax, based on which conditions, and by which procedures tax administrations collect taxes and monitor compliance. Differences can be stark: Whereas some countries will consider tax declarations confidential personal data, they are subject to public access in others (e.g. Finland, Norway); as another example, some countries grant tax favours to same-sex unions, while others will not and even criminalise such unions. These differences are by and large irrelevant when countries exchange data for tax matters with each other.<sup>16</sup> As long as one of the major categories of taxation is concerned, the OECD Model Agreement applies (according to its Article 3). Similar is true for the Council of Europe/OECD Convention (ETS 127), Article 2.

D. It is plain that in the area of **asset declarations** the same approach applies. All asset declaration systems differ in larger or smaller details. However, they all serve the same purpose: enhancing integrity through transparency on finances and personal interests of public officials and persons close to them. As far as sanctions are concerned, the OECD Model Agreement foresees exchange of data irrespective whether the same sanction or any sanction at all applies “under the laws of the requested Party” (Article 5 paragraph 1 Model Agreement). This Treaty takes the same approach in Article 1 paragraph 2.

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<sup>16</sup> See for example the case of Sweden and Liberia, who have concluded an “Agreement for the exchange of information relating to tax matters” based on the OECD Model, OECD *website*.

E. All countries in South Eastern, Central, and Eastern Europe have some form of disclosure framework for public officials. Many countries in Western Europe and outside Europe do as well. However, there is a **minority** of countries world-wide without a disclosure system. In case any of these countries might want to unilaterally support international exchange of data, Paragraph 3 foresees this option. This could be relevant for countries such as Liechtenstein, which do not have a system of asset declarations,<sup>17</sup> but might be interested in supporting other states' efforts in enhancing integrity.

### *Article 2: Definitions*

A. The definitions in lit. a to c reflect the work done by the Council of Europe/GRECO,<sup>18</sup> OECD,<sup>19</sup> UNODC,<sup>20</sup> and the World Bank,<sup>21</sup> as well as regional organisations such as the Organisation of American States (OAS),<sup>22</sup> the Regional Anti-Corruption Initiative (RAI)<sup>23</sup> or the Regional School of Public Administration (ReSPA).<sup>24</sup>

B. As is the case with tax declarations,<sup>25</sup> there are targeted and random verifications of asset declarations. For example, where GRECO found verification mechanisms to be missing, it recommended "coupling the disclosure system with an effective control mechanism (including random verifications)".<sup>26</sup> However, this Treaty basically applies only to **targeted** verifications (see Article 3 paragraph 1).

C. Article 9 further details the functions of the **Focal Points**.

### *Article 2a: Information exchanged*

A. Article 2a lists the categories of information which Parties may exchange in principle with each other. Registers on companies, trusts, and similar entities are crucial for finding out whether illegally obtained assets are indirectly held through one or more

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<sup>17</sup> See GRECO Evaluation Report on Liechtenstein (*Eval I/II Rep (2011) 1E*), at para. 110.

<sup>18</sup> GRECO, Lessons learnt from the three evaluation rounds (2000-2010), 2012, p. 14; its Fourth Evaluation Round includes "declaration of assets, income, liabilities and interests"; Council of Europe Eastern Partnership Project, *Practitioner manual on processing and analysing income and asset declarations of public officials*, 2014.

<sup>19</sup> OECD, *Asset Declarations for Public Officials*, *ibid*.

<sup>20</sup> World Bank/UNODC Stolen Asset Recovery Initiative, *Income and Asset Declarations (AD): Tools and Trade-offs*, 2012; World Bank Group/UNODC Stolen Asset Recovery Initiative, *Public Office, Private Interests*, *ibid*.

<sup>21</sup> *Ibid*.

<sup>22</sup> Model law on the declaration of interests, income, assets and liabilities of persons performing public functions, 2013, *SG/MESICIC/doc.344/12 rev. 2*.

<sup>23</sup> RAI, *Rules and Experiences on Integrity Issues*, 2012.

<sup>24</sup> Western Balkan Recommendation on Disclosure of Finances and Interests by Public Officials (2014), *ibid*.

<sup>25</sup> See for example: OECD, *Use of Random Audit Programs* (2004), 51 pages.

<sup>26</sup> See for example GRECO Evaluation Report Bosnia and Herzegovina (*Eval IV Rep (2015) 2E*), recommendation v.

intermediate corporate or non-corporate entities or legal arrangements for which the declarant or his/her family is the beneficial owner.

B. Only insofar the categories of information used by both Parties overlap, shall the Parties exchange data.

C. Paragraph 2 does not preclude a Party from voluntarily providing data, which only the other Party can use for the verification of asset declarations. For example, Party A may have access to the (open) register of intellectual property but may not use the data for the purpose of its own asset declarations. Party A may provide this data voluntarily to Party B, if Party B could obtain this data under its own domestic laws.

### *Article 3: Exchange of information upon request*

A. This Article is largely modelled after Article 5 of the **OECD** Model Agreement. The Council of Europe/OECD Convention (ETS 127) foresees a similar mechanism in its Article 5. Both provisions depend in practice on the principle of reciprocity:<sup>27</sup> Focal Points will only continue to exchange information if support is mutual over time. Notwithstanding bilateral agreements on a case-by-case basis, Article 3 applies mainly to targeted verifications.

B. Once an integrity body has an indication in which **foreign country** one or several public officials might have spent their (undeclared) wealth, it is obvious to cooperate with this country on data exchange. However, if no such indication exists, the following question arises: Should the integrity body send random information requests to foreign countries, and if so, to which ones? One could select countries based on the following criteria:

- **Shared borders:** Citizens of certain neighbouring countries often spend their money cross-border in particular where travel among borders is easy.
- **Language:** Where citizens and/or businesses in a foreign country speak the same language as in the home country, this eases foreign investment by public officials.
- **Attractiveness** for investment: Certain countries in a region might be an attractive destination for investing in specific categories of assets. For example, Croatia or Montenegro provide attractive seaside properties for investment by foreigners of neighbouring countries. Easy crossing of borders and similarity of languages are additional incentives. Similarly, Austria could be traditionally viewed as a financial centre catering to the needs of clients from the Balkans or Eastern Europe with some of its banks having branches in the region.

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<sup>27</sup> See for example Robert O. Keohane, Reciprocity in international relations, International Organization (1986), Vol. 40, No. 1, p. 1-27.

- **Patterns:** Analysis from tax authorities, anti-money laundering units, or the integrity body itself may point to certain destinations having proved attractive to citizens for hiding wealth in the past.
- **Spontaneous information** may also trigger an information request (see below comments under Article 7).
- **Random sample:** Public officials will always defy patterns and logic of investing their (undeclared) wealth. They could prefer certain regions for personal reasons or because of individual connections. However, integrity bodies will only be able to base their requests on random samples within limits: It would simply be disproportionate to send out information requests for 100 public officials to a multitude of foreign countries. In most cases, integrity bodies in these foreign countries struggle already with retrieving data for verifying declarations by their own public officials.

C. Paragraph 3 is taken from Article 5 paragraph 2 of the OECD Model Agreement. In this context, Article 5 paragraph 1 is important. Integrity bodies in different countries have access to a different range of information.<sup>28</sup> The requested Party is only obliged to provide information as the integrity body has **legally access** to. If the integrity body of the requested Party has for example only access to the real estate, business, and vehicle register, it will not be obliged to provide the requesting Party with information from a register of bank accounts. However, as far as the laws of the requesting Party permit, it may do so voluntarily. The same is true for information “in the possession or control of a person within the jurisdiction of the requested Party”: if the requested integrity body has not access to such information, it will not have to provide it (Article 5 paragraph 1). Paragraph 3 does not require the requesting Party to show “grounds for believing that the information requested is held in the requested Party” (Article 5 paragraph 5 lit. d OECD Model Agreement). This Treaty focuses on data contained in State databases; it goes without saying that data contained in State databases of the requested Party is also held by it. Verification of tax declarations uses a broader base of information. Hence, the OECD Model Agreement contains the additional provision.

E. Paragraphs 4 and 5 are taken from Article 5 paragraph 6 of the **OECD** Model Agreement.

F. Paragraph 7 makes it clear that an information request may not only relate to an individual public official, but may contain a **list** of several randomly selected public officials. For example, media reports may point to a significant number of foreign

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<sup>28</sup> See for example GRECO Evaluation Report on Estonia (*Greco Eval II Rep (2003) 4E*), at para. 54: “Certain interlocutors felt that their powers were insufficient as it was difficult in practice to access the necessary data for verification purposes.”; GRECO therefore recommended “to review the system of public officials’ declarations of assets and interests, in particular in respect of the access to data necessary for the control of such declarations” (Recommendation ix).

politicians from countries A and B owning coastal properties in country C. Countries A and B will have an interest of verifying at least for a sample of their public officials, whether any of these properties are missing in the asset declarations (see or this case also the comment under Article 7). One should note in this context that the new EU Directive 2014/107/EU on “mandatory automatic exchange of information in the field of taxation” foresees an automated annual exchange of data for all foreign holders of bank accounts including the account balance or value.<sup>29</sup> The data exchange is disregarding of the fact whether the bank accounts are properly declared for tax purposes or not. The same is true for the new Agreement between the European Union and Switzerland on exchange of tax data.<sup>30</sup> Data exchange under this Treaty will certainly be a less intrusive measure, both in terms of numbers and in terms of sensitivity of the information (see Comment E on the Preamble).

G. Paragraph 8 refers to a template for requests to be used by a requesting Party, which is annexed to the Treaty. The template is meant to facilitate requests. It can be changed at any time between Focal Points on a bilateral or multilateral basis. The following is an example of a filled out request form:

1.	Requesting Focal Point:	Anti-Corruption Agency, Country X
2.	Contact details (email, phone number):	<u>declarations@ACA.x</u> , +386-879 09 883
3.	Name/position of staff:	Mr. Vlad Miller, Senior Inspector
4.	Name of declarant:	Ms. Софија Бејкер
5.	Aliases, transliteration(s):	Ms. Sophia Baker / Sofia Bakr / Sofija Bakr
6.	Date of birth (DD/MM/YYYY):	06/08/1975
7.	Nationality	X-ian
8.	Gender	Male <input type="checkbox"/> Female <input checked="" type="checkbox"/>
9.	Personal identifier (type and number):	Citizen number: C74KJML
10.	Type of verification:	Targeted <input type="checkbox"/> Random <input checked="" type="checkbox"/>
11.	Reason for declaring (official position, family member of public official)	Mayor of Citygrad
12.	Which information is requested? (company name, licence plate, etc.):	Does the declarant hold company shares in your country under the name of “Bakr Ltd.” (or aliases)?

<sup>29</sup> Article 1 paragraph 2 (b), *Council Directive 2014/107/EU* of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

<sup>30</sup> Council of the European Union, *Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments*, 21 May 2015.

		Declarant also is owner of “Construction Ltd.” in the requesting country. Does “Construction Ltd.” hold shares of “Bakr Ltd.” in your country?
13.	Please transmit information by:	Email <input type="checkbox"/> Fax <input type="checkbox"/> Letter <input type="checkbox"/> Other <input checked="" type="checkbox"/> <u>Phone</u> _____
14.	Additional comments:	None

#### *Article 4: Automatic exchange of information*

Article 4 is based on Article 5A of the OECD “Model Protocol for the Purpose of Allowing the **Automatic** and Spontaneous Exchange of Information under a TIEA [Tax Information Exchange Agreement]”.<sup>31</sup> For automated exchange of tax data under the EU Directive see above, Article 3, comment F. It should be mentioned that the Council of Europe/OECD Convention (ETS 127) also foresees “automatic exchange of information” in its Article 6. Whether Parties will make use of this tool at all, is not yet clear. Whereas in the area of taxes automated exchange of data on a large scale is regular business for tax administrations (see above comment F, EU Directive), this is not the case for verifying asset declarations. However, this Treaty foresees such an option, should the need for automatic exchange arise in the future.

#### *Chapter II: Exchange of information*

##### *Article 5: Right to decline a request*

A. Paragraph 1 provides a list of grounds for declining a request. “*Ordre public*” in subparagraph c refers in particular to information which concerns the vital interests of the requested Party.<sup>32</sup> Parties can also refuse to comply with information requests because of **quantity** (subparagraph d). This may be important if one particular country is “flooded” with requests.

B. Subparagraphs a to c of paragraph 1 are taken more or less verbatim from Article 7 paragraphs 1, 2 and 4 of the **OECD Model** Agreement. Paragraphs 3, 5 and 6 of the OECD Model Agreement are not relevant in the context of asset declarations. Subparagraphs d and e take into account the workload and possible factual limits to obtaining data integrity bodies may face. See also comment D under Article 3.

##### *Article 6: Open data and direct access*

A. Certain information relevant for verifying asset declarations is **openly** available to the public. For example, in Croatia, the “Register of Business Entities” is openly accessible free of charge and provides a complex search facility both in Croatian and

<sup>31</sup> *Model Protocol* as of 2015.

<sup>32</sup> OECD Model Agreement, Comment 46 on Article 5.

English.<sup>33</sup> The information is already in effect accessible to the integrity body of another country. Still, the Treaty would put the use of this information on a sound legal basis and would mandate the foreign integrity body. Paragraph 1 Sentence 2 states the obvious: Data that is openly available to everybody can be used outside the restrictions of Article 8. It is important in this context to keep in mind that case-law by the **European Court of Human Rights** in effect renders information contained in asset declarations into open data (see below comment H. on Article 8).

B. Paragraph 2 aims at facilitating research efforts by **foreign users**. The central record may include information inter alia on the languages in which the databases are available and what parameters are searchable.

C. Paragraph 3 follows a similar rationale as paragraph 1. Where any citizen of a Party can in principle **access** certain information, the Party can grant this possibility also to the integrity body of another Party of the Treaty.

D. Paragraph 4 is an additional feature in the context of open data. Once data is open to the public at large, it can be used for any purpose, outside the limits of Article 1 and 8. For example, “international anti-money-laundering standards require banks to have risk management systems to identify whether customers are PEPs [Politically Exposed Persons]. Banks generally perform checks before establishing a business relationship with a new customer.”<sup>34</sup> In this context, the foreign declaration “form provides an important ‘snapshot in time’ that the bank can use to compare to information provided by the customer or with account activity.”<sup>35</sup> In order to ease access, integrity bodies could provide an English translation of the declaration form on their website, so any **foreigner** consulting the declaration forms online would have at least an English version accessible. A more advanced option would be for example the Georgian system, where a bilingual user interface provides all information in Georgian and English.<sup>36</sup> Thus, for example, a German bank exercising due diligence on a new foreign customer could check whether an asset declaration from his/her home country provides any information. Another example is the case of French NGOs exposing that high-level public officials from various African countries “had acquired millions of Euros of assets in France that could not be the fruits of their official salaries.”<sup>37</sup>

E. **Transliteration** of names between languages using different characters (e.g. Cyrillic, Arabic, Latin) is an issue to be considered in practice. There are official transliteration

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<sup>33</sup> <http://www1.biznet.hr/HgkWeb/do/fullSearch>.

<sup>34</sup> World Bank/Ivana Rossi, *Using Asset Disclosure for Identifying Politically Exposed Persons* (2012), page 8.

<sup>35</sup> World Bank, *Politically Exposed Persons, Preventive Measures for the Banking Sector* (2010), English/Russian, page xvii/Recommendation 3.

<sup>36</sup> <http://declaration.gov.ge/>.

<sup>37</sup> Global Witness a.o., *Press release 31 January 2008*, “France must re-open probe into alleged graft by African leaders”.

charts in some countries (for example for spelling a name of original Cyrillic characters in Latin characters). However, one cannot always expect that transliteration follows official (or even only semi-official) guidelines). Thus, for example, a request from Serbia to Croatia should contain a caveat as to the possible Latin spelling of the public official's name (see Annex to the Treaty: Request form).

#### *Article 7: Spontaneous exchange of information*

This Article is taken verbatim from the OECD "Model Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under a TIEA [Tax Information Exchange Agreement]", Article 5B.<sup>38</sup> For example, media reports may reveal that "many politicians" and "high ranking officials" of country A own "properties in touristic areas" of country B.<sup>39</sup> In this case, the Focal Point of country B could alert the Focal Point of country A to the risk that some of these properties are not declared in country A. The Focal Point of country A may follow up on this spontaneous information with a comparison of its list of high level officials (or a random sample) and the real estate registry of country B. Similarly, spontaneous information may concern individual cases. Additional agreements on procedures under Sentence 2 of Article 7 are purely optional. It should be mentioned that the Council of Europe/OECD Convention (ETS 127) also foresees spontaneous exchange of information in its Article 7.

#### *Article 8: Confidentiality*

A. All major **international standards** on data protection set limits for cross-border exchanges of data. The Explanatory Report to the Council of Europe/OECD Convention references the following:<sup>40</sup> the Council of Europe "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (ETS 108)<sup>41</sup> and the OECD "Recommendations of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data".<sup>42</sup> One could also mention in this context the European Union's "Directive on protection of individuals with regard to the processing of personal data and on the free movement of such data" (95/46/EC).<sup>43</sup>

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<sup>38</sup> Ibid; see also the OECD, *Module on Spontaneous Exchange of Information* (2006).

<sup>39</sup> See for example: Independent Balkan News Agency (*22 March 2013*), "Russians put properties owned in Montenegro for sale".

<sup>40</sup> *Explanatory Report* to the Convention on Mutual Administrative Assistance in Tax Matters as Amended by the 2010 Protocol, at no. 216.

<sup>41</sup> [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108).

<sup>42</sup> [www.oecd.org/internet/ieconomy/privacy-guidelines.htm](http://www.oecd.org/internet/ieconomy/privacy-guidelines.htm).

<sup>43</sup> *95/46/EC*. See also *COM (2012) 11*: Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

B. Paragraph 1 and 2 are taken verbatim from Article 22 of the **Council of Europe/OECD** Convention on Mutual Administrative Assistance in Tax Matters, with only the reference to “taxes” replaced by “asset declarations”. Thus, the respective comments in the Explanatory Report to the Convention apply accordingly.<sup>44</sup> The word “secret” in the Council of Europe/OECD Convention is not to be understood in the sense of “state secret protection laws”,<sup>45</sup> but in the sense of privacy and protection of personal data.<sup>46</sup> In order to avoid any confusion with “state secrets”, this Treaty uses the word “confidential” instead. The Council of Europe Convention permits the use of exchanged information also for “the enforcement or prosecution in respect of [...] taxes”. In the area of taxes, offences concerning wrong tax statements mostly concern criminal tax evasion. In the area of asset declarations, such offences mostly concern provision of false information.<sup>47</sup> In the majority of cases, however, the offences are disciplinary or administrative.<sup>48</sup>

C. Article 8 of the OECD Model Agreement and Article 6 paragraph 2 of the new Agreement between the European Community and Switzerland on exchange of tax data<sup>49</sup> contain similar provisions on **data protection**.

C1. In most cases, Parties will provide data not concerning their own citizens, but a **foreigner**, i.e. a public official of another Party. However, this does not mean that the level of data protection could be any lower: privacy standards apply to all persons, whether citizens or not. Further, public officials could hold dual citizenship (e.g. Moldovan and Romanian), or their family members could be foreign citizens. In these cases, they could be citizens of a Party that provides data to the Party where the public official holds his/her position.

D. Following Article 16 paragraph 3 of the OECD Model Agreement, Article 16 paragraph 2 ensures that obligations of a Party under Article 8 remain in force even after that Party has denounced the Treaty. The same result would be effected for all Parties if the Treaty as such was terminated in accordance with Article 54 lit. b of the Vienna Convention on the Law of Treaties.

E. A country that wishes to make use of information obtained under this Treaty in a criminal proceeding not related to asset declarations will have to initiate from the start a separate procedure on **mutual legal assistance** in criminal matters. In this case, the requested Party could still refuse to cooperate as foreseen under the provisions of

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<sup>44</sup> Explanatory Report to the Convention, *ibid*, at no. 216.

<sup>45</sup> See for example the Data Secrecy Act of Croatia of 2007, which distinguishes the categories “Top Secret, Secret, Confidential, Restricted” (Article 4).

<sup>46</sup> Explanatory Report to the Convention, *ibid*.

<sup>47</sup> OECD, Asset Declarations for Public Officials, *ibid*, page 16.

<sup>48</sup> OECD, *ibid*; World Bank a.o., Public Office, Private Interests, *ibid*, page 79.

<sup>49</sup> Article 6 paragraph 1, Council of the European Union, Amending Protocol, *ibid*.

the mutual legal assistance mechanism in criminal matters, even if it has provided the same information already under this Treaty. For example, data exchange under this Treaty might reveal that a public official from Party A failed to declare the ownership of real estate located in Party B. The information can be used in a proceeding against the public official for wrongful declaration of assets. However, the information cannot be used as evidence in a trial against the official concerning embezzlement of funds. Law enforcement authorities would have to initiate a mutual legal assistance procedure, for example based on the European Convention on Mutual Assistance in Criminal Matters.<sup>50</sup>

F. Paragraph 3 is taken verbatim from Article 22 paragraph 4 sentence 1 of the Council of Europe/OECD Convention. Sentence 2 of paragraph 4 and paragraph 3 of Article 22 of the Council of Europe/OECD Convention are not relevant for this Treaty, as cooperation targets only data accessible and used in the requested Party (Article 5 paragraph 1). Article 8 of this Treaty is less far-reaching than Article 22 of the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters. Whereas the latter foresees in paragraph 4 for information to be used by **Third Parties**, this Treaty does not do so: in the area of asset declarations, such wider use does not seem relevant.

G. It is important to note that in a recent case,<sup>51</sup> the **European Court of Human Rights approved** the international administrative exchange of banking data for tax verification purposes. The United States and Switzerland had concluded an administrative agreement regarding the banking data of up to 52,000 U.S. customers in Switzerland ("Agreement 09"). The Court reviewed the data exchange under this agreement and found no violation of Article 8 of the European Convention on Human Rights (Right to respect for private life). As regards the necessity of the measure, the Court underlined that the data exchange only concerned the applicant's bank account details, that is to say purely financial information. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted. The Court affirmed an extensive margin of appreciation of the Swiss government in this regard. The Court also pointed to several effective and genuine procedural guarantees available to the affected citizens to challenge the data exchange. Moreover, the Court did not find that the former restrictive practice of the Swiss authorities in matters of administrative cooperation in the tax field created a possible legitimate expectation on the applicant's part to the effect that he could continue to invest his assets in Switzerland free of any supervision by the relevant US authorities, or even free simply of the possibility of retroactive investigations.

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<sup>50</sup> Of 1959, [ETS 30](#).

<sup>51</sup> G.S.B. v. Switzerland, Application no. [28601/11](#), Judgment of 22 December 2015 (available only in French). The information in this paragraph is taken by and large from: European Court of Human Rights, [Information Note 191](#) – December 2015, page 19.

H. The above mentioned decision by the European Court of Human Rights concerns ordinary citizens. Nonetheless, the Court approved the exchange of international data, even though it concerned one of the most protected private data, i.e. banking data. For public officials, the level of privacy protection is even lower. In 2005, the Court decided, that the **online publication** of asset declarations in question was justified: “[T]he general public has a legitimate interest in ascertaining that local politics are transparent and Internet access to the declarations makes access to such information effective and easy. Without such access, the obligation would have no practical importance or genuine incidence on the degree to which the public is informed about the political process. [...] [T]he Court considers that it is precisely this comprehensive character [of declared data] which makes it realistic to assume that the impugned provisions will meet their objective of giving the public a reasonably exhaustive picture of councillors’ financial positions.”<sup>52</sup> Thus, the Court underpinned with legal certainty the implementation of asset declaration systems as per Article 8 para. 5 and Article 52 para. 5 UNCAC.

#### *Article 9: Focal Points*

A. Information requests need to be channelled through one authority in each Party. Anything else would not be feasible and lead to disorder among state bodies maintaining databases. This Article therefore follows the same rationale as Article 3 paragraph 1 (b) of the OECD Model Agreement. It uses the term “**Focal Point**” instead of “competent authority” in order to avoid any linguistic confusion between the two agreements. **Resolution 6/4** of the sixth Conference of the States Parties to the UNCAC (November 2015) also uses the term “Focal Point” by calling upon Member States “to inform the Secretariat about designated officials or institutions appointed, where appropriate, as **focal points** in the matter of the use of civil and administrative proceedings against corruption, including for international cooperation”.<sup>53</sup>

B. Paragraph 3 is important for public **transparency**, for evaluating the performance of Parties, and for justifying refusal of cooperation because of case overload.

C. Paragraph 4 is a clause designed to be **self-executing**.<sup>54</sup> It will thus not require any further national legislation, once the Treaty has been ratified by a Party. Parties may of course amend their domestic legislation if they wish to translate this provision into a statute for one reason or other. However, many constitutions even explicitly say that this is not necessary (see for example Article 122 paragraph 1 of the Constitution

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<sup>52</sup> Wypych v. Poland, Application no. 2428/05, decision of 25 October 2005.

<sup>53</sup> No. 9, *ibid.*

<sup>54</sup> About the concept, see for example Venice Commission, Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, *CDL-AD(2014)036*, No. 20.

of the Republic of Albania: “Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. *It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law*”<sup>55</sup>).

#### *Article 10: Costs*

This Article is modelled after Article 9 of the OECD Model Agreement. In order to simplify cooperation, it makes cooperation free of cost the standard. Parties can deviate from this standard. However, for the implementation of this Article it is important to keep in mind that it is international standard that “ordinary costs incurred in providing assistance shall be borne by the requested State” (Art. 26 Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol; similar language is found in other conventions on international assistance).

#### *Article 11: Language*

This Article is taken more or less verbatim from Article 11 of the OECD Model Agreement. The rationale of this provision is evident and does not need explanation.

### *Chapter III: Final provisions*

#### *Article 12: Other international agreements or arrangements; European Union law*

Article 12, paragraph 1 is taken more or less verbatim from Article 12 of the OECD Model Agreement. The rationale of this provision is evident and does not need explanation.

Article 12, paragraph 2 addresses the legal situation of Member States of the European Union which have become Parties to the Treaty. In accordance with the doctrine of primacy of EU law, the paragraph states that the Treaty does not restrict or adversely affect the obligations of EU Member States arising from EU law. In the unlikely case of a conflict between an obligation arising from the Treaty, and an obligation arising from EU law, the latter obligation would prevail.

#### *Article 13: Signature, Ratification, Acceptance, Approval and Accession*

The two subsequent phases of signature and ratification (or one of the other forms of expressing consent to be bound by the treaty) are in keeping with the usual practice of States. Normally, States are first invited to sign a treaty on the occasion of a conference convened for that purpose. Afterwards, State are usually given the opportunity to sign the treaty at a place designated in the treaty, like the Headquarters of an international organization, or the Foreign Ministry of the depositary.

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<sup>55</sup> Emphasis added.

In Article 13, paragraph 3, it is suggested to provide for a possibility of accession to the Treaty not only for “any State” but also for “any territory able autonomously to accomplish the purposes of the Treaty as stated in Article 1”. The wording “any territory able autonomously to accomplish the purposes of the Treaty as stated in Article 1” is modelled on Article XII, paragraph 1, first sentence, of the Agreement Establishing the World Trade Organization of 15 April 1994, which reads as follows: “Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO.”

Article 13, paragraph 4 provides for the possibility of an accession of the European Union to the Treaty. The provision is modelled on Article 59, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 14 of May 13, 2004.

In Article 13, paragraph 5, it is suggested to provide for a possibility of accession to the Treaty also for “organizations of regional cooperation or integration and other international organizations wishing to support and promote the purpose of this Treaty in accordance with Article 1”. This provision shall make it possible for organizations other than the European Union to join the Treaty. The qualification “wishing to support and promote the purpose of the Treaty” has been added because, different from the EU and its Member States, such other international organizations will generally not be able themselves to provide for a direct exchange of information as stipulated in the Treaty.

Article 13, paragraph 5, assumes that an international organization which wishes to accede to the Treaty possesses the necessary capacity to conclude international treaties, in accordance with the rules of the respective organization and, in particular, its founding treaty (see Article 6 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of March 21, 1986).

#### *Article 14: Entry into force*

A. Article 14, paragraphs 3 and 4 address the issue of a provisional application of the Treaty pending its entry into force, as provided for in Article 25 of the Vienna Convention on the Law of Treaties and today regularly practiced in the framework of multilateral treaties. Such a provisional application requires a respective declaration made by a State upon signature.

B. Paragraph 5 does not establish any retroactive penalty or sanction on a declarant. Hence, Article 7 of the European Convention on Human Rights, which prohibits the retroactive criminalisation of acts and omissions, does not apply.<sup>56</sup>

#### *Article 15: Amendment*

A. The practical application of the Treaty by the authorities of the Parties may well reveal certain unclear points or difficulties which might make it necessary to amend provisions of the Treaty. It may also be desirable further to develop the Treaty in the future, by extending its scope of application. In such cases it is helpful already to have, as part of the Treaty, rules about how to deal with amendment proposals of a Party. It is true that according to the international law of treaties it is possible to agree on an amendment in the absence of such a clause. However, a respective clause would facilitate the amendment process.

B. There are different options of how to design an amendment process. Article 15 is built on the model of Article 69 of the UN Convention against Corruption. It is characterized by the fact that each Party remains free to accept, or to reject, a particular amendment. In other words, even if a Party is overruled in the meeting of Parties when a decision about an amendment is made (see paragraph 1 of the proposed article below), it still depends on its own free decision to ratify the amendment or not. If it does not ratify the amendment, it will not be bound by it. Instead, it must further observe the rules of the original Treaty. In this way, the sovereignty of each Party is protected. In contrast, there are treaties which provide for the possibility of an amendment becoming binding on a State which did not accept the amendment (the most prominent example being Article 108 of the United Nations Charter according to which amendments shall come into force for all Members of the UN when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified by two-thirds of the Members, including the permanent members of the Security Council). However, it seems advisable rather to follow the traditional, sovereignty-oriented approach.

C. It is suggested that a first amendment process can be initiated only after three years after the entry-into-force of the Treaty. This will allow first to gather a sufficient amount of practical experience. Further, a minimum of three Parties must support a particular amendment to the effect that a meeting of Parties is convened by the depositary.

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<sup>56</sup> See for example the case of introducing a DNA database after the offence was committed: ECtHR, Decision of 12 July 2006, 29514/05, Van der Velden v. Netherlands (Article 7 not applicable).

*Article 16: Denunciation*

This Article is taken from Article 70 of the UNCAC by using the time limit of the OECD Model Agreement. For the meaning and effect of paragraph 2, see above comment D to Article 8.

*Article 17: Depositary's functions*

A. This Article is taken more or less verbatim from Article 14 of the OECD Model Agreement. In paragraph 3, the phrase "competent authorities or their representatives" is replaced with the word "Parties" because under general rules of international law it is to be decided by the Parties how and by whom they wish to be represented at such a meeting. A Party may, for instance, choose a representation by the Minister of Justice, or the Minister of Foreign Affairs, or a high-ranking official, or the Head of the Focal Point.

B. In conformity with general usage, a paragraph is added about the deposit of the original of the Treaty, the transmittal of copies to the Parties, and the language of the Treaty. Paragraph 3 is an addition in order to facilitate work in this new field of cooperation.