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INTERNATIONAL TAX

Upcoming Power Battle Between UN And OECD: Is CARF The Last Landmark Of An Ending Era?

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The advent of digital assets has revolutionised the financial world, offering new opportunities, but also new challenges in regulatory and compliance realms. The Organization for Economic Co-operation and Development (OECD) has stepped up and will expand its Automatic Exchange of Information in Tax Matters (AEoI) to crypto assets with the Crypto Asset Reporting Framework (CARF). This framework marks a significant stride towards integrating the dynamic world of crypto assets into the global financial regulatory landscape. Meanwhile, a power struggle seems to appear on the horizon between the United Nations (UN) and the OECD.

CARF[1] emerges as a response to the burgeoning crypto market's complexity and growth. It aims to bridge the regulatory gap, ensuring that crypto assets are not used for tax evasion or money laundering. CARF does so by standardising the reporting and exchange of information related to crypto transactions, enhancing transparency, and maintaining fiscal integrity across borders.

Functioning Of CARF

Central to CARF is the role of Crypto Asset Service Providers (CASPs) who provide services by effectuating exchange transactions for or on behalf of customers, including by acting as a counterparty, or as an intermediary, or by making available a trading platform.

This ambiguous definition of CASP is a significant challenge for the CARF implementation, particularly around the term "effectuating transactions." This term is intended to include a range of activities facilitating crypto transactions, but its broad interpretation leads to uncertainty. It raises questions about whether it applies only to entities directly executing transactions, like exchanges, or also includes brokers, intermediaries, and even individuals/entities instructing transactions, such as asset managers, who only act on behalf of clients based on a power of attorney, trustees, or investment companies.

CASPs are tasked with collecting and reporting data on crypto transactions to its competent national tax authority, which then exchanges the data with all other relevant national tax authorities. This data includes detailed information about the parties involved, and the nature, units, and fair market value (measured in Fiat currency at the moment of transaction) of the crypto assets exchanged against other crypto assets or Fiat currencies.

CARF outlines specific types of information to be reported and the protocols for sharing this data among participating countries, allowing tax authorities to gain a comprehensive view of potentially taxable crypto transactions.

The Scope Of Assets

CARF's focus is primarily on crypto assets, meaning a digital representation of value that relies on a cryptographically secured distributed ledger or a similar technology to validate and secure transactions. In contrast, AEoI and FATCA cover a broader range of financial assets, like bank accounts and traditional investment vehicles. Overlaps, and therefore potential double reporting duties, do exist, especially where traditional financial products have been tokenised, creating additional complexities in compliance and reporting. However, non-tokenised financial instruments having crypto assets only as underlying (indirect crypto asset exposure), as well as central bank digital currencies (CBDCs) and specified electronic money products, are only in scope of AEoI.

Comparison With AEoI And FATCA

CARF can be seen as an extension to the principles of the AEoI and the Foreign Account Tax Compliance Act (FATCA). While AEoI and FATCA deal with traditional financial accounts and investments, CARF expands this scope to the burgeoning field of digital assets. This distinction is critical as digital assets were previously not fully-covered under the AEoI or FATCA frameworks. However, whereas AEoI and FATCA deal with account balances and interest/dividend payments, CARF requires the reporting of aggregate transaction amounts per crypto asset and various accompanying data, leading to a huge data flood to be exchanged, assessed, and used.

Implementation Of CARF

Around 48 jurisdictions, including even the US, which has not implemented the AEoI, have already undertaken to apply it from 1 January 2026 in order to exchange data in 2027. Also, Switzerland, known for its forward-looking approach to finance and crypto, will actively integrate CARF into its tax information exchange framework.

The European Union's implementation of the OECD's Crypto Asset Reporting Framework (CARF) is being conducted through its proposed Directive known as DAC8[2] – the eighth update to the EU's Directive on Administrative Cooperation – which entered into force on 13 November 2023, and is required to be transposed into national law mostly from 1 January 2026.

Effectiveness Requires Clear Definitions

The OECD's CARF represents a vital step in bringing clarity and regulation to the crypto asset market. However, its success hinges on its adaptability to the fast-evolving digital finance landscape and the provision of clear, enforceable guidelines for stakeholders. As jurisdictions like Switzerland move towards implementation, the effectiveness of CARF will depend on resolving ambiguities, especially in the definition of CASPs and the scope of assets covered. This framework's implementation poses financial and operational challenges, highlighting the need for strategic planning and balanced regulatory approaches to ensure a fair, transparent, and efficient crypto asset market.

Power Struggle Between UN And OECD

"OECD and UN tussle for control over international tax affairs". "U.N. Vs. OECD: The Clash of global tax visions". "The OECD and the UN at a cross road on tax".[3]

These were just some of the headlines accompanying the official publication of Global Tax report[4] by the UN at the beginning of August 2023. They illustrate the actual risk imminent to current debates on fostering the presence of the UN in the field of international tax cooperation, which so far was strongly presided by the OECD. The UN report was mandated by a landmark UN General Assembly resolution on the "Promotion of inclusive and effective tax cooperation at the United Nations," aiming at an analysis of the role of the UN in global tax policy matters while reaffirming international commitments to combat tax avoidance and evasion, as well as illicit financial flows. The resolution was adopted by consensus at the end of 2022[5], discussed in the General Assembly on 12 September 2023, and resulted in the adoption of a tax resolution in a historic vote held on 22 November 2023, paving the way to the negotiation of a new UN framework convention on international tax cooperation.

UN Criticises Under-representation

The UN represents one of the major global players when it comes to the definition of international tax policy rules besides the World Trade Organisation (WTO) and the OECD. So far, however, the role of the UN in tax matters became evident mainly in the realm of double tax treaties and the publication of the alternative Model Double Taxation Convention,[6] focusing more on the requirements of developing countries compared to the version of the OECD. Overall, however, the perception of the UN in the agenda-setting of international tax policy can be considered as subordinate compared to the force exerted by the OECD.

Not surprisingly, one of the key areas of improvement identified in the tax report is "enhancing the role of the United Nations in tax-norm shaping and rule-setting, with full consideration of existing multilateral and international arrangements" as it "appears the most viable path for making international tax cooperation fully inclusive and more effective"[7].

The written feedback statements of over 80 UN member states[8] forming the basis of the report show in impressive manner that the current concerns of the developing countries were mainly triggered by the latest initiatives of the OECD/Group of 20 and the "two-pillar" solution aimed at taxing the digital economy and limiting harmful tax competition[9]. The main criticism raised touches upon the apparent complexity of the rules, the limited capacity in developing countries for their adaption, and foremost, the lack in accordance with the immediate needs and priorities of the developing countries favouring the demands of the developed countries.

Three Options Presented

To allow the UN to presume an enhanced role in international tax-norm shaping and rule-setting, the following three options are presented in the tax report:

1. A multilateral convention on tax:
- Binding legal agreement to establish enforceable obligations regarding international tax cooperation similar to the exchange of information with some modifications to parties' taxing rights.
- Possible next step: Establishment of member state-led, intergovernmental ad hoc advisory expert group to prepare draft terms of reference for the negotiation of such an instrument.

2. A framework convention on international tax cooperation:
- Binding legal agreement establishing a general system of governance in the area of international tax cooperation. It would be primarily constitutive in nature with regulatory aspects adopted through protocols.
- Possible next step: Same as in option 1.

3. A framework for international tax cooperation:
- Non-binding agenda for coordinated actions at national and international, regional and bilateral levels on improving tax norms and capacity.
- Possible next step: Establishment of member state-led, intergovernmental ad hoc advisory expert group to serve as preparatory committee to undertake the preparation of the conference, negotiate input papers, and draft outcome document on most pressing international tax cooperation issues.

Historic Vote For New Global Tax Convention

Of the three options, the first one is currently subject to controversial discussions heating up the international debate around the subject. On 22 November 2023, the UN General Assembly voted with an overwhelming majority for the organisation to develop a global tax framework, which has been promoted in an UN draft resolution, tabled by Nigeria on behalf of the African Group on 11 October 2023[10]. This option has strong resemblance to the Multilateral instrument implemented by the OECD and would in fact represent a form of multilateral treaty.

Considering the already existing treaty structures and the required political input for the implementation, UN member states such as the United States, the United Kingdom, and the European Union (EU), warned that the proposed approach would represent duplication to the work on tax transparency of the OECD, bearing the risk of causing chaos in international tax policy matters[11]. However, the outcome of the vote with a clear majority of all UN member states voting in favour of the adoption of option 1 is a strong signal that a global urge for a new binding and inclusive tax policy framework, also representing the concerns of the developing countries, has evolved.

On the contrary, the EU voiced its support for option 3,[12] which proposes an overall framework where no ratification or political involvement would be required. Although this option shows a low level of formality and would be easy to implement, its non-binding nature gives rise to the question of its effectiveness.

Finally, the second option – as middle-way between the other two proposed routes – proposing a general agreement on the guiding poles along which future tax policy decisions should be taken, triggered the inspiration of academia, which inter alia as a thought experiment discusses the implementation of a meta regime at global level[13].

Collaboration Needed To Prevent Chaos

The latest efforts of the UN through the tax report, and the clear vote for a new global tax convention by the UN assembly, put the OECD under pressure, shaking its dominant role in agenda-setting in international tax matters. These developments harbour far-reaching risks to the global tax system. With a world becoming more digital, global, and mobile, tax regimes have to take on various challenges. Accordingly, collaboration and joint engagements by the international tax policy setting bodies like the UN and the OECD are of crucial importance to avoid a chaos of rules and regulations. However, the mixed reactions at international level to the propositions raised by the UN leave the tax world in a place between concern and slight hope.

While the EU clearly voiced its support to "promote inclusive and effective international tax cooperation, based on the published UN Secretary-General's Report on the UN Tax Resolution"[14], the OECD did not issue any positive sign toward a closer integration of the UN in international tax policy matters. On the level of the UN, now the new resolution calls for the creation of an ad hoc intergovernmental, which will be tasked with establishing the terms of reference for "a United Nations framework convention on international tax cooperation" by August 2024. In the meantime, the next steps in this international tax 'thriller' will need to be monitored critically and with some awe. IFC

Endnotes

1 OECD. Crypto Asset Reporting Framework: https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.pdf.

2 Council of the European Union. 17 October 2023. Council adopts directive to boost cooperation between national taxation authorities (DAC8): https://www.consilium.europa.eu/en/press/press-releases/2023/10/17/council-adopts-directive-to-boost-cooperation-between-national-taxation-authorities-dac8/

3 The headlines derive form the following publications (in chronological order as mentioned in the article):
Financial Times. 28 August 2023. Emma Agyemang. OECD and UN tussle for control over international tax affairs: https://www.ft.com/content/e05b0767-cab5-44de-9fbf-af5ce841a026.
Forbes. 20 October 2023. Robert Goulder. U.N. Vs. OECD: The Clash of global tax visions: https://www.forbes.com/sites/taxnotes/2023/10/20/un-vs-oecd-the-clash-of-global-tax-visions/?sh=60f7ab4f1903
PWC UK. The OECD and the UN at a cross road on tax: https://www.pwc.co.uk/services/tax/insights/oecd-and-un-at-cross-road-on-tax.html

4 United Nations. General Assembly. Promotion of inclusive and effective international tax cooperation at the United Nations. Report of the Secretary-General: https://financing.desa.un.org/document/promotion-inclusive-and-effective-international-tax-cooperation-united-nations-a78235

5 United Nations: Tax Report 2023. The resolution: https://financing.desa.un.org/tax-report-2023.

6 The UN first presented a model agreement in 1980, which is systematically based on the articles of the OECD MA but takes into account the interests of developing countries and emerging economies in terms of content and accordingly contains a strengthening of source control. Subsequently, revisions of the original UN MA were presented in 2001, 2011, 2017 and 2021. One focus area are the withholding tax rates on dividends, licence and interest payments.

7 UN Tax report, Summary.

8 Input of UN member states for Tax report: https://financing.desa.un.org/inputs

9 Pillar One focuses on the taxation in the market jurisdictions in which large multinational enterprises with an annual turnover of more than 20 billion Euros and a profit margin of more than 10 percent sell their products and services. Meanwhile, with Pillar Two a minimum taxation of 15% for internationally active groups of companies that reach the threshold of 750 million euros turnover has been introduced.

10 https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/300/69/PDF/N2330069.pdf?OpenElement

11 Department of the Treasury Washington, D.C. office of Tax Policy. Solicitation for Comments on the Secretary-General's Report in Response to General Assembly resolution 77/244: https://financing.desa.un.org/sites/default/files/2023-03/United%20States_Input%20Tax%20Report.pdf. Council of the European Union. 22 September 2023. Position on behalf of the European Union and its Member States on tax cooperation at the United Nations: https://data.consilium.europa.eu/doc/document/ST-12967-2023-INIT/en/pdf. The Guardian. Push to give UN more say on global tax rules likely to stumble at vote, 22 November 2023: https://www.theguardian.com/world/2023/nov/22/push-to-give-un-more-say-on-global-tax-rules-likely-to-stumble-at-vote

12 Council of the European Union. 22 September 2023. Position on behalf of the European Union and its Member States on tax cooperation at the United Nations: https://data.consilium.europa.eu/doc/document/ST-12967-2023-INIT/en/pdf

13 GlobalTaxGov. 12 October 2023. Peter Hongler. Plea for a Meta Regime! (and why the UN should be the governing body) https://globtaxgov.weblog.leidenuniv.nl/2023/10/12/plea-for-a-meta-regime-and-why-the-un-should-be-the-governing-body/

14 Council of the European Union. 22 September 2023. Position on behalf of the European Union and its Member States on tax cooperation at the United Nations: https://data.consilium.europa.eu/doc/document/ST-12967-2023-INIT/en/pdf