tax justice network

Final Report

"The end of bank secrecy”? Bridging the gap to effective automatic information exchange

An Evaluation of OECD’s Common Reporting Standard (CRS) and its alternatives*

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Executive Summary

On July 21st, 2014 the OECD published Commentaries on the Common Reporting Standard (CRS) published five months earlier, fulfilling the G20’s request to develop a global standard on Automatic Information Exchange (AIE) of tax data.

Although the objective is that CRS should become the “global” AIE standard, it will not be the only AIE system in place. For instance, the European Union Savings Tax Directive (EUSTD) has been running since 2005 (though it may soon be replaced by a more comprehensive, revised Directive on Administrative Cooperation or “DAC”) and the US’s Foreign Account Tax Compliance Act (FATCA) recently entered into force. In fact, the CRS was adapted from FATCA though it lacks its most striking feature, the 30% withholding tax on non-participants that —many argue —allowed FATCA (and probably the CRS) to become a reality. However, unlike

* This is a preliminary legal and political analysis of the CRS and its Commentaries published on July 21st, 2014, taking into account public developments as of October 27th, 2014. After incorporating feedback and comments by experts and partners we plan to finalise this analysis after the M-CAA has been signed. To contact us about this paper, please write to andres@taxjustice.net or markus@taxjustice.net. Thanks to Mark Morris and other experts for their feedback on an earlier draft. Please visit www.taxjustice.net for more information.

FATCA, the EUSTD (and now the DAC), the CRS is, at least in spirit,—supposed to be open and multilateral, not only in its scope, but also when offering benefits to all countries.

Nevertheless, the potential of the initiative does not seem to have been fully realised by the CRS. A first problem consists in the artificial limitations that have been included regarding the use of the data to fight money laundering and corruption. The CRS explicitly restricts the use of the information received to tax purses, and explicitly prohibits sharing information with law-enforcement authorities, which prevents cost-free synergies for fighting corruption and money laundering to be fully harvested.

Furthermore, entry barriers do not look particularly low for developing countries: there are no provisions on non-reciprocity in their favour (to first only receive information). On the contrary, non-reciprocity is offered only to tax havens (jurisdictions without income tax), for whom receiving information and discarding it was apparently not enough: they ensured that no data would ever be collected about their residents. This desire to perpetuate opacity seems to be an odd wish under a new transparency framework and highlights that some jurisdictions are betting on defending their offshore finance industry by selling tax residency certificates which offer escape routes to criminals. For the same reasons, the US appears willing to postpone or even sidetrack multilateral AIE, offering only very narrow reciprocity via FATCA and thus positioning itself as a monopolistic secrecy jurisdiction.

The US and other secrecy jurisdictions can find it easier to sidetrack because the CRS does not prescribe a unique multilateral competent authority agreement (CAA) for all jurisdictions to engage in AIE with each other in a consistent way. Provisions mandating secrecy jurisdictions to exchange information with any jurisdiction that raises such a request are also absent. In contrast, the Commentaries detail exhaustive confidentiality requirements for any country wishing to receive information.

As if this were a puzzle adapted to one country, Switzerland has already expressed its intention to sign only bilateral CAAs (instead of a multilateral one) and in limited cases: only with countries with close economic relations and considered promising in terms of their market potential for Switzerland's finance industry[1]. On top of everything, the July version of the CSR has removed—from the original February publication —all references to commitments for capacity building and to benefits being attainable by all countries.

Seemingly, the problem in much of the CRS' design is related to institutional problems with the OECD, a group representing only developed countries (instead of a more representative one like the UN Tax Committee), designing a standard that was supposed to benefit all, especially developing countries.

[1] http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=53050; 12.9.2014.

Notwithstanding its moral obligations, the OECD could have realized that a more welcoming framework for developing countries was in the best interests of developed countries: since the CRS will only be effective once all jurisdictions participate, the longer it takes for the rest of the world to be part of it the higher the chances for tax dodgers and money launderers to keep avoiding transparency.

This short-sightedness is also visible in the CRS' many loopholes, which remain since February: apart from high thresholds preventing beneficial owners—the true owners of shell companies - from being identified, there is an opportunity to avoid any identification at all of an entity' owners by hiding them behind an "Active non-financial entity." In addition, a USD 250.000 *de minimis* threshold prevents any reporting whatsoever and is available to all entities that open an account before 2016, giving plenty of time to any individual or entity to arrange their business in an opaque-effective way, and giving financial advisers such as KPMG plenty of business opportunities. Furthermore, very valuable information on wealthy individuals (companies' ownership, interests in real estate and hard assets, or safe deposits and warehouses for gold and art in freeports) is excluded from the information exchanged under the CRS. Another flaw refers to the lack of effective provisions encouraging the issuance and collection of Tax Identification Numbers (TINs) which are essential to analyse the information received. On the bright side, the CRS improved provisions to identify the related persons of trusts, foundations and similar legal arrangements, though not all trusts will be required to do so.

In conclusion, many loopholes remain to be fixed, entry barriers for developing countries need to be lower, and even the current CRS provisions will have to be monitored to ensure their proper enforcement (especially by secrecy jurisdictions). But all in all, a global AIE framework with the potential to benefit all countries is a major transparency breakthrough. The emergence of this framework can be attributed in part to the OECD, whose membership was far from supportive in its entirety for such a system to develop. We expect them to now to accommodate the other stakeholders' needs and concerns by amending its standard before it enters into force. Rejecting and resisting undue influence by narrow financial sector lobbyism and their captured governments, such as the Swiss and the US governments, will be crucial to maintain any role in the future for the OECD in international tax matters.

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1. Introduction

1. All countries, and especially their citizens, are suffering the consequences of illicit financial flows (IFFs). These involve (i) hidden transactions with illegal capital (the laundering of the proceeds of crime, bribery, the theft of state assets and other corrupt practices) as well as (ii) illicit[2]—and often illegal—transactions, with legally obtained capital (such as tax abuse, both corporate and individual; and hidden ownership to hide conflicts of interest and to facilitate market abuse) (Cobham 2014).

2. All kinds of agents are involved in facilitating and benefiting from IFFs: private actors (individuals, domestic businesses and multinational company groups committing tax and regulatory abuse, and their related tax, legal and accounting professional advisers); public officeholders (both elected and employed); and criminal groups (Cobham 2014).

3. As was explained in detail here, various mechanisms enable IFFs, but one chief condition is secrecy (Knobel/Meinzer 2014). While this opacity does not allow the volume of IFFs to be calculated with precision, some sources estimate them in trillions of US dollars (Kar/LeBlanc 2013; Henry 2012)[3].

4. IFFs' appalling effects, though, are widely perceivable, especially in developing countries: they undermine domestic resource mobilization by eroding the tax base; cause greater dependency on development assistance; reduce domestic investment; worsen inequality as wealthy residents incur a relatively smaller tax burden than poorer citizens; generate distributional effects through exchange rate depreciation (for those who hold all their wealth domestically); and allow political elites to consolidate power, affecting the state's ability to impose taxes on individuals and businesses (UNDP Brief 2014) and thereby challenge democratic, accountable decision-making.

5. The IMF has also referred to the consequences for developing countries in a recent report regarding the spillover effects of international corporate taxation (exploited via tax havens), explaining that "spillovers are especially marked and important for developing countries [...] The amounts at stake in a single tax planning case now quite routinely run into tens or hundreds of millions of dollars" (IMF 2014). Likewise, UNCTAD refers to different assessments, stating that in relation to public revenue loss resulting from assets held in tax havens, "for developing countries, a similar calculation yields a tax gap of $66−$84 billion per year, which is about two thirds of total official development assistance (ODA).

[2] Cobham explains that "illicit" encompasses both "illegal" (against the law) and against rules or customs, which may be socially and morally unacceptable, but not necessarily illegal.

[3] Global Financial Integrity calculated USD 5.9 tn of IFFs from developing countries between 2002 and 2011 (Kar/LeBlanc 2013); TJN's "The Price of Offshore Revisited" estimated that at least $21 trillion of unreported private financial wealth was held offshore in conditions of secrecy at the end of 2010 (Henry 2012).

These are, by construction, conservative estimates." Moreover, regarding tax abuse, the report quotes several studies, and while it acknowledges the criticism they posit, it firmly expresses that "notwithstanding the inherent limitations of such assessments, there is wide agreement that the public revenue losses due to tax abuses are huge" (UNCTAD 2014).

6. While it is impossible to deter and prevent (ex ante) or prosecute (ex post) all crimes, practices and abuses which feed IFFs, an indisputable strategy to tackle them consists of achieving a larger degree of transparency. By collecting and sharing more data with the public at large or appropriate public authorities, respectively, criminals and tax abusers are left with fewer places to hide and thus can be expected to change their behaviour. As is common knowledge, third party reporting, or control of an individual's tax reporting, is vital for ensuring tax compliance (IRS 2012).

2. The Case for Comprehensive Information Exchange of Confidential Financial Data

7. IFFs rely on the international financial system and on the network of company service providers to escape the law and public scrutiny via secrecy[4] (incorporating entities in secrecy jurisdictions to hide ownership and/or to engage in tax abuse schemes through accounting methods, hiding money and financial assets in foreign bank accounts to evade taxes or conceal crimes, etc.). Transparency should thus bring light to these schemes by providing the relevant parties with effective access to appropriate data[5]. Channels to and recipients of this data may differ according to the nature of information and on whether or not the information is confidential or relevant for the whole public to know.

8. As regards public-relevant information (e.g. companies' real owners and their financial reporting), access to this data should not be limited to a country's authorities but should include journalists, civil society organizations and ordinary citizens (e.g. investors, minority shareholders). These may usually use information to fill the gaps left by state authorities, constrained by shortages of staff or capability, and even scrutinize them to prevent political influence and corruption. This information would also allow financial institutions and authorities to verify the information received through other channels (e.g. in due diligence procedures). This kind of public-relevant information should ideally be accessible to the general

[4] For a description of how secrecy enables IFFs see: http://www.taxjustice.net/wp-content/uploads/2013/04/AIE-An-opportunity-for-developing-countries.pdf; 28.7.72014.

[5] For a detailed explanation of relevant data that should be collected and exchanged see: http://www.taxjustice.net/wp-content/uploads/2013/04/AIE-An-opportunity-for-developing-countries.pdf (pages 11-16).

public via (i) central registries of beneficial ownership[6] and (ii) country-by-country reporting[7].

9. Confidential information (e.g. bank account information, individual's tax returns, etc.) should be sent to authorities via automatic information exchange (AIE), to avoid the costs and risks of requesting each piece of information specifically[8]. This practice of ensuring access to a natural person's economic and financial situation would hardly be revolutionary; it would simply entail extending to wealth owners and receivers of capital income the same reporting scheme used for employees worldwide, whereby employers routinely send information about wages and salaries directly to the tax administration.

10. Until public availability of central registries of beneficial ownership and of country-by-country reporting becomes a reality, all this information should at least be automatically exchanged among authorities (together with confidential information), making sure that developing countries in particular can access this information. While this would still not be the aspirational scenario (because it would include reduced availability of information to journalists and civil society organizations), it would nevertheless be an improvement in respect of the current international system whereby only legal ownership is – at most –collected and for limited types of entities[9]; there is hardly any country-by-country reporting (and only for limited industries)[10]; and most exchanges of information take place pursuant to the upon request standard[11], which require previous detailed investigations about particular cases and are extremely costly in time and resources, and offer limited effective access to developing countries.

11. Taking a bird's eye view, the most recent transparency advance refers to AIE. As Table 1 shows (grey area), this is an improvement but not yet the full aspirational scenario. However, as will be explained in detail below, all of the available AIE systems provide frameworks which are quite limited in their reach and scope. A truly effective global AIE standard should be as comprehensive as possible in terms of its territorial application (covering all jurisdictions), its reporting agents who collect information, the persons about whom information will be collected (individuals, entities, legal arrangements and their beneficial owners), and the actual information that will be exchanged: financial account information (bank account, insurance accounts), physical assets (real estate, gold, art), income, shareholdings and participations in legal entities and arrangements, etc.

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[6] For further detail see: http://eurodad.org/files/integration/2013/05/Why-public-beneficial-ownership-registiries.pdf; 10.7.2014.

[7] For further detail see: http://www.taxjustice.net/topics/corporate-tax/country-by-country/; 10.7.2014.

[8] For further detail onthe flaws of the Upon Request standard (pages 11-16) see: http://www.taxjustice.net/wp-content/uploads/2013/04/AIE-An-opportunity-for-developing-countries.pdf; 10.7.2014.

[9] For further detail see http://www.financialsecrecyindex.com/PDF/2-Trusts-Foundations-Register.pdf, http://www.financialsecrecyindex.com/PDF/3-Recorded-Company-Ownership.pdf, http://www.financialsecrecyindex.com/PDF/4-Public-Company-Ownership.pdf; 10.7.2014.

[10] For further detail see: http://www.financialsecrecyindex.com/PDF/6-C-b-C-Reporting.pdf; 10.7.2014.

[11] See footnote 8.

Table 1: Overview of evolution to aspirational transparency advances

	CURRENT SITUATION	POTENTIAL PARTIAL IMPROVEMENT (that could take place as a first step)	ASPIRATION	
			Public-relevant info (Beneficial Ownership of all entities and arrangements, and of interests in real estate, companies' accounts and tax returns, etc.)	Confidential info (bank account information, individuals' tax returns, ownership of wealth assets (gold, art, etc.)
Access to info by NGOs, Journalists, ordinary citizens (investors, shareholders, etc.)	Very limited access (if at all), usually through leaks	Access to all public-relevant information, by requesting it to authorities	Direct and free online access (no need to request it to any domestic or foreign authority)	Access, at least to aggregate information, by requesting it to authorities
Exchange of Information among competent authorities: main standard in use	Upon Request	Once CRS is implemented: combination of AIE and Upon Request, but limited to financial account info. If CRS is improved: covering all info, not only financial account	Direct and free online access (no need to request to, or receive from any foreign authority) to all public-relevant information	Combination of AIE and Upon Request (about all confidential information, not only financial account info)
Access to Beneficial Ownership (BO) Information	No. At best, collection of legal ownership about some entities or arrangements	AIE of info available in Central Registries of BO for all entities, legal arrangements and interests in real estate	Direct and free online access (no need to request it to or receive it from any authority) to Central Registries of BO for all entities, legal arrangements and interests in real estate	[No need, BO info should not be confidential]
Country-by-Country Reporting	Limited in scope, and only required for some industries	AIE of C-b-C, expanded in scope and for all industries	Direct and free online access to C-b-C info (assets, number of employees, salaries, sales, tax liabilities, effective tax paid, payments to governments, etc)	AIE or Upon Request of C-b-C confidential info (trade secrets, etc)
Access to info by Developing Countries	Very limited, if at all	Access to AIE and Upon Request by all developing countries	Direct and free online access (no need to request to, or receive from any foreign authority) to all public-relevant information	Combination of AIE and Upon Request (about all confidential information, not only financial account info)

This Report focuses on the grey area, which refers to the present state of affairs characterized by the transition from the exclusivity of the Upon-Request standard, to a combination of it with AIE.

3. What is Currently on Offer—Overview of Existing AIE Systems

3.1 EUSTD

12. The first operative system of multilateral AIE is the European Union Savings Tax Directive[12] (EUSTD), which entered into force in 2005. This prescribes the automatic exchange of information among authorities in member states, about interest payments made to non-resident individuals. However, it allowed countries (e.g. Austria, Luxembourg) to withhold taxes instead of to exchange information, and it is only applicable to European Union states and a few other European or related territories (no global reach).

13. The EUSTD was amended[13] in March 2014 to address some of its flaws (e.g. only individuals were covered, so reporting could be avoided by interposing a legal entity or by arranging payments not to be legally considered as "interest"). Other limitations remained (it was still focused on Europe and only interest payments were covered, leaving dividends and royalties behind). Some of the amendments' advances will be analysed below.

14. However, on October 14th, 2014 the Council of the European Union approved a revision of the Directive on Administrative Cooperation (DAC) which contemplates automatic exchange of information on five categories of income and capital based on available information (income from employment, director's fees, life insurance products not covered by other Directives, pensions, ownership of and income from immovable property). In addition, the revised DAC will accommodate (explicitly incorporate) the OECD's CRS, thereby becoming the most comprehensive standard of automatic exchange of information. With the existence of the revised DAC, though, the EUSTD has become obsolete, and it will likely be repealed. The DAC, however, will be strictly applied only among EU member states. Moreover, DAC provides for the EU commission to be the exclusive negotiator for any automatic information exchange of an EU member state with non-EU countries. This may save costs for any developing country interested in obtaining data from the EU under the CRS. Finally, it remains to be determined if the transparency advances achieved in the EUSTD amendments (e.g. the Paying Agent Upon Receipt) will be incorporated into the revised DAC as well.

[12] For further detail see: http://www.taxjustice.net/cms/upload/pdf/EUSTD-TJN-Briefing_-_JAN-2011.pdf; 11.7.2014.

[13] See http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/revised_directive/index_en.htm; 11.7.2014.

3.2 FATCA

15. Triggered by cases of tax evasion by US citizens with Liechtenstein's LGT bank and Swiss UBS, in addition to avoidance mechanisms of the US Qualified Intermediary (QI) Program[14], the US enacted the Foreign Account Tax Compliance Act (FATCA) to tackle tax evasion of its own nationals. FATCA requires financial institutions anywhere in the world to report to the US tax authorities (the "IRS"), about accounts held by US persons. It imposes a 30% withholding tax on investments in US financial income in case of non-compliance or non-participation in FATCA.

16. Originally, financial institutions abroad were supposed to report directly to the US. However, as some countries needed to undertake domestic legal changes for their financial institutions to comply with FATCA, they also became interested in receiving information from the US. Therefore, two FATCA Intergovernmental Agreements (IGAs) were developed. Model IGA II stayed like the original version, prescribing (non-reciprocal) reporting of information from financial institutions abroad directly to the IRS. In contrast, Model IGA I involves either reciprocal ("IGA I A") or non-reciprocal (IGA I "B") exchanges of information between the IRS and the other country's authorities. However, even reciprocity in Model IGA I A, is still biased in favour of the US (Grinberg 2013: 12-13)[15].

3.3 CRS

17. In 2013 the G8 and G20 endorsed AIE as the global standard for exchange of information and requested the OECD to develop its legal framework. In February 2014, the OECD published the "Common Reporting Standard" (CRS) which is based on FATCA IGA Model I, although adapted to a multilateral context (e.g. reference is made to residency instead of nationality) and other changes (lower thresholds, lack of sanctions for non-compliance in contrast to FATCA's 30% withholding tax, etc.). In July 2014, the OECD published a slightly revised version of the Standard, including Commentaries on the CRS, which will be analysed below.

18. Reproachfully, the CRS lacks provisions that could facilitate implementation by developing countries[16] (e.g. neither non-reciprocity in their favour nor a unique multilateral competent authority agreement to operationalize AIE, etc.) and OECD officials seem to have been discouraging their participation[17]. Despite this, CRS still offers the best available platform for a global AIE which could eventually benefit developing countries. While the revised DAC is only regional (it covers only the European Union), it potentially lowers the barriers for developing countries

[14] For further detail see: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969123; 14.7.2014.
[15] For further detail see: http://scholarship.law.georgetown.edu/facpub/1227/; 14.7.2014.
[16] For further detail see: http://www.internationaltaxreview.com/pdfs/TJN2014_OECD-AIE-Report.pdf; (page 7-9) 14.7.2014.
[17] For further detail see: http://www.taxjustice.net/wp-content/uploads/2013/04/AIE-An-opportunity-for-developing-countries.pdf; 17.7.2014.

wishing to obtain data from all EU member states because any third country will negotiate with the EU Commission about receiving (and sending) data from all EU members at once. In contrast, FATCA offers only a bilateral scheme, imposed and biased in favour of the US, with higher thresholds to start exchanging information. For this reason, this report will be based on CRS, although specific provisions of (the now obsolete) EUSTD and FATCA will also be analysed to the extent to which they are adding value over the current CRS.

Table 2: Why the OECD's CRS is the best available alternative for global AIE

	OECD's CRS	FATCA IGA I	FATCA IGA II	EUSTD / DAC
Potential Scope	Worldwide	Worldwide	Worldwide	European Union. EUSTD: also other selected countries[18]
Potential Benefits	Worldwide, as long as provisions for developing countries' engagement (especially low income ones) are improved	IGA I A: Worldwide, though biased in favour of the US / IGA I B: benefits only for the US	Benefits only for the US	European Union. EUSTD: also other selected countries
Engagement	CAA: Bilateral / Multilateral (optional)	Bilateral	Bilateral	Regional and bilateral (for some non-UE jurisdictions)
Reference to Benefit Developing Countries	Yes (Feb version)/ No (current version)	No	No	No
Non-Reciprocity in Favour of Developing Countries	No in Multilateral CAA / Possible in bilateral Model	IGA I A: Opposite. Reciprocity in favor of US / IGA I B: Opposite. Non-reciprocity in favor of US	Opposite. Non-reciprocity in favor of US	No
Capacity Building Commitments in Favour of Developing Countries	Possible in Global Forum context	No	No	No

[18] Such as Andorra, Liechtenstein, Switzerland, San Marino, Monaco, Cayman Islands, British Virgin Islands, etc.

4. Understanding the CRS

4.1 Where and when will information be reported?

Becoming a jurisdiction participating in the CRS ("participating jurisdiction[19]")

19. The CRS will not apply in all jurisdictions, but only in those which have created the legal basis for implementing the OECD's CRS. This requires two steps, and the easiest way to do this is by (i) becoming a party to the Council of Europe / OECD Multilateral Convention on Mutual Assistance in Tax Matters (the "Multilateral Convention") which creates the legal framework for AIE, and then (ii) signing a Multilateral Competent Authority Agreement (CAA) containing CRS provisions, to operationalize the automatic exchange of information. This double multilateral approach (of both the Multilateral Convention and a Multilateral CAA) is likely to be the fastest route for benefiting from AIE with a large set of relevant jurisdictions, while ensuring consistency among all jurisdictions.

20. Regarding the legal framework, as of November 24th, 2014 the Amended Multilateral Convention[20] is in force among 59 jurisdictions and related territories, and 24 others have signed it (but they still need to ratify it), including many secrecy jurisdictions such as Switzerland, the US, Liechtenstein, Singapore, Cyprus, Germany, Andorra, and Monaco.

21. With regard to the endorsement of the CRS, as of November 24th, 2014, 52 jurisdictions have signed the Multilateral CAA and committed to start exchanging information in 2017 (except for Albania, Aruba, Austria and Switzerland who committed to 2018). In addition to these 52 signatories, other 41 jurisdictions committed to exchange information either in 2017 or 2018, though they have not signed the Multilateral CAA yet. Among these, 10 jurisdictions have committed to 2017 (including India, Seychelles and Uruguay) and the remaining 31 have committed to 2018 (including Australia, Bahamas, Hong Kong, Singapore and the UAE). However, it is not clear if they will end up signing the Multilateral CAA or pursue bilateral ones, such as Bahamas[21].

[19] For our purposes, "participating jurisdiction" is usually equal to "reportable jurisdiction" and "reporting jurisdiction." While any jurisdiction engaging in AIE would be a participating jurisdiction," the CRS differentiates, in case of non-reciprocal AIE, between "Reporting Jurisdiction" (jurisdiction or its financial institutions) sending information, and "Reportable Jurisdiction" (jurisdiction only receiving information).
[20] http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf; 12.9.2014.
[21] Ryan Pinder, Minister of Financial Services of Bahamas has expressed that they rejected the Multilateral CAA and would engage in bilateral ones (though not with all jurisdictions, especially not with those in Latin America): "We chose a bilateral approach, agreeing to implement the standard on a country-by-country basis. That was accepted" (http://www.tribune242.com/news/2014/oct/31/bahamas-got-everything-needed-on-tax-exchange/; 17.11.2014).

22. In contrast, five jurisdictions (Bahrain, Cook Islands, Nauru, Panama and Vanuatu) have not committed to any time frame. A special case is the US, which apparently rejected the CRS, since it has expressed that they will engage in AIE through FATCA. This represents a big problem, since FATCA engagement is bilateral (and not all countries have been able to sign one) and even in the case of reciprocal agreements, more information flows to the US (than from the US to other countries). Annex A (below) offers the full list of jurisdictions which signed and committed to the CRS.

23. If,—in practice, there is not a unique multilateral CAA for all jurisdictions, the second-best option for jurisdictions which are party to the Multilateral Convention is to sign one or a few multilateral CAAs and then negotiate specific bilateral CAAs with jurisdictions which oppose to be part of a multilateral one[22].

24. The most costly engagement would be having to negotiate bilaterally with all other jurisdictions, not only a CAA but also the legal framework for AIE altogether, for instance by having to (re)negotiate a double tax agreement (DTA)[23]. Apart from high negotiating costs and risks, there would be a great risk for loopholes and mismatches to result in reduced effectiveness of such a bilateral approach for AIE.

Consequences of being a participating jurisdiction

25. In principle, only jurisdictions participating in the CRS will bilaterally send and receive[24] information with each other. From an "active" point of view, this means that only financial institutions resident in participating jurisdictions will have to collect information (by following the CRS due diligence procedures). Likewise, from a "passive" point of view, information will be collected (by financial institutions) only about individuals and entities[25] who are residents of a participating jurisdiction. Consequently, (a) financial institutions not resident in a participating jurisdiction will not have to collect any information whatsoever, regardless of the residency of the account holders, and (b) financial institutions

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[22] A clear example of a secrecy jurisdiction captured by its financial industry which rejects to exchange information automatically with developing countries is Switzerland which has already stated that they are only willing to sign bilateral CAAs, but will only start with those countries "with which there are close economic and political ties and which, if appropriate, provide their taxpayers with sufficient scope for regularisation and which are considered to be important and promising in terms of their market potential for Switzerland's finance industry" (http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=53050; 3.8.2014).

[23] For a description of the negative consequences of DTAs, especially for developing countries see http://www.taxjustice.net/wp-content/uploads/2013/04/AIE-An-opportunity-for-developing-countries.pdf.

[24] If non-reciprocity provisions apply, then a jurisdiction may only send or only receive information, depending on the case.

[25] There may still be no collection of information about some entities which are resident in a participating jurisdiction, if the type of entity is excluded from reporting (e.g. listed corporation or government entity). This will be analysed below.

resident in a participating jurisdiction, in principle[26], will have to collect information about account holders who are resident in a participating jurisdiction, but not about account holders (either individuals or entities) who are not resident in a participating jurisdiction.

Table 3: Reporting obligations for financial institutions in participating jurisdictions

Financial Institution is resident in…	Account holder is an individual or entity Resident in…		
	Participating Jurisdiction		NON-participating jurisdiction
	Reciprocity	Non-Reciprocity (A sends, B receives)	
Participating Jurisdiction…	Collect & report Information (about account holders who are resident in a participating jurisdiction)	in A: collect & report information (about account holders resident in B) in B: don't collect nor report (about account holders resident in A)	Don't collect nor report Information (about account holder resident in non-participating jurisdiction), except if such account holder is a "Passive NFE" with any controlling person who is a resident in a participating jurisdiction. In such case, collect & report about all controlling persons resident in participating jurisdiction.
NON-participating jurisdiction…	Don't collect nor report Information (regardless of residence of account holders)		

Timeframe

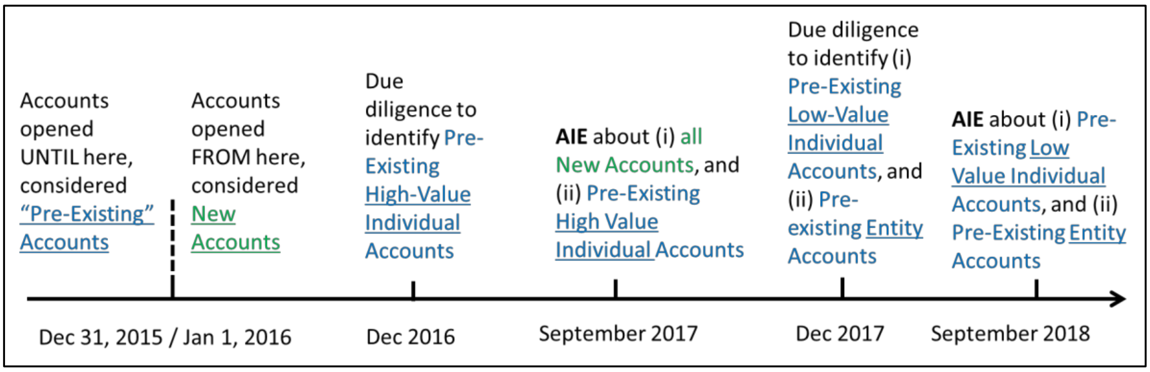
26. The CRS itself does not contain any specific timeframe for the start of AIE; this will depend on the date in which jurisdictions decide so when they sign bilateral or multilateral CAAs.

27. As a proxy, early adopters of the CRS have committed to exchanging information about (i) all new accounts (individuals and entities) and pre-existing individual high value accounts by September 2017, and (ii) "pre-existing individual low value accounts and pre-existing entity accounts will either first be exchanged by the end of September 2017 or September 2018 depending on when financial institutions identify them as reportable accounts"[27].

[26] There are exceptions to this principle. First, in case of non-reciprocity between A and B: only financial institutions resident in jurisdiction A (only sending) will have to report information about residents of B (which is only receiving). Thus, financial institutions in B will not have to report any information about A's residents, even though both jurisdictions are "participating" in the CRS. A second exception refers to an account holder which is an entity: even if the entity is not a resident of a participating jurisdiction, information about it will still be reported if: (i) it is a passive Non-Financial Entity (NFE) and (ii) any of its controlling persons are residents in a participating jurisdiction. This will be analyzed below. A third exception refers to specific exclusions from reporting. This will also be analyzed below.

[27] Joint Statement by the Early Adopters Group, March 2014, available at: http://www.oecd.org/tax/transparency/AEOIjointstatement.pdf; 3.8.2014.

Figure 1: Timeframe for Early Adopters



28. The CRS suggests exchanging information within nine months after the end of the calendar year to which information relates, although shorter periods could be agreed by jurisdictions. There may also be exceptions in case a CAA has been signed, but one jurisdiction does not yet have the appropriate domestic legal framework (i.e. compliance with confidentiality requirements), in which case AIE will be postponed[28]. AIE may also be postponed in relation to gross proceeds from the sale of financial assets[29].

29. Regarding the Multilateral CAA signed last October 29th in Berlin, many obstacles may prevent the actual AIE between two countries which signed the CAA. This is a consequence of Section 7 of the agreement. Pursuant to it, signing jurisdictions will need to pass on to the Secretariat the following information before AIE becomes applicable:

- That it has the relevant laws in place to implement the CRS, specifying the dates for pre-existing and new accounts;
- Whether it intends to send information, without receiving it (request to be listed in Annex A);
- The method for data transmission;
- Specific procedures for the protection of personal data by recipient jurisdiction;
- That it has adequate measures to ensure confidentiality and data protection (include responses to the Commentaries' confidentiality questionnaire); and
- A list of jurisdictions with whom the signing jurisdiction expects to engage in AIE;

30. For instance, Bahamas[30] has already expressed it will invoke confidentiality to refuse to send information to many Latin American countries. Likewise, AIE will

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[28] See the OECD's "Standard for Automatic Exchange of Financial Information in Tax Matters" published in July 21, 2014, containing the Commentaries to the CRS, (hereafter, the "Standard"), page 49, para. 3 and 4.
[29] The rationale behind this is that it may be difficult for jurisdictions to calculate and obtain this information, requiring more time. See Standard, page 49, para. 5.
[30] Ryan Pinder, Minister of Financial Services of Bahamas has expressed: "as we have re-focused our industry in Latin America, in countries where many practitioners would say that the risk to personal safety of clients is real, and that a transparency agenda brings these concerns to the forefront […] We believe that an objective case can be made for many of our key markets that this clause on confidentiality and use of information would

only take place among jurisdictions which mutually chose each other, resulting in a "match", like in a dating system. Therefore, tax havens may easily avoid AIE with other countries by simply not "choosing" them.

4.2 Which institutions need to report information?

31. Financial institutions (FIs) considered "reporting financial institutions" are the institutions—or agents—required to collect information (following the due diligence procedures described below) and report it to their local competent authorities, for exchange with other jurisdictions. However, the definition of "reporting financial institution" is very complex and depends on inclusions or exclusions according to their residency or location, public character, type of institution, risks of being used for tax evasion, etc.

32. As regards the definition according to its type, FIs comprise the following entities which meet specific criteria: (i) custodial institutions (which mainly hold financial assets for the account of others, such as custodial banks, brokers and central securities depositaries -but not insurance brokers); (ii) depository institutions (which accept deposits and make loans, discount checks, provide trust or fiduciary services or finances foreign exchange transactions, etc., such as savings and commercial banks or credit unions); (iii) investment entities (either (a) an entity which primarily trades, invests or manages[31] for a customer financial assets such as securities, swaps, etc. - except for non-debt direct interests in real estate or commodities which are a physical good; or (b) any entity which trades or invests in financial assets and is managed by an FI); or (iv) specified insurance companies (insurance companies which issue or make payments with respect to cash value[32] insurance contracts or annuity[33] contracts, such as life-insurance companies—but not: non-life insurance companies or insurance brokers).

33. Even though the CRS does not include a specific category for private banking (used by high net worth individuals), these entities would also be a reporting FI as

apply, resulting in a lack of an OECD mandate for an automatic exchange agreement with these countries. In fact, to make the case that this clause would apply is fundamental to the survivability of a legitimate financial centre serving the Latin American market." (http://www.tribune242.com/news/2014/oct/31/bahamas-got-everything-needed-on-tax-exchange/; 17.11.2014).

[31] "Manages" does not include providing non-binding investment advice (Standard, page 112, para. 16).

[32] This may refer to some insurance wrappers: an insurance contract used as an investment (so not those which insure against death or injury for example), where the policyholder is entitled to receive or borrow an amount of money upon termination or surrender of the insurance contract (unless it relates to death in case of a life-insurance contract, or injury or sickness against which the individual had insured himself). (Standard, page 35).

[33] This may (also) refer to some insurance wrappers: an insurance contract related to the life expectancy of a person but used as an investment (so not those which insure against death or injury for example), where the "issuer agrees to make payments for a period of time determined in whole or in part by reference to the life expectancy of one or more individuals" (Standard, page 35).

long as they fall under any definition, for instance, for being a depositary institution or a custodial one.

34. As regards the definition according to its fiscal residency (for FIs) or geographical location (for branches of FIs), reporting FIs are: (i) FIs resident in a participating jurisdiction "P" (but not their branches located outside such participating jurisdiction P), and (ii) any branch of an FI not resident in the participating jurisdiction P, if that branch is located in such participating jurisdiction P.

Figure 2: Reporting FIs according to their geographical residence or location

Participating Jurisdiction "P"

Bank 1 (resident in P)

Branch (located in P) of Bank 2 (resident outside P)

GREEN = Reporting FI in P (reports info to P's authorities)

RED = Not-Reporting FI in P (does not report info in P)

* Bank 2 (resident outside P) and any branch of Bank 1 (located outside P) will not be reporting FIs in P. However, they could be Reporting FIs in the jurisdiction where they are resident and located respectively, if that other jurisdiction is also participating in the CRS. In contrast, if that other jurisdiction where they are resident and located is not a participating jurisdiction, then neither will be a reporting FI (anywhere).

35. As regards the exclusion from the definition of FI on the grounds of their public nature and their low risk of being used for tax evasion, many institutions are explicitly excluded from reporting obligations: governmental entities, international organizations and central banks. This exclusion extends also to their pension funds, a qualified credit card issuer, some retirement funds or similar low-risk entities.

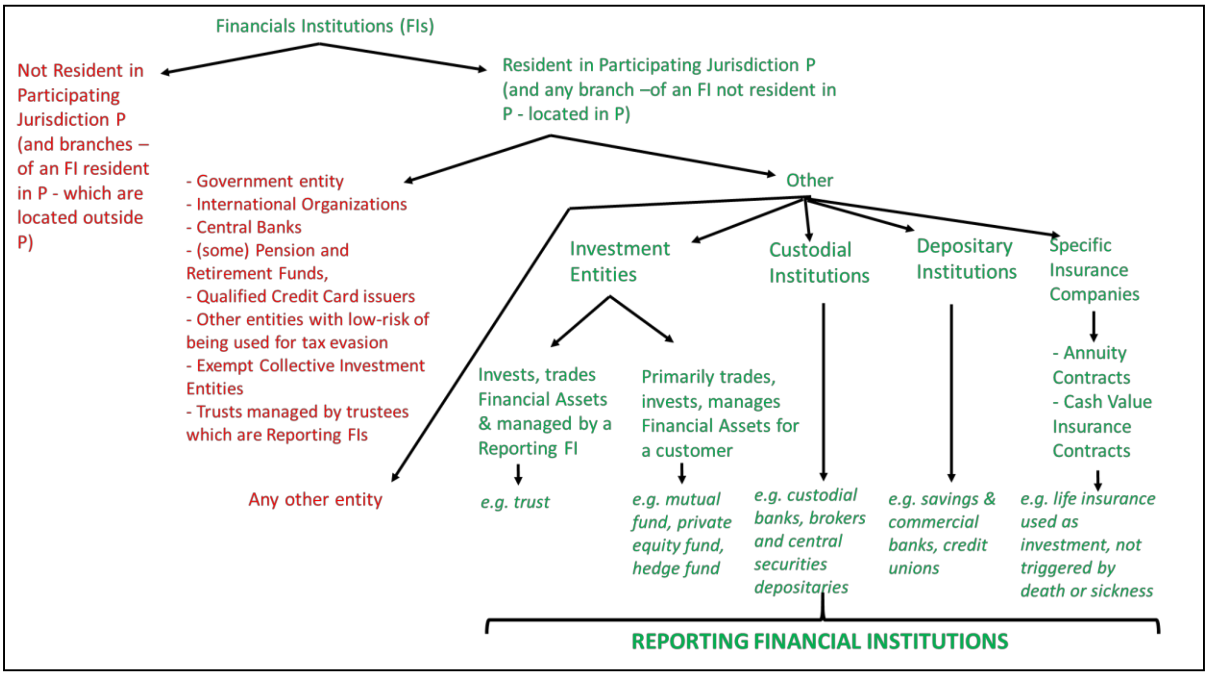
36. Other exclusions refer to a lack of reporting obligations by FIs because their interest holders[34] are not reportable persons[35] (so no information would have to be collected about them anyway), or to avoid reporting twice the same information. Explicitly, the CRS refers to Exempt Collective Investment Entities, which are regulated, without bearer shares and the interests of which are not held by reportable persons[36]; and trusts, the trustees of which are reporting financial institutions. These FIs which are trustees are obliged to report the same information that the trust would otherwise have to report.

[34] Interest holders would be the equivalent of "account holders" (of a depositary institution such as bank), but regarding financial institutions that are investment entities, such as mutual fund, hedge fund, etc.

[35] Reportable persons are individuals and entities about whom information has to be collected and reported. It will be analyzed below.

[36] Since none of the interest holders (equivalent to "account holders") of an Exempt Collective Investment Entity would be reportable persons, such investment entity would not need to report any information.

Figure 3: Summary of FIs which qualify as Reporting FIs



Due diligence procedures

37. As explained above, reporting FIs will have to collect and report information only about account holders (individuals or entities[37]) who are resident in a participating jurisdiction and are thus considered "reportable persons." Therefore, reporting FIs will first need to determine their account holders' residence by performing the following due diligence procedures.

38. These procedures will depend on the time[38] the account was opened (to differentiate between pre-existing and new accounts—since it should be easier for FIs to obtain information on new accounts) and whether the account holder is an individual or an entity. Additionally, if an entity account holder is considered a "Passive Non-Financial Entity" (Passive NFE[39]), then the FI will need to look through it, to identify its "controlling persons"[40] and their residence.

[37] Entities resident in a participating jurisdiction may still be non-reportable persons, because of the entity's type (i.e. if it is a listed corporation or a government entity). This will be analysed below.

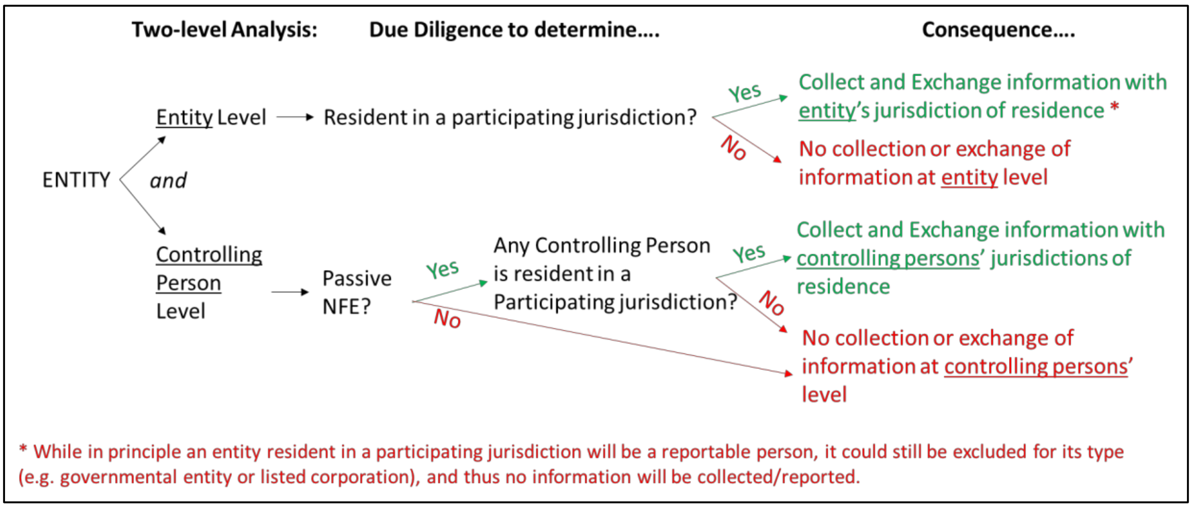
[38] There in one exception: an account opened after the cut-off date (to be consider "pre-existing") may still be considered pre-existing if the account holder already had a pre-existing account (opened before the cut-off date) and all such accounts are treated as a single one for the identity purposes and to determine the account balance or value.

[39] Passive NFE means: (i) a non-financial entity or institution, the income of which is mainly passive (e.g. dividends, interests, royalties, etc) or (ii) an investment entity resident in a non-participating jurisdiction, but managed by a financial institution. Unless an FI may determine otherwise, an entity should (always) be considered a Passive NFE.

[40] The CRS basically defines "controlling persons" as the ultimate natural persons who own or control an entity. While the CRS refers to "controlling persons," the definition itself is the one provided by the Financial Action Task Force (FATF) Recommendations on Anti-Money Laundering to define "beneficial owners." This will be analyzed below.

39. Procedures for existing individual account holders differ according to the value of the account: those with higher value (more than USD 1,000,000) are subject to more demanding due diligence procedures. Moreover, due diligence procedures for entity account holders need to determine (i) the entity's residence for tax purposes[41], (ii) its potential status as a "passive NFE," and in such case, look through it to (iii) identify its controlling persons and determine their residence. In other words, information about entities has to be (potentially) collected and exchanged at two levels: (a) at the entity level (to determine if the entity is resident for tax purposes in a participating jurisdiction and thus a reportable person[42]), and (b) if the entity is considered a passive NFE—regardless of where it is resident—information will have to be collected and exchanged at the controlling persons level, with every jurisdiction where any controlling person is resident (as long as the controlling person is resident in a participating jurisdiction).

Figure 4: Due diligence for entity account holders



40. There are, however, exceptions to the collection and reporting of information. Regarding existing individual accounts, there is no collection or reporting of information in case of accounts which are annuity or cash value insurance contracts of an FI prevented by law from selling such contracts to residents of a reportable jurisdiction[43]. As for pre-existing entity accounts, there is no collection or reporting of information about accounts with an aggregate account balance or value of less than USD 250,000, unless the jurisdiction decides otherwise.

[41] If an entity has no residence for tax purposes (i.e. a fiscally transparent entity such as a limited partnership) it will be considered resident in the jurisdiction where the effective place of management is situated.

[42] However, as expressed above, an entity may be resident in a participating jurisdiction, but still be a non-reportable person for its type (i.e. listed corporation or government entity). This will be analysed below.

[43] The rationale behind this is that, considering AIE between jurisdictions A and B, if these Special Insurance Companies (in jurisdiction A) cannot legally sell insurance contracts to residents of jurisdiction B, there is no need to look into their accounts (related to insurance contracts) because none of its holders would be residents of B, and hence none of its holders would be reportable persons.

Table 4: Due Diligence for Individual Account Holder

Time of opening of Individual Account	**Value / Special case**	**Due diligence to determine residence**
Existing	Annuity or Cash Value Insurance Contracts of an FI prevented by law from selling such contracts to residents of a reportable jurisdiction	No collection or reporting of information
Existing	Lower Value Account (up to USD 1,000,000)	(1) Permanent residence test based[44] on already existing documentary evidence or[45] (2) Residence-indicia search of electronically searchable data maintained in the FI. Then: (2.a) If indicia search is conflicting, a self-certification[46] (and/or[47] documentary evidence) by account holder is required. Otherwise, information has to be exchanged with all reportable jurisdictions identified in the indicia search; (2.b) If only hold-mail instruction or in-care-of address is available from electronic indicia search, then either paper search is required, or the FI needs to obtain self-certification or documentary evidence from account holder; (3) If no residence could be identified following previous steps, account must be reported as undocumented account.
Existing	Higher Value Account (more than USD 1,000,000).	Same as above, but: there is no permanent resident test, it starts with the electronic indicia search, where all (not just any) fields must be determined. Otherwise, paper search must be performed for the missing information. Additionally –and regardless of both indicia searches- if Relationship Manager knows that account holder is resident in a reportable jurisdiction, then the account will be considered reportable (and thus information will be collected and exchanged)
New	(irrelevant)	Self-certification from account holder (based on documentary evidence, including KYC/AML[48] and subject to reasonableness test[49])

[44] The Residence Address Test requires that: (i) such address is in the records of the FI, (ii) such address is current, and (iii) based on documentary evidence (basically, issued by an authorized government body).
[45] While the CRS suggests that the electronic search is required "if the FI does not rely on the residence test," the Commentary explains that an FI may actually choose between the residence test or electronic indicia search (Standard, page 75).
[46] A Self-Certification requires to be signed and to include the account holder's: name, residence address, jurisdiction(s) of residence for tax purposes, TIN with respect to each reportable jurisdiction, and date of birth.
[47] Pursuant to the CRS, Section III, B.6, a self-certification and documentary evidence will be needed to determine the non-reportable status of an account holder in case he maintains an address or telephone number in a reportable jurisdiction, but only a self-certification or documentary evidence if he has a power of attorney in favour of a person with an address in a reportable jurisdiction.
[48] Know your client (KYC) and Anti-Money Laundering (AML).
[49] If there is no reason to know or believe that the provided information is incorrect or unreliable (this would not happen, for instance, with contradictory information).

Table 5: Due Diligence for Entity Account Holder

Time of opening of Entity Account	Value above USD 250,000?	Passive NFE?	Due Diligence to determine entity's residence, passive-NFE status and residence of controlling persons (if Passive NFE)
Existing	No	(irrelevant)	No Collection of information nor reporting (unless jurisdiction decides otherwise, with respect to all accounts or a specific group of accounts)
Existing	Yes	No	Based on already existing information from AML/KYC or publicly available information. Otherwise, self-certification needed (only relating to the entity)
Existing	Yes	Yes	- For entity's residence and identity of controlling persons: same as above; - For residence of controlling persons: (i) if entity account value is up to USD 1,000,000, then same as above (search into already existing information from AML/KYC or publicly available information. Otherwise, self-certification needed); (ii) If entity account value is greater than USD 1,000,000, then self-certification is required[50].
New	(irrelevant)	No/Yes	Self-certification and other information (i.e. KYC/AML) provided when opening the account and subject to reasonableness test (about entity, passive NFE status and controlling persons' residence, if applicable)

41. Given the existence of value thresholds[51] which trigger either more demanding due diligence procedures (for higher-value existing individual accounts) or collection of information altogether (for pre-existing entity accounts), the Standard requires—within each reporting FI—that accounts belonging to the same individual or entity be aggregated, as long as the financial institution's computerized system allows for such aggregation (by linking together all the accounts to the same client number, TIN, etc.). For individual accounts holders, accounts may also be aggregated whenever the relationship manager knows that the accounts are directly or indirectly owned, controlled or established by the same individual.

4.3 What information must be reported?

42. Information that must be collected and exchanged includes: (i) identification of the individual or entity account holder[52] (name, address, and if available: TIN

[50] Oddly, if no self-certification was obtained, the reporting FI may look into its documents for indicia (see Standard, page 96, para. 24).

[51] As described above: USD 250,000 for pre-existing entity accounts; and more than USD 1,000,000 for high-value pre-existing individual accounts.

[52] The identification requirement applies to direct account holders and to -some- indirect ones: the controlling persons of a passive NFE who are resident in a participating jurisdiction. In this case, the Passive NFE would be the direct account holder and its reportable controlling persons, the indirect ones. Nominees are not considered account holders, the individuals they represent would be the direct account holders.

and date of birth[53]), (ii) identification of the account (account number and FI's name and identification number), and (iii) the account holder's financial account information (the account balance or value as well as the gross amount of income from dividends, interests, sale and redemption of financial assets).

43. The CRS thus covers reporting of account balance and income <u>only related to financial assets</u> such as: a security (share of stock in a corporation; partnership or beneficial ownership interest in a widely held or publicly traded partnership or trust; note, bond, debenture), partnership interest, commodity[54], swap; insurance contract or annuity contract, or any interest (including a futures or forward contract or option) in a security, partnership interest, commodity, swap. The term "Financial Asset" does not include a non-debt, direct interest in real property, or a commodity that is a physical good, such as wheat.

Table 6: Reporting of Account Holder's <u>Identity</u> Information

Account Holder	Information to be reported	Observations
Individual (direct account holder or indirect: controlling person of Passive NFE account holder)	Name, address, jurisdiction(s) of residence, TIN(s) and date and place of birth.	-For <u>pre-existing accounts</u>: TIN or Date of birth not required to be reported if not in the records[55] of FI (nor required by law to be collected). -For <u>all accounts (pre-existing and new)</u>: (i) TIN is not required to be reported if it is not issued or required to be collected by the reportable jurisdiction; and (ii) Date of birth is not required to be reported unless domestic law requires its collection by the FI and it is available in electronically searchable data maintained by the FI.
Entity	Name, address, jurisdiction(s) of residence and TIN(s)	Same as above in relation to TIN

[53] This is only for individuals.
[54] Since the CRS expressly states that non-debt direct interest in real estate and commodities which are physical goods are not considered financial assets, commodities which are considered financial assets could be those referred to by Investopedia.com: "Some traditional examples of commodities include grains, gold, beef, oil and natural gas. More recently, the definition has expanded to include financial products such as foreign currencies and indexes. Technological advances have also led to new types of commodities being exchanged in the marketplace: for example, cell phone minutes and bandwidth" (http://www.investopedia.com/terms/c/commodity.asp; 28.9.2014).
[55] FIs are required to use "reasonable efforts" (contact the account holder at least once per year) to obtain this information by the second year since account became a reportable account.

Table 7: Reporting of Account Holder's Financial Account Information

Type of Account	Information to be reported	Observations
All	Account Balance or Value, or closure of account[56] (if closed).	Surrender Value in case of Insurance Account
Custodial	Total gross amount of interest, dividends and any other income related to held assets as well as total gross proceeds of sale or redemption of financial assets	Amounts paid or credited to account.
Depositary	Total gross amount of interest	
Other than Custodial or Depositary	Total gross amount paid or credited, including redemption payments	

44. There are, however, exceptions. The following "Excluded Accounts" will not be subject to reporting: retirement and pension accounts[57]; non-retirement tax-favoured accounts[58]; term life insurance contracts[59]; estate accounts (if death certificate or decedent's will is available); accounts related to court order or judgement; escrow accounts; Depository Accounts due to not-returned overpayments; and low-risk excluded accounts[60].

4.4 About whom will there be information reporting?

45. Information has to be reported about those (individuals or entities) considered "reportable persons." In principle, this means that information has to be reported about account holders who are: (i) individuals or entities (active or passive), that are resident in a reportable jurisdiction and (ii) an estate[61] (of a decedent that was a resident of a Reportable Jurisdiction). Additionally, in an attempt to prevent avoidance of reporting (achieved by setting an entity in a non-participating jurisdiction), the CRS requires that, if the account holder is a passive

[56] In this case, there is no reporting of the account balance before the account was closed.
[57] If, among other, they are subject to regulation and reporting to tax authorities.
[58] Same as note above.
[59] This refers to insurance contracts not used as an investment: they are excluded accounts if they are non-investment-linked, non-transferable, immediate life annuity that is issued to an individual and monetizes a pension or disability benefit.
[60] If subject to regulation and reporting to tax authorities.
[61] An estate would be a reportable person until the FI has documentation about the deceased's will or death certificate. Then it would be an excluded account.

NFE (regardless of its residence), information will also have to be reported about (iii) its controlling persons who are resident in a reportable jurisdiction.

46. An NFE is an entity that is not a financial entity (not an FI). NFEs may be passive or active. A Passive NFE is generally an entity which does not qualify as an Active NFE. This non-Active status could be (i) either because of the "passiveness" of its income or assets (most[62] of its income is passive or most[63] of its assets (could) produce passive income), or (ii) because it is not one special type of Active NFE. However, in an additional attempt to prevent avoidance of reporting, the look-through treatment of Passive NFEs is also extended to an investment entity managed by a reporting financial institution, if the investment entity is not resident in a participating jurisdiction. Without this exception, this investment entity (resident in a non-participating jurisdiction) could be excluded from reporting altogether for being considered an FI—since FIs are not reportable persons, as it will be explained below. However, the CRS exempts the United States from this provision[64].

47. An Active NFE (which will <u>not</u> be subject to look-through treatment to identify its controlling persons) is in principle an entity with: less than 50% of passive[65] income <u>and</u> less than 50% of assets that could produce passive income. There are also special cases of Active NFEs (regardless of their income or assets): holding NFEs of a non-financial group, start-up NFEs, NFEs that are liquidating, or non-profit NFEs[66].

48. "Controlling person" in the CRS is the equivalent of "beneficial owner" as defined in the Financial Action Task Force (FATF)'s Anti-Money Laundering Recommendation 10 and its interpretative note[67]. The definition refers, in general, to the natural person(s) who exercise(s) control over the entity by (i) holding a controlling interest ownership (for example, more than 25% of the shares) or (ii) by other means. When none of the above are identified, the controlling person would be the natural person who holds the position of senior managing official.

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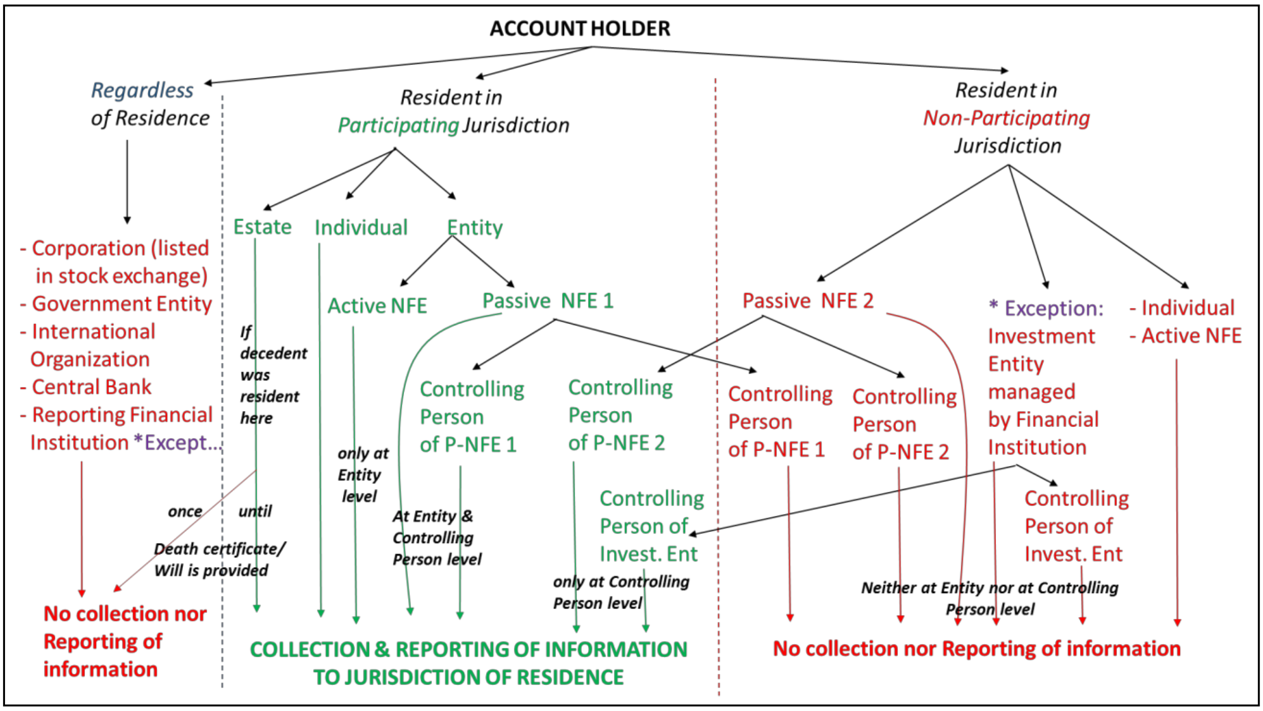
[62] More than 50%.
[63] More than 50%.
[64] There is one exception to this look-through extension, specifically for the United States. According to the CRS's "Introduction" section, the US will not need to look-through investment entities resident in non-participating jurisdictions, as long as it imposes FATCA's 30% withholding tax against them. Expressly, the CRS establishes: "*Given these features* [FATCA withholding tax]*, that the intergovernmental approach to FATCA is a pre-existing system with close similarities to the CRS, and the anticipated progress towards widespread participation in the CRS, <u>it is compatible and consistent with the CRS for the US to not require the look through treatment for investment entities in Non-Participating Jurisdictions</u>*" (Standard, Introduction, para. 5 [note and emphasis added]). This loophole in favour of the US will become obsolete once all jurisdictions are part of the CRS. Likewise, honest taxpayers may prefer the exchange of information rather than to be subject to the 30% withholding tax. However, this may not hold true for money launderers and corrupt officials who may prefer the 30% tax in order to keep anonymity.
[65] Example of passive income are: interests, dividends, royalties, annuities, net income from swaps or trading in financial assets, etc.
[66] As long as no income or assets could be distributed to private persons or a non-charitable entity.
[67]http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf; 12.9.2014.

49. In the case of a trust or similar legal arrangement (such as foundation), the "controlling persons" would be all of the trust's related persons: the settlor(s), the trustee(s), the protector(s), the beneficiary(ies), and any other natural person(s) exercising ultimate effective control over the trust, including through a chain of ownership.

50. There are, however, exceptions to reporting for certain entities. No information will be reported about: (i) a corporation (and its related entities) listed in an established securities market, (ii) a governmental entity, (iii) an international organization, (iv) a Central Bank, or (v) a financial institution (except those investment entities resident in a non-participating jurisdictions and thus treated as a Passive NFE).

Figure 5: Account Holders subject to reporting at individual, entity and/or controlling person level



Box 1: Reporting for different types of trusts (same would apply to foundations and similar legal arrangements)

Trusts (or foundations and similar legal arrangements used for the same purposes) are special entities or legal arrangements used to unbundle into separate parts the different aspects of ownership of an asset. This can be done for valid and legitimate reasons, or for abusive ones, such as to hide ownership to evade taxes or shield assets from creditors, authorities, etc. The CRS has special provisions for trusts, subjecting them to different reporting rules depending on the trust's features. There will be reporting on a trust's related persons as long as they are considered reporting FIs or Passive-NFE account holders. However, there will be only reporting at the "entity" level (not at the related person level) if the trust is an Active-NFE account holder. Moreover, in cases of trusts with non-financial assets (such as interests in real estate) and no account in an FI, there will be no reporting whatsoever. The following Table describes the reporting requirements for different types of trusts.

Trust with more than 50% of gross income from managing /investing in…	Managed by…	Considered reporting FI?	Account holder as Active/Passive NFE?	Reporting at entity level?	Reporting at which related persons level?	Example
Financial Assets	FI	Yes	Not Relevant	No	Yes [as Account Holders or Equity Holders]: settlor[68], mandatory beneficiaries, discretionary beneficiaries who received a distribution[69], any other natural person with effective control over the trust.	A trust investing In bonds, stocks, which is managed by a bank or by a trust firm[70].

[68] It is not clear if settlor always refers to a natural person (the CRS only refers to "person treated as settlor," while it then expressly states "any other natural person with effective control").Oddly, here settlor is defined in singular, while the CRS' controlling person definition for trusts refers to settlor(s) in plural.

[69] Not clear if use of a car/house, or fake "loan" (never to be paid back) given by the trust to a person, would be considered a "distribution."

[70] In this case, the trust itself would be a reporting FI (according to the investment entity (b) definition), and the trust company would be a reporting FI according to the investment entity (a) definition.

Trust with more than 50% of gross income from managing /investing in…	Managed by…	Considered reporting FI?	Account holder as Active/Passive NFE?	Reporting at entity level?	Reporting at which related persons level?	Example
	Individual Trustee	No	Passive[71]	Yes	Yes [as Controlling persons]: settlor(s), the trustee(s), the protector(s) (if any), and the beneficiary(ies) or class(es) of beneficiaries regardless of whether or not any of them exercises control over the trust & any other natural person(s) exercising ultimate effective control over the trust (including through a chain of control or ownership).	A trust, the income of which is mainly from dividends and interest. The trust is managed by an individual.
		No	Active[72]	Yes	No	It appears this case could refer to a trust, the income of which is from acting as a dealer in financial assets, and managed by an individual[73] if also the assets of the trust are mainly for non-passive income.
Non-Financial Assets (e.g. real estate)	Not Relevant	No	Passive	Yes	Yes [as Controlling persons]: settlor(s), the trustee(s), the protector(s) (if any), and the beneficiary(ies) or class(es) of beneficiaries	It appears this case could refer to a trust that manages

[71] Passive because more than 50% of income is passive, such as interests, dividends, etc.; or more than 50% of assets are held for production of passive income.

[72] Active because less than 50% of income is passive, such as interests, dividends, etc.) and less than 50% of assets are held for production of passive income.

[73] The CRS' Commentaries state: "passive income will not include, in the case of a NFE that regularly acts as a dealer in Financial Assets, any income from any transaction entered into in the ordinary course of such dealer's business as such a dealer" (Standard, page 137).

Trust with more than 50% of gross income from managing /investing in…	Managed by…	Considered reporting FI?	Account holder as Active/Passive NFE?	Reporting at entity level?	Reporting at which related persons level?	Example
					regardless of whether or not any of them exercises control over the trust & any other natural person(s) exercising ultimate effective control over the trust (including through a chain of control or ownership.	real estate[74], but either the income or the assets of which are mainly passive or could produce passive income.
		No	Active	Yes	No	It appears this case could refer to a trust which operates as a commercial company (selling goods). Regarding real estate investment trusts (REITs)[75], it is not clear if their income would be considered active or passive.
		No	Does not hold any account	No	No	A trust that - either directly or through a company it controls - manages (owns) real estate, cars, yachts (and has no bank account)
A trust could also incorporate a company to hold its investments and have such company be managed by an FI or by an individual. Based on this table and the loopholes identified below, it appears that, if either the trust and/or the underlying company are account holders considered Active NFE, there would be no collection of the trust's related persons. In contrast, there would be identification of the trust's related persons if: (i) the underlying company is considered an FI (because it is managed by an FI) and the trust is considered a passive NFE equity holder, or (ii) the underlying company is managed by an individual, but holds an account (e.g. a bank account) and is considered a passive NFE. Nevertheless, it could be the case that identification of related persons may also be prevented if the trust only holds 20% of the underlying company (so neither the trust nor any of its related persons could be						

[74] It appears that rent from real estate would be considered passive income, based on the Commentaries on the concept of passive income, paragraph 126.d: "*Passive income would generally be considered to include the portion of gross income that consists of: […] d) rents and royalties, other than rents and royalties derived in the active conduct of a business conducted, at least in part, by employees of the NFE".*

[75] The CRS's Commentaries state: "An Entity that primarily conducts as a business investing, administering, or managing non-debt, direct interests in real property on behalf of other persons, such as a type of real estate investment trust, will not be an Investment Entity" (Standard, page 112).

Trust with more than 50% of gross income from managing /investing in…	Managed by…	Considered reporting FI?	Account holder as Active/Passive NFE?	Reporting at entity level?	Reporting at which related persons level?	Example
considered a controlling person for not owning/controlling 25%) and thus the controlling person would be the person with effective management of the underlying company.						

5. Analysis & Comparison: Likely Effectiveness of CRS

5.1 CRS Loopholes

51. The CRS will need to address many of its loopholes, exclusions and exceptions which affect the AIE's overall effectiveness. Otherwise, tax dodgers, corrupt officials, money launderers and other criminals will still be able to conceal their ill-gotten funds and keep breaching the law. Here is a list of issues that the CRS has improved (since the February publication), as well as new and remaining ones that still need to be addressed and fixed.

Affecting the time and territorial scope: which jurisdictions exchange information, and since when?

52. As explained above, unless all jurisdictions are required to collect and exchange information, tax dodgers and other criminals (resident in a participating jurisdiction such as Germany) could avoid their information being collected and/or reported by either: (i) opening an account in a financial institution (i.e. a bank) in a non-participating jurisdiction, or (ii) becoming a (fake[76]) resident of any non-participating jurisdiction (so as to be considered a non-reportable person).

53. However, even once all jurisdictions become participating jurisdictions, tax dodgers could still avoid their information being reported to their relevant (and real) jurisdiction of residence by either: (i) becoming a (fake) resident of a another participating jurisdiction (so that their information will be sent to an irrelevant jurisdiction, where they are not liable to any tax), or even worse by (ii) becoming a (fake) resident of a tax haven listed in the Annex A of the Multilateral CAA (jurisdictions only sending but not receiving information), so that no information at all will be collected or reported about them.

[76] By "fake resident" we refer to individuals who still live and work (together with their families) in the same jurisdiction they have been living and working (i.e. Germany), but who acquire "residence certificates" from a tax haven (such as Malta, St. Kitts, the US, the UK, etc.) to submit this (fake) resident certificate when opening an account with a financial institution.

Table 8—Loopholes affecting the territorial and time scope

The Problem	The Fix
1. No unique Multilateral CAA for all countries While a bilateral CAA is the default option, the Standard now offers an alternative Multilateral CAA in the Annex section. However, if many bilateral or multilateral CAAs become available (instead of a unique one for all jurisdictions), it will be costlier for jurisdictions to engage in AIE with each other (for the required time and staff to sign every new CAA and because secrecy jurisdictions such as Switzerland[77], could much more easily reject to engage in AIE with them). Also, many CAAs would increase the risk of inconsistency among them (creating costs for financial institutions and authorities).	**Fix** Only one unique Multilateral CAA for all countries.
2. Discretion to reject AIE with other jurisdictions Nothing in the CRS demands a jurisdiction (i.e. secrecy jurisdiction) to sign a CAA or engage in AIE with another jurisdiction that requests this, even if the latter complies with confidentiality and data protection safeguards. A secrecy jurisdiction (e.g. Switzerland) may thus keep its reputation intact by engaging in AIE only with other secrecy jurisdictions or major financial centres.	**Fix** Include provisions stating that no jurisdiction may impede, reject or postpone the engagement in AIE with another jurisdiction, as long as the latter complies with the confidentiality and data protection safeguards. Develop a multilateral[78] sanction scheme to sanction any jurisdiction which opposes to engage in AIE with another jurisdiction which requests so (and complies with confidentiality requirements). However, developing countries (which are not financial centres) should not be sanctioned if they are unable to implement AIE. Instead, they should be assisted.

[77] The Swiss Federal Council already expressed on May 21, 2014 that it will analyze whether to engage in AIE with other countries (other than the US and EU) and in such case, it will be done through bilateral CAAs and only with countries "with which there are close economic and political ties and which, if appropriate, provide their taxpayers with sufficient scope for regularisation and which are considered to be important and promising in terms of their market potential for Switzerland's finance industry" (http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=53050; 9.1.2014).

[78] While FATCA became a reality because of the risk of the 30% withholding tax imposed unilaterally by the US, a secrecy jurisdiction would remain unmoved if a low-income developing country threatened by itself to impose sanctions. Thus, a multilateral sanction scheme would be necessary.

3. Consensus to accept new jurisdictions Related to the point above, the Model Multilateral CAA requires consensus before accepting a new jurisdiction, enabling any secrecy jurisdiction to prevent a jurisdiction from engaging in AIE, even if a majority of signatory countries accepts it.	**Fix** Eliminate the consensus requirement. <u>Partial solution</u>: allow any jurisdiction to join the Multilateral CAA, while allowing all jurisdictions to make a reservation against engaging in AIE with a specific jurisdiction (even if a signatory to the CAA) as long as reservation is justified and complies with the point above (against discretion to reject AIE if confidentiality is respected).
4. Lack of non-reciprocity for developing countries The CRS will not be effective until all jurisdictions implement it. However, many low-income developing countries will find it impossible to engage in AIE if they are required to invest their limited resources to collect and send information from the beginning (instead of focusing first on analysing the received information). However, if developing countries are awarded non-reciprocity (to first only receive information), there should be provisions describing when full-reciprocity would be required (the earliest between a moment in the future or whenever the jurisdiction becomes a secrecy jurisdiction by offering financial services to non-residents wishing to avoid the CRS). The CRS now offers a model non-reciprocal bilateral agreement. However, as expressed above, only a multilateral engagement would be effective and allow developing countries to promptly implement AIE. Moreover, this model non-reciprocal bilateral agreement has no provisions regarding the time when full reciprocity would be required.	**Fix** Include a new Annex to the (unique) Multilateral CAA for developing countries which request to first only receive information, because they cannot yet send it. Specify when full-reciprocity would be required. <u>Partial Solution</u>: Specify when full-reciprocity would be required for the model non-reciprocal bilateral CAA. While the Standard offers a bilateral non-reciprocal CAA that could be used by a developing country, it has no provision stating when full-reciprocity would be required. In addition, it would be impossible for a low-income developing country to sign bilateral CAAs with every other jurisdiction in a reasonable time.

5. Non-Reciprocity in favour of Tax Havens The Model Multilateral CAA offers non-reciprocity to tax havens (jurisdictions without income tax) where they would need to send information, without receiving it. Not only is this outrageous in a new transparency standard, but it promotes the status quo and corruption of a tax haven which could otherwise use the information on its residents' foreign income, and especially their balance account information, to prosecute cases of money laundering against individuals who could not justify the origins of their funds held abroad. The lack of collection and reporting of information about these tax haven's (real and fake) residents increases the risks of avoidance by fuelling the fake residency certificate business which is thriving.	**Fix** Eliminate this option of non-reciprocity for tax havens. If they do not want to use the received information, they could simply discard it after they receive it.
6. Confidentiality Requirements The Commentaries prevent against arbitrary confidentiality requirements by expressly stating that "safeguards should be limited to what is needed to ensure the protection of personal data without unduly preventing or delaying the effective exchange of information." However, it will be up to each sending jurisdiction to decide whether another jurisdiction meets the confidentiality requirements.	**Fix** Jurisdictions should only be required to comply with an international standard on confidentiality (as described by the Commentaries to the CRS) instead of being subject to the discretion of each sending jurisdiction. Moreover, confidentiality requirements should be proportional to the risks of their disclosure, especially if developing countries are first only offered limited information[79].
7. Collection of information prior to AIE The Model CAA prevents the actual AIE until both jurisdictions comply with confidentiality requirements. Given that most treaties prevent	**Fix** Demand (as allowed by the Standard's Annex 5) that Financial Institutions collect information about all residents, even those which are resident of jurisdictions which are not yet participating in AIE. This would

[79] The International Chamber of Commerce suggested this limited exchange of information in a letter to the UN Tax Committee: http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2014/ICC-advises-the-UN-on-Automatic-Exchange-of-Information-(2014)/; 12.9.2014.

the retroactive collection and exchange of information, tax dodgers will benefit from avoidance as long as their residence jurisdictions do not engage in AIE.	allow the deterrent effect to start taking place, and would enable information to be exchanged as soon as the jurisdiction becomes a participating jurisdiction. Partial solution: demand that financial institutions collect information about residents of jurisdictions which have signed a CAA but still need to comply with confidentiality requirements before the AIE takes place.
8. Fake resident certificates A tax dodger may prevent his information being collected and exchanged to the relevant (his real) residence jurisdiction by acquiring a residence certificate from a secrecy jurisdiction in exchange for investments[80]. This tax dodger would very likely also be able to acquire documentary evidence such as an electricity bill to pass the residence test.	**Fix** Monitor jurisdictions offering residence certificates, especially if they are listed in the Annex A for jurisdictions not receiving information, and demand extra due diligence (such as demanding all previous certificates of residence). Partial solution: a) Before AIE is in place: demand FIs to collect and exchange information about changes of residence, closure and opening of accounts (specifying number and amounts) which took place between 2012 (when no one needed to change their residence because no information would be reported anyway) and the time when AIE becomes effective for every jurisdiction. b) After entry into force of AIE: FIs should report to all AIE-parties the aggregate amount (number and amounts) of accounts being opened with respect to each jurisdiction of residence, to allow countries to follow the money trail.

Affecting reporting institutions: which institutions need not collect and report information? Are due diligence procedures effective?

54. Many institutions which are resident in participating jurisdictions are nonetheless excluded from collecting and reporting information, even though they hold very valuable data related to potential cases of tax evasion, corruption and money laundering, allowing criminals to keep hiding their proceeds from crime. The table below provides an overview of the related shortcomings.

[80] While many secrecy jurisdictions and OECD countries offer this, see examples here for Gibraltar and St. Kitts.

Table 9: Loopholes affecting reporting FIs

9. Trusts investing in financial assets but managed by an individual trustee, and trusts managing interests in real estate (regardless of who manages it) are excluded from FI definition	**Fix**
The CRS now explicitly extends provisions referring to trusts to other similar entities and legal arrangements such as foundations. Therefore, the loopholes affecting trusts also affect the said similar entities and arrangements. The CRS considers that **only** a trust that is: (i) an investment entity (invests or manages financial assets, which excludes direct interests in real estate), and (ii) is managed by an FI, would be considered a reporting FI. However, even in such case, **not all of the trust's related persons (or controlling persons) would be identified** and reported (such as the protector), but only the account holders (those holding an equity interest in the trust): the settlor, the mandatory beneficiary(ies) or any other natural person holding effective control of the trust. **In case of discretionary beneficiary(ies), only those who actually received a distribution would be considered equity holders** (and identified). It is not clear if the settlor or beneficiaries identified as equity holders could be legal persons[81].	All of the related persons of a trust (and of similar legal arrangements such as foundations) should always be reported, by identifying the ultimate natural person (regardless of the chain of ownership). In case of discretionary trusts: all potential discretionary beneficiaries should be identified and reported (regardless of any distribution) and the concept of "distribution" should not be limited to payments but should include any economic benefit provided by the trust or the trustee (such as using a house or car belonging to the trust, or a loan). While the Standard now provides comprehensive reporting obligations about a trust's related persons (still called "controlling persons" of a trust), these requirements only refer to trusts considered Passive NFEs (but not to those considered Active NFEs[82] and to trusts which are not account holders for not having any account in an FI). Related persons of all kinds of trusts (and similar legal arrangements) should always be identified and reported, regardless if the trust is considered an FI, an active or a passive NFE or a non- account holder in an FI.

[81] The CRS only refers to a "person" treated as settlor or beneficiary, and only then refers to "any other natural person with effective control of the trust." However, when referring to controlling persons of a trust (as a passive NFE) the Commentaries establish that "*With a view to establishing the source of funds in the account(s) held by the trust, where the settlor(s) of a trust is an Entity, Reporting Financial Institutions must also identify the Controlling Person(s) of the settlor(s) and report them as Controlling Person(s) of the trust*" (Standard, Commentaries to "controlling persons," para. 134).

[82] The UK Guidelines for FATCA, suggest that a trust may be a Passive or Active NFFE (similar to CRS's NFE): "Where a Trust is not a Financial Institution it will be a NFFE. In such circumstances it must be determined whether the Trust is either an Active or Passive NFFE" (UK HM Revenue and Customs, Guidance Notes, August 2014, page 62: http://www.hmrc.gov.uk/drafts/uk-us-fatca-guidance-notes.pdf; 12.9.2014.

Moreover, it is not clear whether identification of discretionary beneficiaries could be avoided by allowing them to use cars, planes, yachts or houses, or handing out loans which may never be paid back, instead of giving them a "distribution." On top of everything, if a trust (i) neither meets the above requirements to be considered an FI, nor (ii) is considered a Passive NFE, there will be no reporting whatsoever of any related person of the trust (see below on Active NFE).	
10. Exclusion of registries and entities with information on hard assets Since the CRS focuses on financial account information, it excludes from reporting obligations: real estate registries, registries of yachts, planes or luxury cars as wells as bank's safe deposit boxes, warehouses for art and gold in freeports or jewellery houses, even though they could also provide valuable information on tax evasion and money laundering. Moreover, the CRS excludes from the "investment entity" definition those entities investing in non-debt direct interests in real estate (such as a real estate investment trust).	**Fix** Extend reporting obligations to real estate registries, registries of yachts, planes or luxury cars as wells as warehouses for art and gold or jewellery houses. This could be based on the revised DAC which contemplates AIE of on five categories of income and capital (income from employment, director's fees, life insurance products not covered by other Directives, pensions, ownership of and income from immovable property).
11. Exclusion of commercial registries of companies, partnerships, trusts and foundations Until public central registries of beneficial ownership accessible online become a reality for all jurisdictions, there is no way for reporting financial institutions and authorities to cross-check the information on the controlling persons and owners of entities provided by their account holders.	**Fix** Demand central registries of beneficial ownership information in all jurisdictions, and extend reporting obligations to these registries until their information becomes publicly available to all persons online and with free access.
12. Exclusion of credit cards issuers A credit card issuer would be excluded from reporting obligations if it does not	**Fix** Eliminate this exemption or establish the exchange of average account balance (see below). Another option

allow overpayments of over USD 50.000 or if such overpayment is refunded to the customer within 60 days. The 60-day option to exclude a credit card issuer is problematic, since it could be used by a tax evader to avoid reporting his account balance: if the account balance will be reported every year according to its value as of December 31st, a tax dodger could make an overpayment on December 30th, pretend he has no money on December 31st, and then get his unreported funds within 60 days. While tax authorities could still find it odd that an account produces interest income but reports no balance account, this scheme could actually be used to take advantage of the *de minimis* threshold for pre-existing entity accounts to avoid reporting altogether (of account balance and income). While the CRS requests jurisdictions to establish anti-avoidance procedures against this case, entrusting secrecy jurisdictions to do this seems quite risky.	would be to prevent overpayments during the cut-off date when the account balance is determined.
13. Individual Broker According to the CRS, only institutional (entity) brokers or investment entities managed by an institutional (entity) broker, would be reporting FIs. Thus, it appears[83] that an entity could avoid reporting of all of their account holders by having their investments be handled by an individual broker. This way, even if the investment entity is considered a Passive NFE, only its controlling persons (but not all persons holding an account in the investment entity) would be reported. If the entity could be considered an Active NFE, then	**Fix** Eliminate this exemption.

[83] The Commentaries to the CRS express that: "Example 6 (Individual broker): B, an individual broker, primarily conducts a business of providing advice to clients, has discretionary authority to manage clients' assets, and uses the services of an entity to conduct and execute trades on behalf of clients. B provides services as an investment advisor and manager to E, a corporation. E has earned 50% or more of its gross income for the past three years from investing, reinvesting, or trading in Financial Assets. Because B is an individual, notwithstanding that B primarily conducts certain investment-related activities, B is not an Investment Entity under subparagraph A(6)(a). Further, E is not an Investment Entity under subparagraph A(6)(b) because E is managed by B, an individual" (Standard, page 113).

there would not be any reporting about its controlling persons or account holders (see below).	
14. Non-binding advice excluded from investment entity definition The CRS determines that an investment entity managed by an FI would also be considered a reporting FI (having to report on its account holders). However, (i) providing non-binding investment advice or (ii) not having discretionary authority to manage the assets, would not fall under the definition of "managed" by an FI. This loophole could be combined with the trust managed by an individual trustee or an investment entity managed by an individual broker, to avoid being considered a reporting FI, while still being managed in practice (not in papers) by an FI: the FI would provide "non-binding" advice to the individual trustee or broker, who could "decide by himself" to follow the FI's advice. This way, the FI will be really managing the investment, but the individual will be the manager according to the papers. Thus, the investment entity would not be considered a reporting FI and would not have to identify its account holders.	**Fix** Eliminate this exception—it is too easy to pretend the advice is not binding, to avoid reporting.

55. Additionally, differences in due diligence procedures allow tax dodgers to structure their accounts in certain ways to avoid reporting.

Table 10- Loopholes affecting due diligence procedures

15. No collection of TIN or date of birth in all cases The TIN and date of birth are essential for tax authorities to process the received information (by matching it with domestic file returns and other information) to detect tax evasion and underreporting. However, FIs are not always required to collect them, if they are not in their records (for pre-existing accounts, although now the	**Fix** Demand jurisdictions to issue TIN and date of birth, and to require FIs to collect them. Due diligence provisions should also focus on reasonable means (e.g. provide algorithm or evidentiary documentation) to ascertain the validity of TINs. The OECD should also coordinate an effort to create consistent TINs across

CRS explains what would be considered a "reasonable effort" to obtain them) or if they are not required by law to collect them or if they are not issued.	the globe, similar to the work around legal entity identifiers for financial market participants developed by the Bank for International Settlements (BIS).
16. New accounts of pre-existing account holders, still pre-existing A new account belonging to a pre-existing individual or entity account holder, may still be considered pre-existing (even if opened after the cut-off date for pre-existing accounts), as long as both accounts are aggregated and there is no need to provide new information.	**Fix** This should be eliminated given the risks of avoidance by using the less demanding thresholds and due diligence procedures for pre-existing accounts. Moreover, these less demanding due diligence rules for pre-existing accounts were "justified" because of the difficulty to obtain information from them. However, this "difficulty" becomes obsolete whenever a (pre-existing) account holder wished to open a new account.
17. Aggregation of accounts only if bank's computerized system allows it An account holder's aggregate account value could trigger increased due diligence procedures or reporting altogether. However, this depends on each financial institution's computerized system being able to aggregate such accounts.	**Fix** Demand all banks to link all accounts belonging to the same entity or individual by a TIN or a client number. This should not be rocket science for an FI in the 21st century.
18. Aggregation of accounts by Relationship Manager only for individuals In order to determine if an individual account holder has a high value account, even if a financial institution's computerized system does not link accounts of an individual, these may be aggregated by the Relationship Manager if he knows that they belong to the same individual. This also applies to individuals that are controlling persons of a Passive NFE, but only to determine if such individual controlling person has a high value account.	**Fix** Extend Relationship Manager aggregation of accounts to entity account holders.
19. Entities without residence for tax purposes, resident in the place of effective management	**Fix** Entities without residence for tax purposes, regardless of their active or passive status should be considered

The CRS determines that transparent entities (such as limited partnerships or limited liability partnerships) which have no residence for tax purposes, should be considered resident in the place of their effective management. This allows the beneficial owners of such transparent entities to avoid reporting by appointing a director (or somehow passing the place of effective management test) to avoid reporting.	resident in every jurisdiction where their beneficial owners (or "controlling persons" as the CRS calls them) are resident. In other words, these type of entities, should be looked-through like passive NFEs.

Affecting the material scope: what information will be reported?

56. As explained above, the CRS excludes exchanges of wealth-related information (such as interests in real estate, planes, yachts, luxury cars) which would be relevant for tax evasion and money laundering. Moreover, even the "financial account information" which does require to be exchanged is filled with exclusions which limits its use and allows for avoidance schemes.

Table 11- Loopholes affecting the material scope

20. No reporting of pre-existing entity accounts up to USD 250.000 Unless jurisdictions decide otherwise, financial institutions need not collect or report information on pre-existing entity account holders, the aggregate account or value of which does not exceed USD 250.000. These could be easily avoided by Series Companies (many companies incorporated at once, but each separate and with a separate account) or by splitting the account in different FIs. Another option would be to have many accounts in a bank which does not link them by TIN or client number. Moreover, while this exclusion applies only to pre-existing entity account holders, **any individual could avoid** reporting by setting one (or many) entity account(s) with an aggregate balance below USD 250.000. Given how easy it is to incorporate such an entity, and there's at least 2 years before the cut-off date, any individual could avoid reporting.	**Fix** Eliminate the USD 250.000 threshold. Partial Solution: extend the Relationship Manager rule for aggregation of entity accounts and command all FIs to link their accounts by TIN or client number.

21. No reporting if law prevents sale of insurance contract A Pre-existing individual Account that is a Cash Value Insurance Contract or an Annuity Contract is not required to be reviewed, identified or reported, provided the Reporting Financial Institution is effectively prevented by law from selling the Contract to residents of a Reportable Jurisdiction. This would be understandable in a world of effective law enforcement—but in the current state of affairs, this could be easily circumvented[84].	**Fix** Eliminate this exception.
22. Only Account Balance, as of X date Account balance information, which triggers different due diligence procedures and/or reporting altogether could easily be avoided by transferring funds or withdrawing cash one day before the date in which the account balance is determined.	**Fix** Information should be exchanged not just on account balances as of a particular reporting date, but also the average balance for the year, and the highest value registered for that year. This would allow tax administrations and legal enforcement agencies to investigate for instance whether tax was evaded also on the principal and whether high amounts, the origin of which cannot be justified, lead to a corruption or money laundering investigation.
23. Exclusion of investments in real estate The CRS excludes non-debt direct interests in real estate from the "financial account" definition, meaning that tax dodgers and money launderers could still launder money by investing in real estate either under their own name, a nominee or through an entity.	**Fix** Eliminate this exclusion. This could be based on the revised DAC (see section 3.1) which contemplates AIE of ownership and income from immovable property.
24. Benefit for Undocumented Accounts The CRS determines that accounts, the address of which could not be	**Fix** Undocumented accounts and any account whose beneficial owner cannot be determined must be closed and the

[84] For example, insurance company in A may only be legally allowed to sell insurance wrappers (insurance contracts used for investment, not to hedge against death or injury) to residents of A. However, if A also offers fake resident certificates (e.g. in exchange for investments), then a resident of B could pretend to be a resident of A to acquire such an insurance wrapper and this way circumvent the legal prohibition. The same would apply if a resident of B uses a nominee resident in A to obtain such insurance wrapper.

determined (because neither the FI obtained information nor the account holder provided it) should be reported as undocumented account. Instead of punishing those who did not provide information and manage to avoid reporting to their resident jurisdiction, the CRS rewards them.	account balance transferred to the tax authority within the country that is most closely associated with the account. Jurisdictions should also provide public statistics about the aggregate values and amounts of undocumented accounts.
25. Benefit for Closure of Accounts The CRS requires that upon closure of accounts, the FI must report the account closure, without specifying the balance account. Again, this only rewards those who try to avoid reporting. This would be especially problematic, if accounts are (systematically) opened for a single transaction and are then closed, to escape reporting.	**Fix** As expressed above, FIs should report the amount (both in numbers and amounts) of closed accounts. Moreover, the identity of the account holder (of the closed account) should be reported too.
26. Discretion to define "closure" of accounts In addition to the benefit of "closed accounts" to avoid reporting of the (former) account holder and balance account, the CRS leaves up to each jurisdiction to define when an account is considered "closed." Secrecy jurisdictions may thus offer a flexible definition, whereby account holders could leave their money secure from reporting, but still available to them, at least during balance account determination date.	**Fix** Define that "closed" accounts involves both (i) the inexistence of any standing relationship between the account holder and the financial institution, and (ii) the account holder has no deposit, asset, right or any claim against such financial institution.
27. Public statistics about all types of financial accounts The CRS has no provisions relating to exchanging or publishing information about the amount and value of accounts, especially about those closed, undocumented, excluded, etc. This information would be vital to understand the amount and values which are not subject to reporting to monitor the effectiveness and counteract avoidance schemes.	**Fix** All jurisdictions should provide, in a country-by-country basis, annual statistics with aggregate amount and value information regarding: (i) reported accounts, differentiating according to account type (custodial, depositary, etc.), account holder (entity or individual), special status (pre-existing or new, low or high value); and (ii) those accounts which are not reported: either because they are excluded accounts (or excluded financial institutions or not considered

	reportable persons), or because they are undocumented or closed accounts.

Affecting the personal scope: about whom will information be exchanged?

57. As explained above, the most important tool to fight tax evasion, corruption and money laundering is to identify the beneficial owners (natural persons) who own and/or control entities. However, through exclusions and high thresholds, the CRS allow the real owners to hide behind entities, avoiding reporting altogether.

Table 12- Loopholes affecting the personal scope

28. "Controlling persons" instead of "beneficial owners," and too high a threshold	**Fix**
The CRS refer to "controlling persons" instead of "beneficial owners," which is the normal international standard set by the FATF. However, it now defines "controlling persons" in the same way as the FATF defines "beneficial owners," keeping all of the latter's shortcomings described below. All entities ultimately have (or can be deemed to have) beneficial owners: that is a natural person who owns and/or controls them. However, not all have "controlling persons"—such as when a shareholding is atomised or is a minority stake. In fact, both the FATF and CRS' threshold to become a beneficial owner is too high: more than 25% of ownership interests in an entity. This high threshold could easily be avoided by a family of four (father, mother and two children, none of which would have more than 25% of the shares).	The notion of "Controlling persons" should be replaced by the broader definition of "Beneficial Owner" based on an improved version of the definition by the FATF[86]. This definition should cover the ultimate natural persons, disregarding any intermediate chain of control or ownership made up of legal persons, whether incorporated in different jurisdictions or not. Nominee directors or any other sham nominee service provider should not be considered a controlling person or a beneficial owner. Ideally, there should be no threshold to become a beneficial owner. However, if a threshold were necessary, in principle it should be above 10%[87] (instead of 25%). If any account holder fails to provide all the necessary information to determine the ultimate beneficial

[86] The FATF definition is as follows: (FATF 2012, Page 110:) "Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement." ("Reference to "ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.") While this definition is useful as a conceptual basis, the way the FATF breaks it down to trusts and foundations is insufficient. Sections 5-8 referring to 'ownerless assets' describes tools to tackle these problems.

[87] For instance, 10% of shares/capital in an entity is FATCA's threshold to define a US substantial ownership ("FATCA + AML = an equation with too many variables?," Weis, Thinnes, PWC Luxembourg, May 2012, at: http://www.pwc.lu/en/press-articles/2012/fatca-aml-an-equation-with-too-many-variables.jhtml; 20.7.2014).

Furthermore, the FATF rules, to which the CRS is making reference, are weak in some other important aspects. For instance, in case of an account held by a company, a (nominee) director could be registered as a beneficial owner if other mechanisms fail[85]. These problems are clearly replicated with OECD's CRS.	owner or owners, the account should be closed and the Financial Institution should file a report to the Financial Intelligence Unit (FIU). The AIE standard should require participating jurisdictions to establish public registries of beneficial ownership information for all legal persons and arrangements.
29. No look-through of Active NFEs Controlling persons are identified only for Passive NFEs. While the CRS now expresses that in case of doubt, an entity should be considered a Passive NFE[88], there are still many ways to ensure an entity is -beyond doubt- considered an Active NFE. This is extremely problematic, since any entity or trust that is neither considered a reporting FI nor a Passive NFE (because they are considered Active NFEs) will not be required to report any of its controlling persons and related persons (settlor, protector, beneficiaries, etc) respectively. In addition, not only a trust's related persons but any natural person could avoid reporting by setting an active NFE or simply pretending/simulating that most of their (already existing) Passive entity's income is actually active[89]. Moreover, an individual could use his genuine Active NFE (e.g. a pizza restaurant) to open an account for its passive income (dividends, interests,	**Fix** Controlling persons (or beneficial owners as expressed above) should be identified and reported for all types of entities (either active or passive), at least until central registries of beneficial owners are publicly available for all legal entities and arrangements in all jurisdictions. Partial Solutions: For all entities claiming to be Active NFE, the FI should check the account held therein, to check whether less than 50% of the income and assets held in the account are passive and producing passive income respectively (as should be expected from Active NFEs). Unless all Active NFEs are required to identify their controlling persons (as suggested here), special types of Active NFEs should be eliminated: non-profit, holding companies, etc. should all be considered Passive NFE and their controlling persons should be reported.

[85] Pages 60-61, in: Financial Action Task Force 2012: The FATF Recommendations. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (February 2012), Paris, at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf; 6.6.2013.

[88] The Commentaries express: "A Reporting Financial Institution that cannot determine the status of the Account Holder as an Active NFE or a Financial Institution other than non-participating professionally managed investment entity must presume that it is a Passive NFE" (Standard, page 96).

[89] One way to do this is by creating a fake turnover via fake invoicing. This is indeed a widespread practice used by organised crime, discovered by German police and prosecutors (http://www.spiegel.de/wirtschaft/soziales/baumafia-koelner-staatsanwaltschaft-klagt-betruegerbande-an-a-930210.html#; 28.9.2014).

etc.). Since the account holder would be the Active NFE, there would be no reporting of the individual. Furthermore, Active NFEs may be considered resident where they were incorporated, but not where they are effectively managed. Since it is extremely easy to incorporate an entity anywhere in the world, tax dodgers will find it extremely easy not only to hide behind the Active NFE but also to hide the NFE from any (relevant) authority. The CRS also considers specific type of NFEs as active: holding NFEs that are members of a nonfinancial group; start-up NFEs; NFEs that are liquidating or emerging from bankruptcy; treasury centres that are members of a nonfinancial group; non-profit NFEs. However, no explanation is provided as to why their controlling persons should not be identified (as would happen if the NFEs were passive). Problematically, jurisdictions may define what they consider to be active or passive income.	
30. Trusts with no reporting whatsoever A trust which does invest in financial assets nor is an account holder (e.g. if it –directly or through a company - only owns real estate property, a car yacht or oil tanker, and holds no account in a financial institution) would neither be considered a reporting FI nor an account holder, so there would be no reporting whatsoever.	**Fix** As expressed above, controlling persons (or beneficial owners) should be identified and reported for all types of entities such as trusts, foundations and similar legal arrangements used to hide assets, even if they are not account holders in an FI, at least until central registries of beneficial owners are publicly available for all legal entities and arrangements in all jurisdictions.
31. Exceptions to corporations listed in a stock exchange, governmental entities and reporting financial institutions The CRS excludes corporations listed in a stock exchange, governmental entities and reporting financial institutions because of their ongoing disclosure or reporting requirements or	**Fix** Eliminate this exception, unless effective measures and monitoring are provided. Moreover, as an anti-elusion measure against recalcitrant financial institutions, demand domestic legislation to protect whistleblowers,

their low risk of being used for tax evasion. In the past, though, secrecy jurisdictions have been setting up low quality stock exchanges for bogus listings in order to avoid such disclosures and regulations. The Commentaries detail minimum requirements for these stock exchanges (volume and value of trade, etc.). Moreover, identifying beneficial owners of listed corporations and financial institutions is not only about tax evasion at the entity level (which could be low-risk) but about tax evasion, corruption or money laundering at the individuals' level. Therefore, until beneficial owners (natural persons) are disclosed for all owners of at least 5% or 10% of traded corporations, these beneficial owners will be able to avoid reporting, especially if they hold their shares with custodial institutions which are resident in non-participating jurisdictions.	and prescribe that any data provided by the whistleblower should be exchanged with all AIE-partners.
32. Exclusion of Estates with death certificate or deceased's will The CRS considers estates are reportable (with the same status the account had before the account holder's death) until (or unless) the account's documentation includes the deceased's will or death certificate. While a judge may have information about the heirs or beneficiaries of such an estate account, this information may never reach tax authorities for its exchange (for example if all the cash is withdrawn). Also, the heirs might want to extend indefinitely the estate status to avoid reporting while keeping the value of the estate.	**Fix** An estate should never be in limbo ("excluded account" status). It should always be a reportable person, either considered with the same status as before the death of the account holder, or - once the heirs are determined - they should be considered the new account holders.
33. Exclusion of specific types of accounts Retirement and pension accounts, non-retirement tax-favoured accounts, term life insurance contracts, estate accounts (see above), account related to court order or judgements, escrow accounts, depository accounts due to not-returned overpayments, and low-	**Fix** Eliminate these exclusions.

risk excluded accounts are excluded from reporting. These exclusions could easily be exploited as loopholes. For instance, fake lawsuits are common as a way to move money offshore or justify illicit origin of funds. <u>If accounts under court orders</u> are excluded from reporting, then a person who won a lawsuit could withdraw all the cash (instead of transferring the money to his bank account) and this way he could avoid reporting on this amount, and the money trace would be lost. While it is true that the court or judge would know who the beneficiary is, unless there is any reporting from the court or the financial institution, there will be no reporting to the corresponding jurisdiction. Likewise, <u>escrow accounts</u> could be used by faking a real estate purchase or another investment and leaving the money secure from reporting (for instance, to avoid reporting of account balance).	

Other issues affecting the CRS effectiveness in the fight against corruption

58. The fight against corruption and money laundering is also affected by the principle of specialty (limiting the sharing of information for tax purposes only).

Table 13- Loopholes affecting the CRS effectiveness

34. Principle of Specialty: "only for tax purposes"	**Fix**
The Model CAA limits the exchange of information to those which are "for tax purposes" and allows jurisdictions to determine the scope and modalities of such exchanges. This seemingly innocent provision may actually enable the supplying jurisdiction (e.g. secrecy jurisdiction) to prevent the recipient jurisdiction's tax authorities from sharing the received information with law enforcement agencies, even if the information could be relevant for corruption or money laundering	"Fight against Corruption" and "Anti-Money Laundering" should be added to the "tax" purposes of AIE.

cases[90]. It is not surprising that this was one of Switzerland's concerns which was included in the CRS[91].	
35. In favour of the US only: FIs resident in the US will not need to look through investment entities resident in non-participating jurisdictions (to identify their controlling persons) Not surprisingly, the Swiss Banking Association has complained against this loophole. While the CRS requires all participating jurisdictions to look through investment entities (managed by an FI) which are resident in a non-participating jurisdiction (because they are also considered Passive NFEs), US' FIs are not required to do so. There are two "pragmatic" reasons offered to justify this: it is an incentive to bring the US on board, by reducing their FIs' administrative burdens; and FATCA 30% withholding tax against these investment entities (resident in non-participating jurisdictions) is enough of a sanction. Notwithstanding the unequal treatment in favour of one single country (against the so-called "level-playing field"), the problem with this approach is that a 30% withholding tax may be a sufficiently harsh sanction for a tax dodger, but could still be futile to money-launderers or corrupt officials	**Fix** Eliminate this loophole. Partial Solution: since this provision is included in the CRS' Introduction but not in the actual CRS legal framework, other jurisdictions could simply claim that it is not binding on them.

[90] The OECD Convention on Mutual Assistance in Tax Matters addresses this issue in Article 22.4 regarding Secrecy: "Notwithstanding the provisions of paragraphs 1, 2 and 3, information received by a Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use […]" [emphasis added]. The OECD Model Convention Article 26 however, did not even allow for this other (non-tax) uses: "Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall 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, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions" [emphasis added]. It was only with the 2012 update of Article 26 that information could be shared for other (non-tax) uses, though again, as long as the supplying jurisdiction allows it. The update added "Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use."

[91] http://www.nzz.ch/wirtschaft/wirtschafts-und-finanzportal/baldige-verabschiedung-neuer-standards-zum-informationsaustausch-1.18230257; 2.9.2014.

who value more keeping their anonymity.	

5.2 Available improvements in EUSTD and FATCA

59. While the CRS offers overall the best option for global AIE, special features of the amended EUSTD and FATCA provide better solutions to current loopholes of the CRS. These are the EUSTD's Paying Agent Upon Receipt (PAUR) to report and identify beneficial owners trying to avoid reporting, as well as FATCA's 10% threshold for determining "substantial ownership" and its 30% withholding tax to promote participation.

Enhanced Anti-Avoidance: Amended EUSTD's PAUR

60. The EUSTD's "Paying Agent" is the agent required to report information (or withhold taxes) about the beneficial owner. It is similar to the CRS's "Reporting FI," which is the agent in charge of reporting information about individual and entity account holders or controlling persons of Passive NFEs.

61. The Paying Agent system was improved to prevent reporting avoidance schemes. The EUSTD[92] assigns the obligation to report (or withhold taxes) to the agent (bank, entity or legal arrangement, depending on the case) which is in the best position to know who the beneficial owner (receiving the payment) is.

62. Some situations contemplated by the EUSTD's Paying Agent rules are also addressed by the CRS. For instance, the obligation to look-through an intermediary entity established in a territory outside the scope, which was used to block the reporting. Specifically, these refer to those cases when the financial institution (e.g. bank) located in a "participating jurisdiction" (CRS) or "within the EU" (EUSTD) has to "look-through" an intermediary entity or financial institution which is located outside the scope (either in a "non-participating jurisdiction" or "outside the EU") to identify the "controlling person" (CRS) or "beneficial owner" (EUSTD). This intermediary entity or financial institution would be considered a Passive NFE (CRS) or an untaxed entity or arrangement listed in a specific Annex or a passive financial institution (EUSTD).

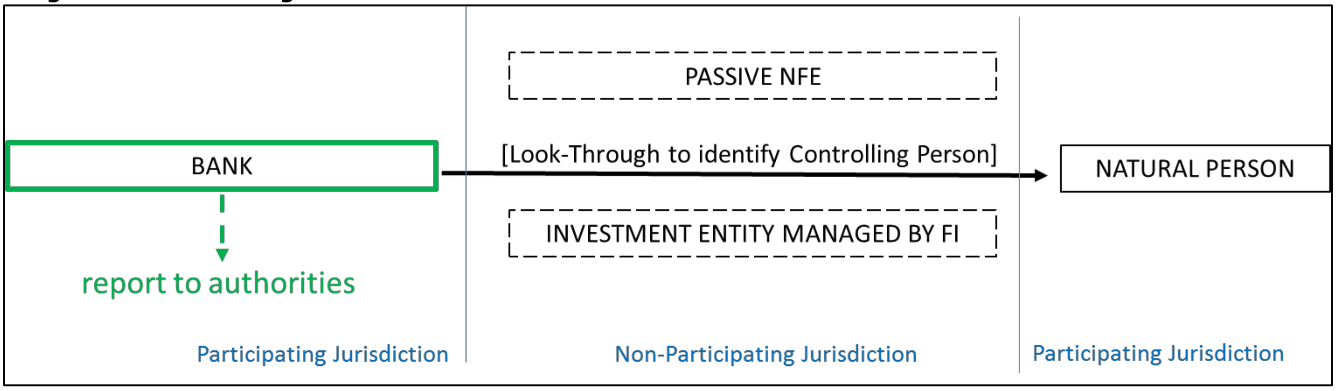
63. However, the EUSTD offers an anti-avoidance scheme not available in the CRS: the Paying Agent Upon Receipt or Upon Distribution[93]. The EUSTD assigns the Paying Agent obligations to any untaxed entity or arrangement (e.g. a trust) effectively managed in the EU, even if it has bank accounts (in banks) located

[92] EUSTD, article 4: http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/rules_applicable/index_en.htm; 28.9.2014.

[93] In case of a discretionary arrangement, such as a discretionary trust or foundation, the agent would be called "Paying Agent Upon Distribution" because if no beneficial owner could be identified, then the Paying Agent will have to identify -as the beneficial owner- whomever receives a distribution (payment) within 10 years.

outside the EU. Whenever such entity receives a payment, it has to report (or withhold) about its beneficial owner located in the EU. In the CRS, this requirement would be similar to turning a Passive NFE which is resident in a participating jurisdiction into a reporting financial institution. This way, any account held abroad (in a non-participating jurisdiction) by a Passive NFE resident in a participating jurisdiction would not escape reporting (as it currently does) because the Passive NFE itself would have to report on the income/balance account at the entity's and controlling persons' level[94].

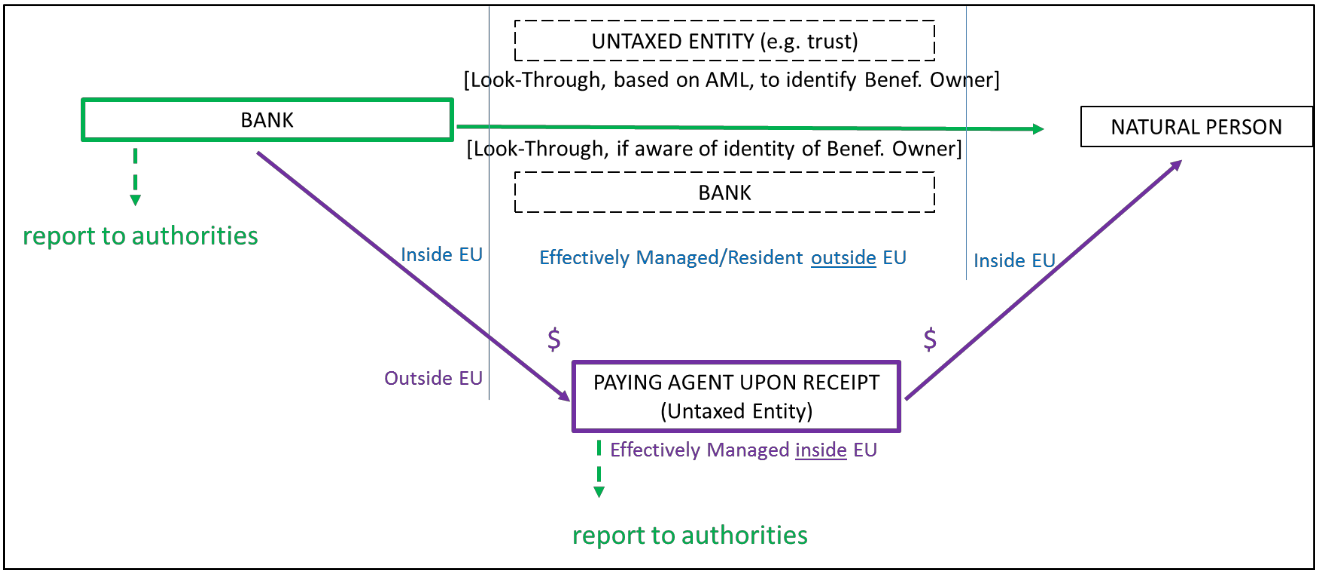
Figure 6: Look-through measures in the CRS



(1) a Bank ("reporting financial institution") "resident in a participating jurisdiction" would have to look through an account holder which is a Passive NFE (with mainly passive income) resident in a non-participating jurisdiction, to identify the Natural Persons ("controlling persons") who are resident in a participating jurisdiction, and report it to authorities.

(2) a Bank ("reporting financial institution") "resident in a participating jurisdiction" would have to look through an account holder which is an Investment Entity (considered a "Passive NFE" because –though managed by an FI - it is resident in a non-participating jurisdiction) to identify the Natural Persons ("controlling persons") who are resident in a participating jurisdiction, to report it to authorities.

Figure 7: Look-through measures and Paying Agent Upon Receipt (PAUR) in the EUSTD



[94] In contrast, under the CRS, neither the FI (bank) located in a non-participating jurisdiction nor the Passive NFE account holder resident in a participating jurisdiction need to report any information.

(1) a Bank ("paying agent") "located inside the EU" would have to look-through an Intermediate Structure (such as "untaxed entity," e.g. a trust) effectively managed outside the EU to identify the Natural Person ("beneficial owner") who is a resident in the EU, and report it to authorities.

(2) a Bank ("paying agent") "located inside the EU" would have to look-through another Bank ("Economic Operator") resident outside the EU (used to route the payment) to identify the Natural Person ("beneficial owner") who is a resident in the EU, as long it is aware of the identity of the beneficial owner, to report it to authorities.

(3) The "Paying Agent Upon Receipt" (an Untaxed Entity, e.g. a trust) which is effectively managed inside the EU is required to report any payment received in a foreign bank account (held in a Bank –called "Upstream Economic Operator"- located outside the EU), if the "beneficial owner" of such Untaxed Entity is a Natural Person resident in the EU.

Enhanced Beneficial Ownership Identification: FATCA's 10% threshold for US ownership

64. FATCA IGA Models require to identify the "controlling persons" of a Passive Non-Financial Foreign Entity (NFFE)[95], with the same limitation as the CRS: the 25% threshold. However, FATCA regulation (not the IGA Treaties) requires to identify those "substantial US persons" owning 10% of an NFFE, providing a threshold much harder to avoid. Given this precedent, the CRS could have improved the easily-avoidable FATF threshold (of more than 25%) and apply FATCA's 10%, to consider an individual as the controlling person of a Passive NFE.

Enhanced incentive for participation: FATCA's 30% withholding tax

65. The CRS has no collective sanction or incentive scheme to promote implementation and participation—it merely relies on political pressure, hoping that "reputation" will be enough to engage secrecy jurisdictions and financial centres. However, nothing prevents these secrecy jurisdictions from keeping their reputation intact by engaging in AIE only with each other or major powers, while excluding developing countries. In contrast, FATCA became a reality (with 42 signed IGAs and other 59 which have reached agreements in substance, as of September 11th, 2014) very likely because of its 30% withholding tax on any US sourced payment to any foreign financial institution not participating in FATCA and to any recalcitrant account holder (who/which did not provide identity information).

66. Since no country other than the US, and especially a developing country, has leverage to successfully impose a unilateral sanction against any secrecy jurisdiction or financial centre, the CRS should promote a FATCA-like collective sanction or incentive scheme to promote global participation. Nevertheless, there should be no sanctions against developing countries (which are not financial

[95] This would be similar to the CRS's Passive NFE.

centres or secrecy jurisdictions) which should be given time, and if requested capacity building support, before they may implement AIE.

5.3 Lack of provisions in favour of Developing Countries' Participation

67. Notwithstanding the loopholes detailed above, the CRS will be most effective once all jurisdictions implement it and engage in AIE with each other (otherwise tax dodgers may simply become account holders at FIs resident in non-participating jurisdictions). It is thus in developed countries' interest to ensure that all jurisdictions (including developing countries) become part of this system. Moreover, developed countries have a moral obligation towards developing countries, because they are the destination of choice where developing countries' tax dodgers, money launderers and corrupt officials end up hiding their ill-gotten funds.

68. In spite of this, the CRS lacks provisions in favour of developing countries' engagement. This proves that having a global standard be designed by the OECD, a group of rich countries, rather than a much more representative and independent body such as the UN Tax Committee, entails the risks of having only the interests of developed countries included.

69. In international bodies, wide representation –but lacking real independence from the influence of selected countries- is no guarantee that the concerns and interests of all parties will be considered either. For example, as was showed here, the Global Forum (with wide representation of jurisdictions but dependent on the OECD) submitted a survey to a wide range of countries, including developing countries, but the questions were not addressed at designing the CRS or including developing countries' concerns. They were rather aimed at inquiring the needs and costs associated with implementing the already designed (and imposed) CRS. To cast out any reasonable doubt, answers to the survey were expected by ten days after the CRS was first published.

70. In order to ensure developing countries' prompt implementation of AIE, five issues emerge: capacity building, multilateral engagement, non-reciprocity (if needed), proportional confidentiality requirements and sanctions or incentives to guarantee that secrecy jurisdictions will send information to developing countries (and not only among themselves or selected major powers).

71. Until now, there have been no real commitments of capacity building assistance for developing countries. On the contrary, an explicit reference to this, present in the CRS February publication was removed in the new July publication[96].

[96] The following references were removed from the "background" section of the CRS July publication: AIE being "attainable by all countries, including low-income developing countries," "provide capacity building support for them" and "importance of developing countries being able to benefit from a more transparent international tax

72. Unlike developed countries, the interests of which are well represented and defended by the OECD, developing countries hardly cooperate with each other pushing for policies representing their interests. However, even absent specific requests, it is developed countries' moral obligation (and in their best interest) to establish low-entry barriers for developing countries to engage in AIE. For instance, some of them may have limited resources to invest in being able to collect and send information, and should thus be allowed a first stage of non-reciprocity (to receive information only). This way, they would start benefitting from AIE and be able to sooner engage in fully reciprocal AIE, ensuring developed countries that they will not engage in a secrecy jurisdiction strategy.

73. A Multilateral approach (the Multilateral CAA) would be the best way to allow developing countries to establish AIE relationships at a lower cost (than needing to invest staff, time and resources to negotiate each single CAA, with the risks of inconsistency and pressures from developed countries). Moreover, given the absence of any multilateral sanction or incentive scheme, it would be easier for secrecy jurisdictions to oppose engaging in AIE with developing countries, by excusing themselves based on an alleged lack of time or staff to negotiate bilateral CAAs. In fact, this is what the Swiss government has announced to be its official negotiation policy.

74. Unofficial reports of a Multilateral CAA for Early Adopters (see Annex D) suggest that jurisdictions will be able to choose with whom to engage in AIE, regardless of other countries which have signed the Multilateral CAA. If this were the case, then there should be no reason for consensus for allowing (developing) countries to join the same CAA, and for not offering non-reciprocity). Likewise, these "choices" to engage in AIE only with specific jurisdictions should be publicly explained and monitored, instead of discretionary and potentially made in secrecy. Otherwise, secrecy jurisdictions could simply and freely decide not to send information to developing countries.

75. Confidentiality seems the most popular argument against engaging in AIE. However, the CRS' Commentaries already express that confidentiality has to be reasonable and cannot unduly be used to prevent AIE. Moreover, the Global Forum Roadmap Report suggests that a Pilot Program scheme might be designed for developing countries to receive limited information. In such case, confidentiality requirements should also be proportional and reduced according to the limited information being exchanged[97]. Lastly, limitations to information should not result in a mere symbolic exchange, but should include at the very least the identity of all or those taxpayers holding most assets or receiving most income abroad, so

system." See more details here: http://www.taxjustice.net/wp-content/uploads/2014/07/TJN2014_OECD-AIE-ObservationsCRSCommentaries1.pdf.

[97] The International Chamber of Commerce suggested a similar scheme referring to limited AIE with developing countries in a letter to the UN Tax Committee. See here: http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2014/ICC-advises-the-UN-on-Automatic-Exchange-of-Information-(2014)/; 11.9.2014.

that developing countries' tax authorities may check whether they have reported domestically their foreign income and assets (see Annex D). For those developing countries not even participating in the pilot program, major financial centres and secrecy jurisdictions should publish aggregate information about deposits and income from residents of those non-participating developing countries, so that local authorities, journalists, civil society organizations and regular citizens may find out about this and decide themselves the need to engage in the pilot program or directly in the CRS to obtain detailed information.

6. Conclusions and Recommendations

AIE will soon become a reality which will improve global transparency, widening and accelerating the current channels to exchange information. It will complement the upon request standard and will provide tax authorities with very useful information, once technology and the enhanced identity information to be exchanged (TIN, date of birth) allow the data to be analysed and matched effectively. In the meantime, it will provide deterrence against tax evasion, which will eventually increase a country's revenues.

Nevertheless, the benefits of AIE are not yet guaranteed to promptly extend to developing countries, which need this information the most. Many obstacles and entry-barriers will need to be solved, especially having secrecy jurisdictions willing to exchange information with them, in addition to capacity building assistance and a welcoming legal framework (non-reciprocity, multilateral CAA, proportional confidentiality requirements, etc.), regardless of developing countries requesting this explicitly at this stage.

Moreover, many loopholes will need to be fixed, before the CRS becomes truly effective for all countries. Otherwise, those most "sophisticated" (rich elites with access to lawyer, notaries, accountants and other service providers) as well as criminals, corrupt officials and money launderers will keep finding relatively easy escape routes to avoid reporting and hide their ill-gotten funds.

By the same token, different AIE standards (FATCA, DAC, etc) will need to become consistent, ideally when the amount, type and quality of information exchanged automatically becomes comprehensive and equal for all countries. Otherwise, the differences in applicable AIE systems will only help big consulting firms (e.g. the big four) charge higher fees.

It is also important to note that AIE refers to the frequency, channel, method and type of information being exchanged, but does not guarantee the availability (let alone the quality) of such information. A basic pillar on which AIE relies are public central registries of beneficial ownership for all entities and arrangements in all jurisdictions. This would also complement anti-money laundering procedures and enable financial institutions to verify the documentation being presented to them by account holders.

All jurisdictions (especially developing countries) as well as civil society organizations will need to keep pushing to make sure that the CRS is improved, loopholes are fixed and developing countries' needs and interests are taken into account. Likewise, its effective enforcement and a comprehensive monitoring by the Global Forum and the wider public will remain challenges demanding more involvement by all actors. OECD's current approach of claiming "transparency behind closed doors" is not fit for purpose in this respect and must be urgently complemented by comprehensive public statistics on various parameters of the data being annually exchanged via CRS, and by inviting civil society organisations to play a role in reviewing implementation.

In perspective, AIE represents an improvement from the current limited system but only in respect to information that authorities will receive. However, this does not imply that information which should be public (e.g. beneficial ownership of entities, multinational companies' balance sheets) will actually be accessible by journalists, civil society organizations or any interested citizen.

In other words, the CRS represents an important—but just one—step towards the aspirational transparency system, where relevant information is publicly available to anyone online and for free, and only confidential information such as bank account data and personal tax returns is exchanged automatically among authorities. Only then will the global fight for financial integrity and economic justice have a chance in winning its battle against tax evasion, tax abuse, corruption and money laundering.

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ANNEX A: List of jurisdictions[98] which signed the Multilateral Competent Authority Agreement (M-CAA) and which committed to exchange information in 2017 or 2018

JURISDICTION	M-CAA	2017	2018	JURISDICTION	M-CAA	2017	2018
ALBANIA	Yes		X	ISLE OF MAN	Yes	X	
ANGUILLA	Yes	X		ITALY	Yes	X	
ARGENTINA	Yes	X		JERSEY	Yes	X	
ARUBA	Yes		X	KOREA	Yes	X	
AUSTRIA	Yes		X	LATVIA	Yes	X	
BELGIUM	Yes	X		LIECHTENSTEIN	Yes	X	
BERMUDA	Yes	X		LITHUANIA	Yes	X	
BVI	Yes	X		LUXEMBOURG	Yes	X	
CAYMAN ISL	Yes	X		MALTA	Yes	X	
COLOMBIA	Yes	X		MAURITIUS	Yes	X	
CROATIA	Yes	X		MEXICO	Yes	X	
CURACAO	Yes	X		MONTSERRAT	Yes	X	
CYPRUS	Yes	X		NETHERLANDS	Yes	X	
CEZCH REP.	Yes	X		NORWAY	Yes	X	
DENMARK	Yes	X		POLAND	Yes	X	
ESTONIA	Yes	X		PORTUGAL	Yes	X	
FAROE ISLANDS	Yes	X		ROMANIA	Yes	X	
FINLAND	Yes	X		SAN MARINO	Yes	X	
FRANCE	Yes	X		SLOVAK REP	Yes	X	
GERMANY	Yes	X		SLOVENIA	Yes	X	
GIBRALTAR	Yes	X		SOUTH AFRICA	Yes	X	
GREECE	Yes	X		SPAIN	Yes	X	
GUERNSEY	Yes	X		SWEDEN	Yes	X	
HUNGARY	Yes	X		SWITZERLAND	Yes		X
ICELAND	Yes	X		TURKS & C.	Yes	X	
IRELAND	Yes	X		UK	Yes	X	

[98] As of November 24th, 2014.

JURISDICTION	M-CAA	2017	2018	JURISDICTION	M-CAA	2017	2018
BARBADOS	No	X		JAPAN	No		X
BULGARIA	No	X		MARSHALL ISL	No		X
CHILE	No	X		MACAO	No		X
DOMINICA	No	X		MALAYSIA	No		X
GREENLAND	No	X		MONACO	No		X
INDIA	No	X		NEW ZEALAND	No		X
NIUE	No	X		QATAR	No		X
SEYCHELLES	No	X		RUSSIA	No		X
TRIN. & TOB	No	X		ST. KITTS & N.	No		X
URUGUAY	Noy	X		ST. LUCIA	No		X
ANDORRA	No		X	ST. VINCENT &	No		X
ANTIG & BAR.	No		X	SAMOA	No		X
AUSTRALIA	No		X	SAUDI ARABIA	No		X
BAHAMAS, THE	No		X	SINGAPORE	No		X
BELIZE	No		X	ST. MAARTEN	No		X
BRAZIL	No		X	TURKEY	No		X
BRUNEI	No		X	UAE	No		X
CANADA	No		X	BAHRAIN	No	-	-
CHINA	No		X	COOK ISLANDS	No	-	-
COSTA RICA	No		X	NAURU	No	-	-
GRENADA	No		X	PANAMA	No	-	-
HONG KONG	No		X	VANUATU	No	-	-
INDONESIA	No		X	THE US	ONLY FATCA		
ISRAEL	No		X				

ANNEX B: CRS scope summary

Financial Institutions resident in..	are Reporting Institutions if they are..	Need to collect and report information about Account Holders who are...	As long as their accounts are...	Need to collect and report the following data:
Participating Jurisdiction	Custodial Institution	Resident in a participating jurisdiction: INDIVIDUALS, ENTITIES, ESTATES and CONTROLLING PERSONS (resident in participating jurisdiction) of a PASSIVE NFE (regardless of its residence), except for: CORPORATION (listed in stock exchange); GOVERNMENTAL ENTITY; INTERNATIONAL ORGANIZATION; CENTRAL BANK; REPORTING FINANCIAL INSTITUTION. Resident in Non-Participating Jurisdiction: No reporting about INDIVIDUALS, ENTITES, ESTATES, CONTROLLING PERSONS (resident in a non-participating jurisdiction) of a Passive NFE (regardless of its residence).	Financial Accounts, except for: insurance contracts prevented from law to sell to non-residents (for pre-existing individual accounts), accounts with value not exceeding USD 250.000 (for pre-existing entity accounts), retirement and pension accounts, non-retirement tax-favoured accounts, term life insurance contracts, estate accounts, account related to court order or judgement, escrow accounts; depository accounts due to not-returned overpayments; and low-risk excluded accounts. Additionally, non-financial accounts such as safe deposits, interests in real estate, fixed assets and in legal entities (companies, partnerships).	Identity Information (name, address, jurisdiction(s) of residence, TIN*, and place and date of birth*); FI Identity Information (account number, FI's name & identification number); and Financial Account Information (balance or value, or account closing date; gross amount of dividends, interests and other income related to sale or redemption of financial assets). No Reporting of: average or highest account balance.
	Depositary Institution			
	Investment Entity (trades for a customer)			
	Investment Entity (managed by a FI)			
	Specified Insurance Company			
	Governmental Entity	No collection or Reporting of Information		
	International Organization			
	Central Bank			
	Certain Pension and Retirement Funds			
	Qualified Credit Card issuers			
	Entities considered with low risk of used for tax evasion			
	Exempt Collective Investment Entities			
	Trust, whose trustee is a reporting FI			
	Non-Financial Institutions:			
	Real Estate Registry			
	Registry of Planes, Yatchs, Cars			
	Warehouses			
	Companies' Commercial Registry			
Non-Participating Jurisdiction	(Regardless)			* TIN and date of birth is not always required: it may depend of whether they are in the records of a FI, or whether a FI is required to collect them or whether they are issued by a jurisdiction.

ANNEX C: Overview of Improvements in the CRS (comparing the February and July 2014 publication)

- Controlling person equal to FATF' Beneficial Owner: The Commentaries to the CRS now expressly equal the definition of "controlling person" as the FATF's "beneficial owner," though all of the latter's shortcomings remain.

- Multilateral CAA: While a bilateral CAA is the default option, the CRS now offers an alternative Model Multilateral CAA in the Annex section.

- Foundations and similar legal arrangements: the CRS now expressly extends trusts' provisions to foundations and other similar arrangements.

- Confidentiality: the Commentaries prevent against arbitrary confidentiality requirements by expressly stating that "safeguards should be limited to what is needed to ensure the protection of personal data without unduly preventing or delaying the effective exchange of information."

- Non-Reciprocity: the Standard now offers a bilateral non-reciprocal CAA, which—though designed for tax havens, could be used by a developing country. However, it has no provisions stating when full-reciprocity would be required.

- Passive NFE status: the Commentaries establish that, in case of doubt, an entity should be considered a Passive NFE

- Controlling persons of trusts: controlling persons of trusts are now expressly involve the possibility of plural ones: settlor(s), protector(s), trustee(s), beneficiar(ies), etc.

- Reasonable Efforts: the Commentaries suggest examples of "reasonable efforts" to be performed by FIs to obtain TINs and date of birth of pre-existing accounts.

ANNEX D: Principles for a Multilateral CAA and a Pilot-Program

Relevant text of a Letter sent by the FTC to Global Forum Jurisdictions

We welcome the recent advances on Automatic Exchange of Information (AEOI), including a proposed pilot with the possibility of non-reciprocity and an initiative to negotiate a Multilateral Competent Authority Agreement (M-CAA) to be signed by the Group of Early Adopters this coming October in Berlin at the Global Forum Meeting.

As a global network of over 150 civil society organizations, 13 governments, and dozens of experts working together to uncover corruption and close loopholes in the global financial system, we commend those involved in the process for their effort to enable a prompt implementation of AEOI.

However, the Global Forum at its meeting in Berlin should send a message to the OECD and G20 leaders to set up rules, means of engagement and benchmarks which are not only suitable for first comers, but are also welcoming and open for other jurisdictions to join in the near future.

Developing countries, in particular low and lower-middle income countries, need to be able to increase their tax revenues to sustainably fund their own development. As many developing countries are estimated to have a higher than average percentage of assets held overseas, ensuring they can effectively tax offshore wealth will be a key factor in this process.

Furthermore, notwithstanding the need to fix loopholes found in the Common Reporting Standard (CRS) , global AEOI will only be effective once all jurisdictions participate. Low-entry barriers for developing countries to join and benefit from AEOI are not only a moral obligation, but they are also in the best interest of the developed countries investing their time and resources to make AEOI a reality.

Since including developing countries in AEOI from the start is both a moral and a practical imperative, here are concrete recommendations that we encourage you to pursue in AEOI negotiations in Berlin, Brisbane, and beyond:

Negotiate a robust and inclusive M-CAA

- An option for new jurisdictions to join and sign the M-CAA without preconditions, so that eventually all jurisdictions become party to the same M-CAA. Likewise, this same openness should apply to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

- An annex (similar, but in spirit opposite to the current "Annex A") for non-reciprocity in favor of low capacity tax administrations, to let them, on a temporary basis, first receive information, without needing to send it.

- Confidentiality requirements according to an international standard (to ensure consistency for all jurisdictions as described by the Commentaries to the CRS), instead of subjecting confidentiality to the discretion of each sending jurisdiction.

- Justifications for the exclusion from AEOI of some jurisdictions which are signatories to the M-CAA, if sending jurisdictions are allowed to choose - by informing the Secretariat- with whom they wish to engage in AEOI. This would allow the excluded jurisdictions to undertake the necessary changes.

- An option to share information within a jurisdiction's domestic authorities for the purpose of "tackling corruption and money laundering," not limiting the permitted uses of the data to "tax purposes" only. Exchanging information on balance accounts can be highly relevant for anti-corruption and anti-money laundering authorities such as financial intelligence units and law enforcement. This opportunity should not be missed.

- The requirement for robust annual statistical, country-by-country reporting on all major categories of accounts being reported about, and specifically and at the very least, on the amounts held in undocumented accounts and accounts attributed to residents of jurisdictions which are not yet participating.

Implement the proposed non-reciprocal pilot program

Regarding developing country inclusion, we welcome the non-reciprocal pilot program proposed in the Global Forum Roadmap Report which could be combined with our proposal: developing countries participating in the pilot could be listed in the M-CAA´s non-reciprocity annex to facilitate their eventual (post-pilot) implementation of AEOI with other jurisdictions. However, we do not believe that the "existence of relevant information to be sent to developed countries" should be a relevant criterion to select developing countries. Moreover, all major financial centers should commit both to participating in the pilot and to assisting developing countries with capacity building.

Lastly, we would like to highlight that AEOI and the fight against tax evasion is not only in benefit of governments and tax authorities, but ultimately for its citizens. Therefore, the allegedly "lack of interest or awareness" by some developing countries should be counteracted by having financial centers openly publish aggregate information on deposits and financial assets held by residents of those "uninterested" developing countries. This would enable the constituencies of those jurisdictions to make informed choices and decisions around the desirability of AEOI, and could possibly support civil society to encourage their own authorities to implement AEOI.

We thank you for your effort to bring more transparency but cannot stress enough that, as first comers and benchmark-setters, you will be determining how effective and inclusive AEOI will end up being. The opportunities available to you today go far beyond any leverage a future peer review report may ever have.

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For more information visit www.taxjustice.net