Annex A

Glossary of key concepts

Key Acronyms

AML	Anti-Money Laundering (see *Anti-money laundering legislation*)
DTA	Double Tax Agreement (see International agreements providing for the exchange of information in tax matters).
DTC	Double Tax Convention (see International agreements providing for the exchange of information in tax matters).
JAHGA	Joint Ad-Hoc Group on Accounts (see *JAHGA standards*).
MLAT	Mutual Legal Assistance Treaty
TIEA	Tax Information Exchange Agreement (see International agreements providing for the exchange of information in tax matters).

Criminal tax matters, civil tax matters, all tax matters

There are references in the tables and summary assessments to circumstances where countries are able to exchange or obtain information in relation to either criminal tax matters, civil tax matters or all tax matters. These terms refer to the matter to which the request for information relates. The term “criminal tax matters” means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the requesting jurisdiction. In this context the term “criminal laws” means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes. A civil tax matter is any matter related to the administration and enforcement of a jurisdiction’s tax laws that is not a criminal tax matter.

Consequently, where a jurisdiction reports that it is able to exchange information in “all tax matters” this simply refers to its ability to provide information in respect of both a civil or criminal tax matter. However, the fact that a jurisdiction exchanges information in all tax matters does not imply that a jurisdiction is necessarily able to exchange all relevant information in respect of these tax matters. Secrecy provisions or other impediments to exchange may prevent its authorities from obtaining the information requested. Thus, a jurisdiction that is able to exchange information in all tax matters, but which maintains a domestic tax interest requirement, is not able to exchange information to the international standards.

Domestic tax interest requirement

A domestic tax interest requirement exists where, under a requested jurisdiction's domestic law, regulations and/or administrative practice, the tax authorities of that country are only able to obtain and provide information in response to a specific request if the information is also relevant for domestic tax purposes. The presence of a domestic tax interest requirement can be a significant impediment to information exchange.

Dual criminality principle

Exchange of information can be constrained by the application of the dual criminality principle. The principle of dual criminality provides that assistance can only be provided if the conduct being investigated (and giving rise to the information request) would constitute a crime under the laws of the requested jurisdiction if it had occurred in the requested jurisdiction. Where the definitions of tax crimes are very similar the principle of dual criminality will not generally be an impediment to information exchange for criminal tax purposes. However, where the definitions are markedly different, it may be impossible in many cases for the requesting jurisdiction to obtain information vital to a criminal tax investigation. The dual criminality principle may sometimes also be referred to as the "double incrimination principle".

Anti-money laundering legislation

Anti-money laundering (AML) legislation is generally intended to deter, detect and punish the processing of the proceeds of criminal activities to disguise their illegal origins, and has more recently also targeted terrorist financing activities.

In many cases, jurisdictions report that information must be maintained either by the governmental authorities or by persons (typically service providers) in its jurisdiction under its AML legislation, that its authorities can obtain this information and in some cases may also be able to exchange this information pursuant to the same rules. This is relevant for the purposes of determining the extent to which a jurisdiction has implemented the standards of transparency and exchange of information, since requirements to maintain information and powers to obtain information are crucial aspects of these standards. However, it is important to remember that requirements under AML laws are not necessarily a perfect substitute for laws aimed specifically at maintaining information for tax purposes. For example, the accounting records required to be maintained under AML laws may not be the same as that required by the JAHGA standards. Moreover, powers to obtain information under tax laws may not extend to information maintained for AML purposes. However, the maintenance of this information is important in itself, and powers to obtain information for tax purposes may in many cases be broad enough to allow access to tax authorities. Moreover, these rules may well have a deterrent effect for tax evasion and represent important elements of a jurisdiction's transparency features.

The international AML standard is set forth in detail in the Forty Recommendations of the Financial Action Task Force (FATF), which have been endorsed by more than 130 jurisdictions. The Forty Recommendations cover all the measures that national systems should have in place within their criminal justice and regulatory systems; the preventive measures to be taken by financial institutions and certain other businesses and professions; and provisions for international co-operation. Key elements of the Forty Recommendations include the following:

- "Know your customer" (KYC) rules should require a designated institution to identify and verify the identity of its customers, including beneficial owners in the case of legal persons and to conduct ongoing due diligence with respect to its business relationships.
- Designated institutions should maintain all necessary records on identification data, account files and transactions to allow them to comply swiftly with appropriately authorised requests for information from domestic authorities. Such records should be maintained for at least 5 years (including where the business relationship has ended).
- Countries should ensure their authorities are able to obtain documents and information for use in their investigation of money laundering and underlying predicate offences, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises and for the seizure and obtaining of evidence.
- Countries should ensure that their competent authorities rapidly, constructively and effectively provide the widest possible range of mutual legal assistance and international co-operation in relation to money laundering and terrorist financing investigations, prosecutions and related proceedings. In particular, countries should not refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve tax matters, or on the grounds of a domestic law requirement that financial institutions maintain secrecy or confidentiality. Countries should also render mutual assistance notwithstanding the absence of dual criminality.

Bearer securities

Many jurisdictions permit the issuance of bearer instruments either in the form of bearer shares or bearer debt. Very generally, a bearer security is one in which the legal rights attaching to the instrument belong to the person in physical possession of the instrument itself. This is distinct from a "registered" security, which requires that legal ownership is based not on physical possession of the instrument but on entry in a ledger or other record of ownership. However, the fact that instruments are in bearer form does not preclude the identification of the owners where appropriate mechanisms are in place. Such mechanisms include arrangements whereby bearer shares are not permitted unless they are subject to custodial arrangements with a recognised custodian or other similar arrangements to immobilise such shares. A number of jurisdictions permit the issuance of bearer shares, but at the same time require persons holding an interest in a public company to notify the company of acquisitions or disposals of any form of interest in the shares of the company that brings their shareholding above or below a particular percentage of the issued share capital. Further, anti-money laundering rules (*e.g.* EU Third Anti-Money Laundering Directive) often extends customer identification and record keeping requirements to a range of professions including auditors, external accountants and tax advisors in the exercise of their professional activities. In many jurisdictions there is a requirement for companies to engage such professionals in the course of carrying on its business and they will thus be subject to due diligence by the professionals concerned. More generally, the Financial Action Task Force, in its Recommendation 33, recommends that "[c]ountries should ensure that there is adequate, accurate and timely information on the beneficial

ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures."

A number of jurisdictions require that bearer securities be "immobilised". This means that the bearer instrument must be held by a custodian on behalf of the legal owner. In these circumstances, the ownership of the share or debt instrument can be ascertained, and transfers in ownership cannot be effected without the knowledge of the custodian.

Confidentiality provisions

Confidentiality provisions in a tax information exchange agreement (or the exchange of information article of a tax convention) generally provide that any information received may be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the agreement. Information received may typically not be disclosed to any other person or governmental authorities or to third jurisdictions unless there is an express provision in the treaty allowing such disclosure. See Article 8 (Confidentiality) of the OECD Agreement on Exchange of Information on Tax Matters and paragraph 2 of Article 26 (Exchange of Information) of the OECD Model Tax Convention on Income and on Capital and paragraph 12.2 of the related Commentary.

International agreements providing for the exchange of information in tax matters

The international standards for exchange of information in tax matters are contained in both Article 26 (Exchange of Information) of the OECD Model Tax Convention and the OECD Model Agreement on Exchange of Information on Tax Matters. However, exchange of information is also provided for in a variety of other international agreements. While the international standards requires exchange of information on request in all tax matters for the administration and enforcement of the domestic tax laws of the treaty partners, other instruments may be less expansive in the obligations that they impose upon the parties. For example, many countries are party to mutual legal assistance treaties (MLATs) that are designed to foster international co-operation in criminal cases. In some cases these treaties may cover tax matters either because the tax offence is a crime or is related to a criminal offence (*i.e.* the case involves proceeds of crime in respect of which tax has also been evaded). In other cases, the agreement also includes a specific fiscal protocol that requires exchange of information in pure tax matters.

The following is a survey of the various instruments common among the countries surveyed by the report.

OECD Model Tax Convention

The OECD Model Tax Convention is the basis of a network of more than 3 000 bilateral tax treaties. The OECD published its first Model in 1963. That Model was updated in 1977 and again in 1992. Since 1992, updates to the Model have been published more frequently, in 1994, 1997, 2000, 2003, 2005 and 2008. The latest update was published in 2010.

The OECD Model Tax Convention on Income and on Capital provides a means of settling, on a uniform basis, the most common problems that arise in the field of international

double taxation. It clarifies, standardises and confirms the fiscal situation of taxpayers who are engaged in cross-border commercial, industrial, financial, or any other activities through the application of common solutions to identical cases of double taxation.

Article 26 of the OECD Model Tax Convention provides the most widely accepted legal basis for bilateral exchange of information for tax purposes. Article 26 creates an obligation to exchange information that is foreseeably relevant to the correct application of a tax convention as well as for purposes of the administration and enforcement of domestic tax laws of the contracting states. Jurisdictions are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. In addition, the requesting state should also have pursued all domestic means to access the requested information, except those that would give rise to disproportionate difficulties.

Article 26 was updated in July 2005, at which time paragraphs 4 and 5 were added. These paragraphs make it clear that a jurisdiction cannot refuse a request for information solely because it has no domestic tax interest in the information (paragraph 4) or solely because it is held by a bank or other financial institution (paragraph 5). Bank secrecy is not incompatible with the requirements of Article 26, and virtually all jurisdictions have bank secrecy or confidentiality rules. The UN Model Tax Convention was updated in October 2008 to incorporate new Article 26 of the OECD Model. While the language of the UN article differs slightly, the substance is unchanged from the OECD Article, particularly in respect of paragraphs 4 and 5.

Finally, where information is exchanged, it is subject to strict confidentiality rules. It is expressly provided in Article 26 that information communicated shall be treated as secret and that it can only be used for the purposes provided for in the convention.

The current edition of the OECD Model Tax Convention, updated on 22 July 2010, notes that Austria, Belgium, Luxembourg and Switzerland have withdrawn (as of March 2009) their reservations to Article 26. As a result of these changes, all reservations and positions contrary to the international standards on exchange of information which were previously noted have now been removed.

The Model Agreement on Exchange of Information on Tax Matters

The purpose of the Model Agreement on Exchange of Information on Tax Matters (the Model TIEA) is to promote international co-operation in tax matters through exchange of information. It was developed by the OECD Global Forum Working Group on Effective Exchange of Information, which consisted of representatives from OECD members as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino.

As a stand-alone agreement, the Model TIEA contains a more detailed legal framework for the exchange of information than its counterpart in Article 26 of the OECD Model Tax Convention. For example, the Model TIEA spells out clearly the conditions that a jurisdiction must satisfy when requesting information. In addition, the Model TIEA contains provisions for tax examinations abroad, rules dealing with costs and has definitional provisions that are particular to the exchange of information context. Under Article 26 of the Model Tax Convention many of these issues are dealt with in the commentary to that article.

To date the Model TIEA has been the basis for more than 300 tax information exchange agreements and dozens more are under negotiation.

Council of Europe/OECD Convention on Mutual Assistance in Tax Matters

The Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters was developed jointly by the Council of Europe and the OECD to provide for all possible forms of administrative co-operation between states in the collection and assessment of taxes, in particular with a view to combating tax avoidance and evasion. The convention aims to achieve more effective international co-operation between a large number of states through the uniform application and interpretation of its provisions. The convention covers all mutual administrative assistance activities in tax matters which can be carried out by the public authorities, and which are not covered by criminal law. The convention provides in particular for:

- The exchange, upon request, of any information foreseeably relevant to the assessment and collection of tax, and the recovery and enforcement of tax claims. Automatic and spontaneous exchange of information are also provided for in specific cases.
- Simultaneous tax examinations and tax examinations abroad.
- Recovery by a requested state of an applicant state's tax claims.
- Service by a requested state of documents, including those relating to judicial decisions, which emanate from the applicant state and which relate to taxes covered by the convention.
- The secrecy of any information obtained by a party under the Convention, together with a limit on the disclosure of such information to persons or authorities involved in the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that party.

The Convention was opened for signature by the member states of the Council of Europe and OECD member countries on 25 January 1988 and entered into force on 1 April 1995. As of 7 July 2009, 14 states were parties to the convention: Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, the Netherlands, Norway, Poland, Sweden, Ukraine, the United Kingdom and the United States. Canada and Germany have signed the Convention and are awaiting ratification.

An important amendment was made to the Convention by the 2010 Protocol. This Protocol aligns the Convention to the internationally agreed standard on exchange of information for tax purposes in that it provides that bank secrecy and a domestic tax interest requirement should not prevent a jurisdiction from exchanging information for tax purposes. The amending Protocol also provides for the opening of the Convention to non-OECD and non-Council of Europe members once the Protocol has been ratified by 5 parties. A consensus of the existing parties is required for new members seeking to adhere to the Convention and Protocol, with particular attention being paid to the ability of an applicant jurisdiction to protect the confidentiality of the information exchanged.

EU Convention on Mutual Assistance in Criminal Matters

The EU Convention on Mutual Assistance in Criminal Matters was adopted by the EU Council of Ministers on 29 May 2000 to improve and enhance existing arrangements for co-operation in criminal matters between the judicial, prosecuting, police and customs authorities of EU member states. A protocol adopted on 16 October 2001 amended the convention to add specific provisions to combat money laundering and financial crime,

which include provisions on mutual assistance with respect to information held by banks. Certain provisions of the convention also apply with respect to Iceland and Norway, pursuant to a 29 January 2004 agreement between the EU and those countries.

The convention applies only with respect to EU member states that have adopted it. The convention entered into force for the first eight EU member states to adopt it on 23 August 2005 and is currently in force with respect to 22 EU member states.

European Convention on Mutual Assistance in Criminal Matters and the Fiscal Protocol

The 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters provides for mutual assistance between Council of Europe member states in proceedings in respect of criminal offences. The convention establishes, in particular, procedures whereby a requesting state may obtain the assistance of a requested state to procure evidence in relation to a criminal matter. Such evidence will be procured in the manner provided for by the domestic law of the requested state. The convention expressly provides that a state may refuse to provide assistance if the request concerns a tax offence. A state may also make a declaration that its provision of assistance pursuant to the convention will be conditioned on the dual criminality principle. The convention entered into force on 12 June 1962 and has been ratified by 48 states.

In 1978, the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters made significant modifications to the convention with respect to criminal tax matters. The 1978 protocol provides in particular that:

- Countries shall not refuse to provide assistance solely on the ground that the request concerns a tax offence.
- Where a state conditions its provision of assistance on the dual criminality principle, this condition shall be fulfilled as regards tax offences if the offence is punishable under the law of the requesting state and corresponds to an offence of the same nature under the law of the requested state.
- A request may not be refused on the ground that the law of the requested state does not impose the same kind of tax or does not contain a tax regulation of the same kind as the law of the requesting state.

The 1978 Protocol entered into force on 12 April 1982 and has been ratified by 40 states.

CARICOM agreement

The CARICOM agreement refers to the "Agreement among the Governments of the member states of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment". It is a double tax convention between member states of the Caribbean Community (CARICOM). The CARICOM agreement provides for the exchange of information necessary to carry out the agreement and the domestic laws of the CARICOM member states concerning taxes covered by the agreement. Information exchanged pursuant to the agreement shall be treated as secret and shall only be disclosed to persons and authorities including courts and other administrative bodies concerned with the assessment or collection of the taxes covered by the agreement.

The CARICOM agreement has been signed by 11 of the 14 CARICOM member states: Antigua and Barbuda; Belize; Grenada; Jamaica; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Trinidad and Tobago; Guyana; Dominica; and Barbados.

EU law relevant to transparency and exchange of information in tax matters

The European Union has instituted a wide variety of mechanisms that provide for co-operation between its member states in both criminal and tax matters, and anti-money laundering directives that require the maintenance of information by a wide variety of service providers. These rules ensure that there is a basic, uniform level of transparency and co-operation between all EU members. These standards are not necessarily identical to the international standards of transparency and exchange of information, and thus do not in themselves guarantee that all EU members comply with these standards, but they are nevertheless an important element in their legal and administrative framework. Moreover, some of these legal mechanisms go beyond what is required by the international standards.

The following EU legal instruments are relevant:

- The EU Mutual Assistance Directive;
- The EU Savings Tax Directive; and
- The Third Anti-Money Laundering Directive.

EU Mutual Assistance Directive

The EU Mutual Assistance Directive (Council Directive 77/799/EEC of 19 December 1977) establishes the ground rules for administrative co-operation and the exchange of information by the competent authorities of EU member states in the fields of direct taxation, certain excise duties and the taxation of insurance premiums. The Directive generally provides that the competent authorities of EU member states shall exchange, upon request, any information that may enable them to effect a correct assessment of the covered taxes. The Directive also contains provisions on the automatic and spontaneous exchange of information, the secrecy of information made available under the Directive and limits to the exchange of information (*i.e.* the Directive imposes no obligation upon an EU Member State to carry out inquiries or to communicate information where it would be contrary to its domestic law or administrative practice to conduct such inquiries or collect the information). The Directive has been periodically amended to improve, expand and modernise its rules. EU member states are required to bring into force the necessary domestic laws, regulations and administrative provisions to comply with the Directive.

On 2 February 2009, the European Commission adopted a proposal for two new directives to improve mutual assistance between EU member states in the assessment and collection of taxes. The Directive on administrative co-operation in the field of taxation would supersede the existing mutual assistance directive. The draft directive goes beyond the current directive in that it would prevent a member state from refusing a request because of its bank secrecy rules or because it has no interest in the information for its own tax purposes (domestic tax interest).

EU Savings Tax Directive

The EU Savings Tax Directive (Council Directive 2003/48/EC of 3 June 2003) is intended to ensure the effective taxation of interest income from the cross-border investment of savings by individual EU residents. The directive provides generally for the automatic exchange of information on interest payments by paying agents established in EU member states to individuals resident in other EU member states. During a transitional period, the directive provides that certain member states may elect to levy a withholding tax on interest payments (and to remit a percentage of the revenue to the investor's state of residence) in lieu of information reporting. The directive requires EU member states to adopt and ensure the application of domestic law procedures to allow paying agents to establish the identity and residence of their customers (*i.e.* the beneficial owners of interest payments) who are individuals. Savings agreements between the EU and certain non-EU jurisdictions provide for the same measures as those in the directive – *i.e.* these jurisdictions apply a system of information reporting with respect to savings income paid to individual EU residents or, during the directive's transitional period, levy a withholding tax on the same terms as the EU member states that do so.

In November 2008 the European Commission tabled a proposal to amend the Savings Directive (COM/2008/727) to better ensure effective taxation of savings income and to remove undesirable distortions of competition.

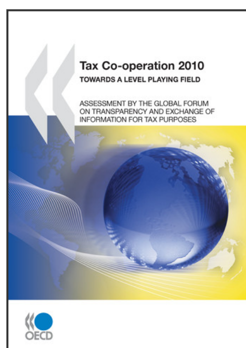
Third Anti-Money Laundering Directive

The Third Anti-Money Laundering Directive (Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005) was adopted to replace certain existing EU law (*i.e.* Council Directive 91/308/EEC of 10 June 1991) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and in particular, to bring EU law in line with the international anti-money laundering standard set forth in the Forty FATF Recommendations. As compared to earlier EU law in this area, the Third AML Directive provides in relevant part for a wider range of predicate offences (*i.e.* offences the proceeds of which may be captured within the scope of "money laundering") as well as more specific and detailed provisions relating to the identification of customers and of beneficial owners and the verification of their identity. The range of persons covered by customer identification, record keeping and reporting requirements is extended by the directive to include, among others, trust and company service providers. Moreover, customer due diligence requirements are expressly extended to beneficial owners, *i.e.* the natural persons who ultimately own or control the customer or on whose behalf a transaction or activity is being conducted. EU member states were required to bring into force the laws, regulations and administrative provisions to comply with the directive by 15 December 2007.

JAHGA standards

The Joint Ad Hoc Group on Accounts (JAHGA) was set up in 2003 under the auspices of the Global Forum to carry forward the Global Forum's work in connection with ensuring the availability of reliable accounting information. JAHGA's final paper ("Enabling Effective Exchange of Information: Availability and Reliability Standard") was issued in 2005 and articulates the following common standards:

- **Reliable accounting records should be kept for all relevant entities and arrangements**. To be reliable, accounting records should correctly explain the transactions of the relevant entity or arrangement, enable the financial position of the relevant entity or arrangement to be determined with reasonable accuracy at any time and allow financial statements to be prepared. Reliable accounting records should reflect details of all receipts and expenditures, all sales and purchases and other transactions and the assets and liabilities of the relevant entity or arrangement.
- **Accounting records must be kept for a minimum period of 5 years** (*i.e.* the period established in this area by FATF).
- **Countries should have in place a system or structure that ensures the maintenance of accounting records consistent with the standards of reliability.** This objective may be achieved in different ways, which include: governing law (including company law, partnership law and trust law) and commercials law; financial regulatory law, anti-money laundering law or other regulatory law; tax law; and effective self-executing mechanisms.
- **Where accounting records are requested by another party, they should be accessible to the requested country's authorities within a reasonable period of time**. The requested country's authorities should have the power to obtain accounting records from any person within their jurisdiction who has possession of, or control of, or has the ability to obtain such information, together with effective enforcement provisions.



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