REGIONAL ANTI-CORRUPTION INITIATIVE

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International Treaty on Exchange of Data for the Verification of Asset Declarations:

# Integrating the Treaty into National Laws

Publisher: Regional Anti-corruption Initiative (RAI)
Fra Andjela Zvizdovica 1, B/7, 71000 sarajevo, Bosnia and Herzegovina
Tel. +387 33 296 327, Fax +387 33 296 329 E-mail: info@rai-see.org
Website: www.rai-see.org

**Author:**
Dr. Tilman Hoppe LL.M., Anti-corruption Expert

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# 1 Introduction

The International Treaty on Exchange of Data for the Verification of Asset Declaration was signed in Belgrade on 19 March 2021 by three countries – Montenegro, North Macedonia, and Serbia.[1] Article 14 para. 3 of the Agreement states:

> "This Treaty is open for accession by any State or any territory able autonomously to accomplish the purpose of the Treaty as stated in Article 1."

The purpose of the International Treaty on Exchange of Data for the Verification of Asset Declarations is to provide for direct administrative exchange of information concerning asset declarations between the Parties of the Treaty.[2] The Treaty will enable asset declaration oversight bodies to communicate formally with each other regarding data on foreign assets and interests, and thus significantly enhance verification of declarations.

As a basic rule, asset declaration oversight bodies of two State parties may exchange data if both bodies use this category of data for their verification purposes. Asset declaration oversight bodies can also provide additional data which only the requesting State party uses for the verification of declarations. The wording of this Treaty is by and large based on the Convention on Mutual Administrative Assistance in Tax Matters (OECD Convention MAATM), developed jointly by the Council of Europe and the OECD.[3]

The three signing countries, as any other country joining the Treaty in the meantime, will have to ratify it. The procedure of ratification depends on the national constitution and practice of each State and is not subject of this paper. As the explanatory notes to the Treaty state (Lit. A on Article 14):

> "The two subsequent phases of signature and ratification (or one of the other forms of expressing consent to be bound by the treaty) are in keeping with the usual practice of States."

Ratification includes seeking "the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty."[4] Thus, usually, ratification entails approval by parliament.

This paper explores, to what extent domestic legislation is needed beyond this approval by parliament.

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[1] https://www.rai-see.org/the-regional-treaty-on-exchange-of-data-for-the-verification-of-asset-declarations-signed-today/.

[2] https://www.rai-see.org/what-we-do/regional-data-exchange-on-asset-disclosure-and-conflict-of-interest/.

[3] https://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm; https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/127.

[4] https://ask.un.org/faq/14594.

# 2 Self-executing option

## 2.1 Basic mechanism

Article 10 para. 4 of the Treaty states:

> "Upon ratification, acceptance or approval of this Treaty by one Party, legal powers of its Focal Point and of the other authorities it cooperates with to obtain information for the verification of asset declarations of domestic declarants extend to information exchanged under this Treaty."

The respective explanatory notes state:

> "Paragraph 4 is a clause designed to be self-executing. It will thus not require any further national legislation, once the Treaty has been ratified by a Party" (footnotes omitted).

Thus, it is a fully viable option to approve the Treaty with a domestic law of one Article:

> "The International Treaty on Exchange of Data for the Verification of Asset Declarations, signed by … on … is approved".

## 2.2 European Union examples

Article 14, paragraph 4 of the Treaty provides for the possibility of an accession of the European Union to the Treaty. So far, neither the EU nor any of its member States have so far acceded to the Treaty. However, the OECD Convention on Mutual Administrative Assistance in Tax Matters follows by and large the same wording as the Treaty. In this regard, the Explanatory Notes state (Lit. D on the Preamble): "For this reason, this Treaty largely uses verbatim the same provisions that the Council of Europe and OECD foresee in the area of taxes."

It is therefore interesting to note, that for example Germany also opted for the self-executing option for ratifying the OECD Convention on Mutual Administrative Assistance in Tax Matters. The respective law simply states: "The Convention signed on … by Germany is approved."[5] All procedural and substantive aspects of this Convention with its 32 Articles are thus directly applicable as any other domestic law in Germany, and, so, without any additional legal technicalities in the ratification law. Similarly, the Austrian law ratifying the OECD Convention contains only one sentence: "Concluding the international Treaty is approved."[6]

[5] Bundesgesetzblatt Jahrgang 2015 Teil II Nr. 20 , 966, https://www.bzst.de/SharedDocs/Downloads/DE/intern_amtshilfe/gesetz_zum_uebereinkommen.pdf;jsessionid=3F130DCED33C0E2EBF23D0742DA2C557.live812?__blob=publicationFile&v=2 (in German).

[6] https://www.ris.bka.gv.at/eli/bgbl/III/2014/193 (in German).

# 3 Other aspects

## 3.1 Designated focal point

On the international level, it would be enough, if the government of each state would assign the Focal Point for the Treaty. However, domestically, usually such a designation and mandate probably require a parliamentary law. Thus, paragraph two of the ratifying law should designate the Focal for the Treaty, for example:

> "Agency XY is designated as Focal Point as per Article 10 para. 1 of the Treaty."

For the sake of clarity, it might be seen as useful that the respective laws on the Focal Point are amended in the articles on the tasks and powers of the respective state body. For example, in Article 17 of the Law on Prevention of Corruption and Conflict of Interest of North Macedonia, the following bullet point could be added:

> "The State Commission shall have the following spheres of competence:
>
> [...]
>
> - Serving as Focal Point for the International Treaty on Exchange of Data for the Verification of Asset Declarations."

In Montenegro, North Macedonia and Serbia, the Laws on Prevention of Corruption already contain at the end of the Article on responsibilities a catch-up competence (Article 78 (ME), Article 17 (MK) and Article 6 (RS)):

> "Perform other tasks set forth by law."

The ratification law for the Treaty would be such a task set forth by law. Therefore, strictly speaking, no amendment is necessary. However, the legislator might want to include an additional number or bullet point as clarification, for example:

> "The Agency shall:
>
> [...]
>
> - Serve as Focal Point for the International Treaty on Exchange of Data for the Verification of Asset Declarations;"

## 3.2 Data request powers

As per Article 10 para. 4 of the Treaty,

> "Legal powers of its Focal Point and of the other authorities it cooperates with to obtain information for the verification of asset declarations of domestic declarants extend to information exchanged under this Treaty."

These powers are in short:

> "In the performance of its competencies the State Commission has access to data bases managed by other bodies and institutions, that is direct electronic access, and uses the data from the data bases at no charge from: […]" (MK, Article 25 para. 4 Law on Prevention of Corruption and Conflict of Interest)
>
> "Authorities and legal persons referred to in paragraph 1 of this Article shall submit the required data and information, i.e. make available the requested documentation in accordance with the law and within the time period and in the manner determined by the Agency" (ME, Article 30 para. 2 Law on Preventing Corruption)
>
> "Public authority bodies and other persons exercising public authority shall be obliged, upon the written and reasoned request of the Agency in order for it to perform activities within its competence, to provide the Agency with direct access to databases they keep in electronic form" (RS, Article 36 para. 1 Law on Preventing Corruption)

Repeating the content of Article 10 para. 4 of the Treaty in the ratification law would appear to be an unnecessary duplication.

## 3.3 Data protection

### 3.3.1 Overview

Domestic data protection laws are designed in a way that they apply to any new law a country adopts, or any new treaty a country joins. The data protection laws are designed in general terms and automatically apply to data transferred under any law or any treaty, including this Treaty. Data protection laws often foresee certain procedural steps for data being exchanged with foreign authorities.[7] These provisions apply without any amendment or modification to transfers done under the Treaty. For example, the Montenegrin Data Protection Law (as of 2018) foresees in its Article 26 regarding foreign data:[8]

[7] See for example the provisions of the GDPR in this regard: https://gdpr-info.eu/chapter-5/.

[8] https://ti.gov.me/ResourceManager/FileDownload.aspx?rid=161533&rType=2&file=Personal%20data%20protection%20law.pdf.

> "The personal data filing system controller shall keep records of personal data filing system he establishes.
>
> The records referred to in paragraph 1 of this Article shall include:
>
> [...]
>
> information on transfer of personal data from Montenegro together with the name of the country, international organization or other foreign recipient of personal data to which data are being transferred, the purpose of the transfer as established by a ratified international treaty, law, or by a written agreement".

So, this provision will apply to any data being provided under this Treaty, or any other treaty. The same is true for all other data protection provisions.

### 3.3.2 Domestic perspective: requesting

Asset declaration oversight bodies in all three countries are already requesting a multitude of data from public authorities within the country (see above 3.2). This process needs to be set up and implemented in line with data protection standards. From a legislative point of view, a clear legal basis is key, taking into account in particular:[9]

- A transparent and adequate scope of data being exchanged;
- A defined, limited purpose for which the data can be used;
- Storage limitation;
- Appropriate confidentiality;
- Legal remedies in case of violations.

It is assumed that national legislation and procedures of all signing countries are compliant with international data protection standards, and the compliance of the domestic data exchange regimes is not subject of this paper.

The Treaty only docks on the respective domestic declaration systems. It thus fully builds on the compliance of domestic data exchange with data protection standards. All principles implemented for domestic data exchange, will inherently apply to the international exchange:

- The scope of data exchanged internationally is the same as used domestically;
- The purpose is the same as used domestically;
- Storage limitations are the same as used domestically;
- Confidentiality is the same (and is ensured by Article 9 of the Treaty, the same way as in the well-established OECD Convention on Mutual Administrative Assistance in Tax Matters);

[9] https://gdpr-info.eu/art-5-gdpr/.

- Legal remedies are the same as used domestically.

All in all, there is thus no need for any modification of national data protection legislation.

### 3.3.3 Domestic perspective: providing

There are two alternatives: The requested state provides data that is also covered by its own asset declaration legislation (a – same data), or, the requested state is asked for data that goes beyond its own asset declaration legislation (b – additional data).

#### *a. Same data*

From the perspective of the state being requested for data and providing it to the requesting state, the legal situation is the same: The national laws of the providing state foresee already a legal framework and a scope of data being exchanged with the asset declaration oversight body (= Focal Point of the Treaty). It is within this legal framework that data is also processed under the Treaty. The ratification law will extend this legal framework to exchanging data with another country, and on public officials from that foreign country. As is stated in paragraph 2 of Article 3 of the Treaty:

> "[Both sides] Focal Points shall exchange information which is available under the domestic law of both Parties for verifying asset declarations."

Thus, the data transmitted by the providing state stays within the domestic framework of the providing state. So, again, there is thus no need for any modification of national data protection legislation.

#### *b. Additional data*

Article 3 paragraph 3 of the Treaty opens the option of providing data not foreseen by the declaration system of the providing state, but used under the system of the requesting state (for example, data from public copyright databases):

> "[One side] Notwithstanding paragraph 2 of this article, one Focal Point may voluntarily provide information to another Focal Point which is only available under the domestic law of the latter Focal Point for verifying asset declarations."

For example, according to a comparative overview by RAI in 2016, Albania was not making use of data from intellectual property registries, while, for example, Bulgaria was doing so. So, if Albania was requested by Bulgaria for data from an intellectual property registry, it could have responded to this request under Article 3 paragraph 3 of the Treaty (if already in force back then).

It is probably unlikely that any of the three countries signing initially will apply Article 3 paragraph 3:

- First, as was the unanimous opinion during negotiations, the range of data used for audits is rather similar if not identical in all three countries.

- Second, the data in question will most likely evolve around "core data" that is unquestionably used in all countries, throughout the region, and throughout any asset declaration system, such as real estate or business registries.
- Third, the voluntary provision of information will probably be something which states later acceding to the Treaty might try, but for the three signing states, it will be precedent enough already to have the Treaty ratified in its "basic version", i.e. without the option of paragraph 3.

However, should countries wish so, they could easily provide a basis for voluntary provision of data. This would only require an explicit legal basis in the providing state, to preclude any legal risk or misunderstanding, how small it only may be. So, the ratification law would need to list the kind of data being provided to other states in addition to the domestically used data.

### 3.3.4 Treaty perspective

The OECD Convention on Mutual Administrative Assistance in Tax Matters itself is in line with data protection standards, and so is the Treaty. It should be recalled that the Treaty follows by and large the same wording as the OECD Convention. The Explanatory Notes state (Lit. D on the Preamble): "For this reason, this Treaty largely uses verbatim the same provisions that the Council of Europe and OECD foresee in the area of taxes."

Regarding the OECD Convention, the Explanatory Notes of the Treaty state:

> "All major international standards on data protection set limits for cross-border exchanges of data. The Explanatory Report to the Council of Europe/OECD Convention references the following: The Council of Europe 'Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data' (ETS 108) and the OECD 'Recommendations of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data'. One could also mention in this context the European Union's General Data Protection Regulation.
>
> B. Paragraph 1 and 2 are taken verbatim from Article 22 of the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, with only the reference to 'taxes' replaced by 'asset declarations'. Thus, the respective comments in the Explanatory Report to the Convention apply accordingly."

It should be recalled that the international exchange of data based on this Treaty is in line with case law on data protection by the European Court of Human Rights. The Explanatory Notes state in this regard (Letter H on Article 9):

> "It is important to note that in a recent case, the European Court of Human Rights[10] approved the international administrative exchange of banking data for tax verification purposes. The United States and Switzerland had concluded an administrative agreement regarding the banking data of up to 52,000 U.S. customers in Switzerland ('Agreement 09'). The Court reviewed the data exchange under this agreement and found no violation of Article 8 of the European Convention on Human Rights (Right to respect for private life). As regards the necessity of the measure, the Court underlined that the data exchange only concerned the applicant's bank account details, that is to say purely financial information. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted. The Court affirmed an extensive margin of appreciation of the Swiss government in this regard. The Court also pointed to several effective and genuine procedural guarantees available to the affected citizens to challenge the data exchange. Moreover, the Court did not find that the former restrictive practice of the Swiss authorities in matters of administrative cooperation in the tax field created a possible legitimate expectation on the applicant's part to the effect that he could continue to invest his assets in Switzerland free of any supervision by the relevant US authorities, or even free simply of the possibility of retroactive investigations."

A similar result is found in another judgment by the ECtHR of the same year.[11] The Court found no violation of privacy in that the Dutch tax authorities provided the Spanish tax authorities upon request inter alia with banking information on a Spanish tax subject. The respective complaint was found inadmissible.

There is also case-law by the Court of Justice of the European Union supporting international exchange of data for taxation purposes:[12]

> "European Union law [...] must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State."

All in all, from the international or Treaty perspective, no additional legal requirements are needed for linking the Treaty with domestic law.

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[10] G.S.B. v. Switzerland, Application no. *28601/11*, Judgment of 22 December 2015 (available only in French). See for English information: European Court of Human Rights, *Information Note 191* – December 2015, page 19.

[11] ECtHR, Othymia Investments BV v. the Netherlands, Application no. *75292/10*, Judgment of 16 June 2015.

[12] Grand Chamber Judgment of 22 October 2013, *ECLI:EU:C:2013:678*, § 51.

### 3.3.5 National discretion

Member states of the Treaty are free to add additional aspects to the procedure, if they feel that this is required by their domestic Constitutional jurisprudence, or by their general policy. So, for example, the ratification law could foresee that an annual summary on foreign data exchange should be reported to the data protection body. It should be noted, though, that in principle no such special features are applied by European Union member states regarding the OECD Convention on Mutual Administrative Assistance in Tax Matters (see above 2.2).

As the OECD Convention, the Treaty is deliberately designed as a universally compatible instrument in this regard, docking onto different domestic systems and building on their individual particularities.

# 4 Conclusion

The Treaty is designed to be self-executing, as is the almost identical OECD Convention on Mutual Administrative Assistance in Tax Matters. Thus, in essence, countries signing the Treaty only need

- to approve the Treaty by parliamentary law as required by their domestic ratification procedures;
- to designate a Focal Point by law;
- to define the Focal Point function in the legal powers of the respective state body to the extent necessary.

This aside, countries are free to slot domestic mechanisms in ahead of the Treaty as they see fit in light of domestic practices or policies.

The practice from European Union member states with the almost identical OECD Convention on Mutual Administrative Assistance in Tax Matters confirms that ratification by simply approving the Treaty and designating a Focal Point would be enough for ratifying the Treaty.