

# **The end of banking secrecy?**

## **Comparing legal and policy convergence in Singapore and Switzerland**

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### **Abstract**

Drawing from the twin domains of law and public policy, this paper traces the evolution of banking secrecy legislation in Singapore and Switzerland, with a focus on how limits to statutory banking secrecy have been gradually imposed, notably with the development of automatic exchange of information (AEOI). In the first part of this paper, I trace the sequential development of international legal regimes designed to facilitate the exchange of tax and banking information, notably Exchange of Information (EOI), the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS). In the second part of this paper, I compare the evolution of banking secrecy legislation in Singapore and Switzerland and examine under what circumstances statutory banking secrecy can be lifted, both domestically and internationally. Finally, I will conclude with some preliminary suggestions on how policy convergence has led to legal convergence in a context of global policy change.

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## Introduction

In April 2009, under the mandate of the Group of 20 (“G20”), the Organisation for Economic Cooperation and Development (“OECD”) released “white”, “black” and “grey” lists classifying selected financial centres depending on whether they had committed to and how far they had implemented “internationally agreed tax standards” relating to the exchange of information. Singapore and Switzerland were included on the so-called grey list, comprising of countries which had committed to, but not substantially implemented, the OECD's tax standard. On the same day, the G20 declared that “the era of banking secrecy is over”.<sup>1</sup>

In the eight years that have ensued since the G20's declaration, the world has indeed witnessed a series of OECD-led policy initiatives that have chipped away gradually but significantly at the principle of national sovereignty in taxation, such as the development of exchange of information (“EOI”) and finally automatic exchange of information (“AEOI”). In January 2017, the launch of the Common Reporting Standard (“CRS”) set in motion the obligation for contracting states to exchange information automatically on a bilateral basis once a year.

Drawing from the twin domains of law and public policy, this paper traces the evolution of banking secrecy legislation in Singapore and Switzerland, with a focus on how limits to statutory banking secrecy have been gradually imposed, notably with the development of automatic exchange of information. In the first part of this paper, it discusses the literature on legal and policy convergence, followed by the sequential development of international legal regimes designed to facilitate the exchange of tax and banking information, notably Exchange of Information, the Foreign Account Tax Compliance Act (“FATCA”) and the Common Reporting Standard. In the second part of this paper, it compares the evolution of banking secrecy legislation in Singapore and Switzerland and examine under what circumstances statutory banking secrecy can be lifted, both domestically and internationally. Finally, it concludes with some preliminary comparisons between both states' legislation and policy responses and developments going forward.

The question that this paper seeks to address is: what is the impact of AEOI on banking secrecy legislation in Singapore and Switzerland? To what extent does banking secrecy still exist, and under what circumstances can it be lifted for purposes of tax investigations, domestically and internationally? It concludes with a few observations for the literature on legal and policy convergence. Firstly, it challenges the assumption in the literature that attributes legal and policy convergence to economic principles, suggesting that political drivers for convergence may override this economic logic. Secondly, it argues for making a distinction between legal and policy convergence; for example, policy convergence is broader than legal convergence. While legal convergence refers only to incorporating international standards into national legal systems, policy convergence relates to policy implementation and evaluation (of outcomes). Thirdly, it makes the argument that despite these differences, the processes that drive legal and policy convergence are relatively similar and can be analysed along two dimensions: level of coordination and whether convergence takes place unilaterally or multilaterally.

### 1. The literature on legal and policy convergence

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<sup>1</sup> Kelvin Chow, *S'pore “Grey-Listed” by OECD*, TODAY, Apr. 4, 2009, <http://eresources.nlb.gov.sg/newspapers/Digitised/Article/today20090404-1.2.22.1.aspx>.

The literature in legal convergence grew out of research comparing common law and civil law systems as well as theories of “legal transplantation”, referring to situations where legal systems unilaterally amend their rules to adopt other rules more often used in other systems.<sup>2</sup> The reasons for legal convergence have been widely discussed in the public choice literature, which sees the production of law as a market responding to general economic principles.<sup>3</sup> One popular explanation favoured by public choice theorists is that convergence between different legal systems aids in international economic integration, since differences between national institutional arrangements incur significant transaction costs.<sup>4</sup> Following a “deterministic logic”, such a convergence is often portrayed as a natural progression in the literature, used to describe the evolution of different systems towards meeting at a “middle ground”.<sup>5</sup>

Much of the recent literature, developed in the context of European unification, is rooted in public choice assumptions that sovereign states conduct a cost-benefit analysis before deciding whether or not to adapt their domestic legal systems to foreign systems, doing so only if the benefits of adaptation outweigh the costs.<sup>6</sup> This was extensively studied in the literature comparing cooperative with competitive methods of legal convergence. Carbonara and Parisi argued that there was a “paradox of harmonisation”: when switching costs are endogenous, countries engaging in cooperative harmonization may end up with less harmonization than those pursuing non-cooperative strategies, and therefore legal competition could be better than legal cooperation.<sup>7</sup> Crettez et al's model of cost-benefit analysis also suggested that cooperation is not necessarily a dominant strategy.<sup>8</sup>

However, the assumption that legal convergence is mainly driven by states’ rational calculations is problematic because in an international context, countries are often in positions of unequal bargaining power and thus power-based explanations also figure heavily in states’ decisions on whether or not to pursue legal convergence. Countries are far from being of equal bargaining power when it comes to the transfer and transplantation of rules and norms; for example, international institutions and developed countries have imposed sets of laws, policies, and institutions on developing countries who were forced to comply in return for access to development assistance or other forms of aid.<sup>9</sup> This paper illustrates that power-based explanations apply not only to developing countries, but even to small states otherwise successfully integrated into global markets, where inadequate compliance is met with coercive political and economic pressures.

Compared to the legal literature, the policy literature places more emphasis on power considerations as an explanation for policy convergence. A discussion of the policy diffusion and transfer literatures is relevant here, as it shows the dynamics of how policies spread across countries and often result in convergence. Although the terms ‘policy transfer’ and ‘policy

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<sup>2</sup> Emanuela Carbonara & Francesco Parisi, *The Paradox of Legal Harmonization*, 132 PUBLIC CHOICE 367 (2007).

<sup>3</sup> Filomena Chirico & Pierre Larouche, *Convergence and Divergence, in Law and Economics and Comparative Law, in NATIONAL LEGAL SYSTEMS AND GLOBALIZATION 9* (Pierre Larouche & Péter Cserne eds., 2013).

<sup>4</sup> Bertrand Crettez et al., *On the Dynamics of Legal Convergence*, 156 PUBLIC CHOICE 345 (2013); Dani Rodrik, *Globalization and Growth — Looking in the Wrong Places*, 26 JOURNAL OF POLICY MODELING 513 (2004).

<sup>5</sup> Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477 (1995). Ugo Mattei & Luca G. Pes, *Civil Law and Common Law: Toward Convergence?*, in THE OXFORD HANDBOOK OF LAW AND POLITICS (2010).

<sup>6</sup> YUN-CHIEN CHANG ET AL., PRIVATE LAW IN CHINA AND TAIWAN: LEGAL AND ECONOMIC ANALYSES (2016).

<sup>7</sup> Carbonara & Parisi, *supra* note 2.

<sup>8</sup> Crettez et al., *supra* note 4.

<sup>9</sup> Mattei & Pes, *supra* note 5.

diffusion’ are sometimes used interchangeably,<sup>10</sup> a distinction between policy transfer and policy diffusion can be drawn in a few areas. Firstly, policy transfer studies originate from the public policy literature, focus on agency and tend to use small-N studies on a limited number of cases. Policy diffusion studies originate from the international relations literature, focus on structure and tend to use large-N studies on a wide number of cases.<sup>11</sup> The table below summarises the main differences between the literatures on legal convergence and policy convergence.

	<b>Legal convergence</b>	<b>Policy convergence</b>
<b>What?</b>	Convergence in legal rules across different legal systems	Convergence in policy goals, content, instruments, outcomes and style
<b>Why?</b>	Reduction of transaction costs due to international economic integration; meeting at a ‘middle ground’. May be cooperative or competitive.	Similar but independent responses, policy imposition/ harmonisation by stronger states/international organisations, regulatory competition, or transnational communication. May be coordinated or coercive.
<b>How?</b>	Legal transplanted, harmonisation or competition	Voluntary/coercive policy transfer or diffusion

**Table 1: Comparing legal and policy convergence**

Policy diffusion has been defined as “the process whereby policy choices in one unit are influenced by policy choices in other units”<sup>12</sup>. The main dynamic is the spread of policy between policy units. In a narrow sense, diffusion is a decentral mode of policy coordination characterised by the lack of a central governing mechanism, and the focus is on “governance by diffusion”<sup>13</sup>; while in a broader sense that tends to characterise earlier studies, diffusion refers to interdependent spreads of policy motivated by forces such as harmonisation, multilateral and bilateral agreements, and policy coordination.<sup>14</sup> The focus here would be on questions such as the presence, speed and actors involved in policy diffusion.<sup>15</sup> The literature also distinguishes between direct and mediated policy diffusion, the latter referring to the facilitation of diffusion by “transfer agents” such as international organisations.<sup>16</sup> Research has tended to focus on the impetus for policy diffusion<sup>17</sup> and its role as a mechanism of policy

<sup>10</sup> Christoph Knill, *Introduction: Cross-National Policy Convergence: Concepts, Approaches and Explanatory Factors*, 12 JOURNAL OF EUROPEAN PUBLIC POLICY 764 (2005).

<sup>11</sup> David Marsh & J.C. Sharman, *Policy Diffusion and Policy Transfer*, 30 POLICY STUDIES 269 (2009).

<sup>12</sup> Martino Maggetti & Fabrizio Gilardi, *How Policies Spread: A Meta-Analysis of Diffusion Mechanisms*, ISA 54TH ANNUAL CONVENTION, SAN FRANCISCO (Citeseer 2013).

<sup>13</sup> Per-Olof Busch & Helge Jörgens, *Dezentrale Politikkoordination Im Internationalen System—Ursachen, Mechanismen Und Wirkungen Der Internationalen Diffusion Politischer Innovationen*, in TRANSFER, DIFFUSION UND KONVERGENZ VON POLITIKEN 56 (2007).

<sup>14</sup> KATJA BENDER ET AL., *THE ROLE OF INTERNATIONAL POLICY TRANSFER AND DIFFUSION FOR POLICY CHANGE IN SOCIAL PROTECTION—A REVIEW OF THE STATE OF THE ART* (2015).

<sup>15</sup> *Id.*

<sup>16</sup> Busch & Jörgens, *supra* note 13.

<sup>17</sup> Lawrence J. Grossback et al., *Ideology and Learning in Policy Diffusion*, 32 AMERICAN POLITICS RESEARCH 521 (2004); Kurt Weyland, *Theories of Policy Diffusion Lessons from Latin American Pension Reform*, 57 WORLD POLITICS 262 (2005).

learning<sup>18</sup>. Some scholars have also identified ‘tipping points’ where the decision by a few countries to adopt a policy triggers a generalised pattern.<sup>19</sup>

The study of policy diffusion grew out of ‘diffusion studies’ that looked at how policies spread between US states. Later research focused on ‘convergence studies’: the policy convergence between sovereign nation-states, with convergence defined as “the tendency of societies to grow more alike, to develop similarities in structures, processes and performances”.<sup>20</sup> According to this theory, convergence in national policy was the result of national policymakers’ reliance on international ‘signals’ on market competitiveness and efficiency.<sup>21</sup> Summarising the literature, Knill identified five causes of policy convergence: similar but independent responses, the imposition of policies, the harmonisation of policies, regulatory competition and transnational communication.<sup>22</sup> Policy convergence has also been attributed to processes of institutional isomorphism<sup>23</sup> such as regulatory competition, international competition and transnational communication<sup>24</sup>, especially in the scenario of a global crisis.<sup>25</sup> Bennett noted that policy convergence could take place in several forms, including convergence in policy goals, content, instruments, outcomes and style. Finally, Drezner suggests that great powers significantly determine the extent of policy convergence: policy convergence through harmonisation takes place when great powers act in concert, but when they fail to agree, policy convergence will take place through competition instead.<sup>26</sup>

Attributing the growth of policy transfer research to new modes of production and trade,<sup>27</sup> Dolowitz and Marsh define policy transfer as “the process by which practices in one system are fed into and utilised in the policy-making arena of another system”.<sup>28</sup> Global economic pressures, in particular, have led to international organisations advocating similar policies across countries. They propose a continuum that distinguishes between different degrees of transfer according to the willingness of the actors, ranging from voluntary transfer or lesson-drawing under perfect rationality conditions, to coercive transfer (when a policy is imposed by international organisations or powerful countries on the actors carrying out the transfer); however the classification of a transfer as voluntary or coercive is not always

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<sup>18</sup> Covadonga Meseguer, *Policy Learning, Policy Diffusion, and the Making of a New Order*, 598 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 67 (2005); Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AMERICAN JOURNAL OF POLITICAL SCIENCE 840 (2008); Fabrizio Gilardi, *Who Learns from What in Policy Diffusion Processes?*, 54 AMERICAN JOURNAL OF POLITICAL SCIENCE 650 (2010).

<sup>19</sup> Katharina Holzinger & Christoph Knill, *Causes and Conditions of Cross-National Policy Convergence*, 12 JOURNAL OF EUROPEAN PUBLIC POLICY 775 (2005).

<sup>20</sup> Colin J. Bennett, *What Is Policy Convergence and What Causes It?*, 21 BRITISH JOURNAL OF POLITICAL SCIENCE 215 (1991).

<sup>21</sup> SIMON BULMER ET AL., *POLICY TRANSFER IN EUROPEAN UNION GOVERNANCE: REGULATING THE UTILITIES* (2007).

<sup>22</sup> Knill, *supra* note 10.

<sup>23</sup> Diane Stone, *Transfer Agents and Global Networks in the “transnationalization” of Policy*, 11 JOURNAL OF EUROPEAN PUBLIC POLICY 545 (2004).

<sup>24</sup> Holzinger & Knill, *supra* note 19; Katharina Holzinger et al., *Environmental Policy Convergence: The Impact of International Harmonization, Transnational Communication, and Regulatory Competition*, 62 INTERNATIONAL ORGANIZATION 553 (2008).

<sup>25</sup> BULMER ET AL., *supra* note 21.

<sup>26</sup> Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 JOURNAL OF EUROPEAN PUBLIC POLICY 841 (2005).

<sup>27</sup> David P. Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making*, 13 GOVERNANCE 5 (2000).

<sup>28</sup> David Dolowitz & David Marsh, *Who Learns What from Whom: A Review of the Policy Transfer Literature*, 44 POLITICAL STUDIES 343 (1996).

consistent.<sup>29</sup> IGOs (international governing organisations) can act as agents of these types of policy transfer, and national governments may be persuaded to adopt programmes and policies in a process of ‘obligated transfer’ as a result of their membership of international regimes and structures.<sup>30</sup> Voluntary transfer mechanisms include learning (e.g. from other countries’ experiences, in a ‘logic of consequences’),<sup>31</sup> emulation/mimicry (conformity to accepted norms rather than concern for objective consequences, in a ‘logic of appropriateness’),<sup>32</sup> and competition (countries trying to attract economic, political and social resources).<sup>33</sup>

The literature suggests that policy-specific, country or international variables may influence the likelihood and propensity of policy transfer or diffusion.<sup>34</sup> These include the policies’ potential for domestic conflicts of interests, the structures of policy problems and the solutions required, proximity and socio-economic, cultural or institutional similarities between countries, and international embeddedness of countries.<sup>35</sup> Finally, Dolowitz and Marsh note that policy transfer is not always successful in achieving policy goals.<sup>36</sup> It could lead to policy failure, which includes scenarios such as “uninformed transfer” (when governments have inadequate information regarding a policy), “incomplete transfer” (when key elements of a policy are excluded) and “inappropriate transfer” (when contextual differences are not accounted for in policy transfer)<sup>37</sup>.

This paper aims to contribute to the literature on policy and legal convergence by analysing the processes among several dimensions. An important omission in the literature is the lack of research distinguishing the relationship between policy and legal convergence. In fact, legal convergence may be more specific than policy convergence, dealing with the content and outcomes of legislation than with other parts of policy such as policy instruments and policy style. Moreover, the processes of policy and legal convergence can be analysed together in a framework along two dimensions, taking into account the type of transfer (coercive or cooperative) and the context of transfer (unilateral or multilateral).

	Processes		Outcomes
	Uni- or bilateral	Multilateral	
<b>Cooperative/coordinated</b>	Adaptation, emulation, learning	Harmonisation, unification	Policy and legal convergence
<b>Coercive/uncoordinated</b>	Transplantation, transfer	Competition, diffusion	

**Table 2: Processes of policy and legal convergence**

This paper seeks to empirically examine the processes of policy and legal convergence by using the case of tax transparency and banking secrecy legislation in Singapore and Switzerland. My findings provide a new perspective to the existing literature. Firstly, I contend that contrary to much of the existing literature, legal and policy convergence driven by political objectives may raise transaction costs (i.e. compliance costs by states and firms), not lower them, and thus convergence does not necessarily lead to more optimal economic outcomes.

<sup>29</sup> TRANSFER, DIFFUSION UND KONVERGENZ VON POLITIKEN (Katharina Holzinger et al. eds., Politische Vierteljahresschrift, volume 38, 1. Aufl ed. 2007).

<sup>30</sup> Dolowitz & Marsh, *supra* note 27.

<sup>31</sup> RICHARD ROSE, LESSON-DRAWING IN PUBLIC POLICY: A GUIDE TO LEARNING ACROSS TIME AND SPACE (1993).

<sup>32</sup> Maggetti & Gilardi, *supra* note 12.

<sup>33</sup> BENDER ET AL., *supra* note 14.

<sup>34</sup> Busch & Jörgens, *supra* note 13; BENDER ET AL., *supra* note 14.

<sup>35</sup> BENDER ET AL., *supra* note 14.

<sup>36</sup> Dolowitz & Marsh, *supra* note 27.

<sup>37</sup> *Id.*

Secondly, although the literature suggests that policy and legal convergence may be driven by poor macroeconomic outcomes within countries, it is submitted that convergence may also mean compliance with new (and constantly evolving) international norms in a process of socialisation driven as much by political (if not more so) as by economic logic. Thirdly, cooperative and coercive processes may co-exist in the process of convergence: the fact that coercion, which is present in the initial stages of a legal or policy transfer, can eventually lead to more coordinated outcomes as more countries adopt the same policies and laws through processes standardised by international organisations. Finally, domestic politics makes a difference in terms of policy convergence. For example, factors such as the presence of party politics and having a clear negotiating strategy can determine the outcomes of convergence.

Thus, this paper seeks to address the question of tax transparency that has been tackled through policy and legal measures, at an international level, and discuss (?) how this has impacted the banking secrecy legislation in Singapore and Switzerland. It also explores the extent to which banking secrecy still exists, and under what circumstances it can be lifted for purposes of tax investigations, domestically and internationally. Finally, it concludes with some observations for the literature on legal and policy convergence.

## 2. The development of the international tax transparency regime

Policy and legal convergence in the area of taxation has been historically contentious because of its association with state sovereignty. As one of the clearest manifestations of state sovereignty and power, taxation has a very special function in every economy and society. Therefore, seen from the perspective of state sovereignty, the nascent development of an international tax regime is a very significant milestone in the history of global governance. It implies that aspects of exclusive state control over the capital of its citizens or residents, such as control over their identities, are subject to greater international (or supranational) scrutiny. This section shows efforts to create policy and legal convergence in tax transparency, facilitated by the OECD, the EU and the USA, gained momentum after the global financial crisis and led to a series of policy initiatives that culminated in the development of the Common Reporting Standard (“CRS”), the instrument by which countries committed to the annual automatic exchange of financial information.

### *a. Pre-2009: OECD/EU developments and the Global Financial Crisis*

The roots of the international regime of tax coordination date back to 1927, when the League of Nations prepared four conventions on double taxation and international cooperation, including one which provided for automatic information exchange of tax information under certain circumstances.<sup>38</sup> Almost a century would go by, however, before this would become a reality.

In 1977, the OECD’s Committee on Fiscal Affairs (“CFA”) was mandated to “facilitate the anti-avoidance and evasion procedures of Member countries” and improve potential for international cooperation.<sup>39</sup> Its 1998 *Report on Harmful Tax Competition* defined tax havens as “states with little or no tax on relevant income and having either lack of effective exchange of information, lack of transparency, and/or ‘insubstantial’ activity attached to the claim of

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<sup>38</sup> Luzius U. Cavelti, *Automatic Information Exchange Versus the Withholding Tax Regime Globalization and Increasing Sovereignty Conflicts in International Taxation*, SSRN Scholarly Paper ID 2362498 (Social Science Research Network), Jun. 1, 2013.

<sup>39</sup> Lorraine Eden & Robert T. Kudrle, *Tax Havens: Renegade States in the International Tax Regime?*, 27 LAW & POLICY 100 (2005).

haven location”<sup>40</sup> and presumed, for the first time, that members would criticise each other’s tax policies multilaterally,<sup>41</sup> directly challenging the traditional assumption of state sovereignty in taxation.<sup>42</sup> After 2000, the OECD made primary use of blacklists to ‘name and shame’ offshore financial centres, and establishing bilateral agreements were the key means for a state to be removed from a blacklist.<sup>43</sup> In 2002, the Model Agreement on Exchange of Information on Tax Matters (“TIEA”) was published. Though limited in effect, it opened the door to exchange of information upon request.<sup>44</sup>

The European Union (“EU”) had also focused on tax havens in an attempt to harmonize corporate income taxes within the EU. In 1977, it adopted a directive of exchange of information, which would be modified many times in the ensuing years.<sup>45</sup> In 2005, the EU Savings Directive was implemented to ensure that all countries would freely disclose interest earned by a resident of an EU country in order to ensure that the interest was fully declared in his country of residence.<sup>46</sup>

With the arrival of the global financial crisis, fiscal cooperation emerged on the Group of 20 (“G20”)’s agenda. The G20 endorsed the OECD’s Global Forum on Transparency and Exchange of Information as a key mechanism for addressing tax evasion.<sup>47</sup> Tax matters, especially automatic exchange of information, was one of the rare areas where the G20 could agree on the reforms required.<sup>48</sup>

Moreover, publicity surrounding the dubious practices of banks facilitating tax evasion provided legitimacy to the G20’s cause. In 2007, former UBS banker Bradley Birkenfeld had approached American authorities and explained to them how his bank had helped Americans evade taxes. Subsequent investigations and legal proceedings culminated in Swiss banks reaching deferred prosecution agreements with the U.S. Department of Justice. In an August 2009 deal with the U.S. authorities, Swiss authorities, in breach of domestic banking secrecy laws, handed over the names of thousands of Americans with undeclared Swiss bank accounts, and abolished the distinction between tax fraud and tax evasion for overseas customers.<sup>49</sup>

*b. Post-2009: Exchange of Information, FATCA, and the Common Reporting Standard*

In 2008, the G20 and the OECD Global Forum pushed for the global adoption of the OECD’s Exchange of Information standards, which would facilitate tax authorities’ exchange of information regarding their respective residents, subject to privacy and other safeguards in local laws.<sup>50</sup> The Global Forum is the continuation of a forum created by the OECD in the early 2000s to address the risks to tax compliance posed by non-cooperative jurisdictions. The

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<sup>40</sup> Robert T. Kudrle, *Tax Policy in the OECD: Soft Governance Gets Harder*, in MECHANISMS OF OECD GOVERNANCE (Kerstin Martens & Anja P. Jakobi eds., 2010).

<sup>41</sup> *Id.*

<sup>42</sup> Joseph H. Beale, *Jurisdiction to Tax*, 32 HARVARD LAW REVIEW 587 (1919).

<sup>43</sup> A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally-Agreed Tax Standard, <http://www.oecd.org/ctp/42497950.pdf>.

<sup>44</sup> XAVIER OBERSON, INTERNATIONAL EXCHANGE OF INFORMATION IN TAX MATTERS: TOWARDS GLOBAL TRANSPARENCY (2015).

<sup>45</sup> *Id.*

<sup>46</sup> European Commission, *Taxation of Savings Income*, TAXATION AND CUSTOMS UNION, [http://ec.europa.eu/taxation\\_customs/taxation/personal\\_tax/savings\\_tax/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/index_en.htm).

<sup>47</sup> KERSTIN MARTENS & ANJA P. JAKOBI, MECHANISMS OF OECD GOVERNANCE (2010).

<sup>48</sup> *Interview on OECD’s work on tax transparency*, with Philip Kerfs (May 28, 2015).

<sup>49</sup> UBS was fined \$780 billion while its counterpart, Credit Suisse, was fined \$2.51 billion.

<sup>50</sup> Moving Forward on the Global Standards of Transparency and Exchange of Information for Tax Purposes (Sept. 2009), <https://www.oecd.org/ctp/harmful/43775637.pdf>.



original members of the Global Forum consisted of OECD countries and jurisdictions that had agreed to implement transparency and exchange of information for tax purposes. In September 2009, in response to the G20 call to strengthen implementation of these standards, the Global Forum was restructured; as of May 2017, it currently has 141 members.<sup>51</sup> Using an in-depth peer review process, the Forum monitors the implementation of the Standard of transparency and exchange of information (discussed previously) that its members have committed to implementing in order to establish a level playing field. The Forum can assess whether countries have data safeguards in place with the assistance of expert groups that make reports about other countries.<sup>52</sup>

Thus, Global Forum peer reviews ensure the quality of national regulation and implementation. Initially, non-member countries were invited to join the Global Forum to support its establishment of a ‘level playing field’. Peer reviews involved two stages: Phase 1 focused on reviewing substantive legal and regulatory frameworks governing exchange of information, while Phase 2 focused on reviewing procedural issues related to implementation of exchange of information. Between 2009 and 2016, almost 7000 exchange of information agreements were signed.<sup>53</sup>

Until the uncovering of the UBS scandals, the United States’ support for the OECD initiatives had been relatively muted. The scandals had been facilitated by loopholes in the Qualified Intermediary (“QI”) Program, which exempted foreign financial institutions from reporting American clients’ income earned on US securities on the condition that a withholding tax was levied.<sup>54</sup>

As a response to these loopholes, the U.S. introduced the Foreign Account Tax Compliance Act (FATCA) in 2009, requiring foreign financial institutions to enter into an agreement with the IRS to identify their U.S. person account holders with foreign assets exceeding US\$50,000 and to disclose the account holders’ names and other details; reporting of this information to the IRS was to be done annually.<sup>55</sup> Through FATCA, the US could demand compliance from foreign financial institutions over which it had no direct jurisdiction, by imposing a non-compliance penalty of a 30% withholding tax on US-based financial activities from non-complying foreign financial institutions (“FFIs”), thus shifting the costs of regulation to the latter. Labelled as a ‘game changer’ for international tax cooperation<sup>56</sup>, FATCA paved the way for automatic exchange of information to emerge as the new global standard.

Initial criticisms of FATCA came in many forms: firstly, FATCA was seen to violate contractual, data protection and bank secrecy legislation in many jurisdictions.<sup>57</sup> Secondly, it

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<sup>51</sup> OECD, About the Global Forum, <https://www.oecd.org/tax/transparency/about-the-global-forum/peerreviewgroup.htm>.

<sup>52</sup> *Id.*

<sup>53</sup> OECD, Tax Transparency 2016: Report on Progress (2016), <http://www.oecd.org/tax/transparency/GF-annual-report-2016.pdf>.

<sup>54</sup> Lukas Hakelberg, *Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power*, 23 REVIEW OF INTERNATIONAL POLITICAL ECONOMY 511 (2016).

<sup>55</sup> Internal Revenue Service, Foreign Account Tax Compliance Act, <https://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-FATCA>.

<sup>56</sup> Patrick Emmenegger, *The Politics of Financial Intransparency: The Case of Swiss Banking Secrecy*, 20 SWISS POLITICAL SCIENCE REVIEW 146 (2014); Richard Eccleston & Felicity Gray, *Foreign Accounts Tax Compliance Act and American Leadership in the Campaign against International Tax Evasion: Revolution or False Dawn?*, 5 GLOB POLICY 321 (2014).

<sup>57</sup> Christiana Panayi, *Current Trends on Automatic Exchange of Information*, SINGAPORE MANAGEMENT UNIVERSITY SCHOOL OF ACCOUNTANCY RESEARCH PAPER 43 (2016).

would impose disproportionately huge compliance and implementation costs on financial institutions compared to the potential benefits to the IRS (\$8.7 billion over 10 years).<sup>58</sup> In the end, the US managed to overcome this initial resistance towards FATCA by arriving at an agreement with five European governments (Germany, France, the UK, Spain and Italy), to adopt an ‘intergovernmental approach’, which would give rise to the Model IGAs (Intergovernmental Agreements).<sup>59</sup> Following this approach, financial institutions would report directly to tax authorities in the jurisdiction where they were based, and governments could exchange this information among themselves, including information pertaining to US taxpayers.<sup>60</sup>

Thus, in early 2012, the US, along with the five European nations, committed to an intergovernmental approach to FATCA, resulting in two variants of IGAs. Under Model 1, foreign financial institutions would give the required information to their domestic fiscal authorities who would report them to US authorities, while under Model 2, foreign financial institutions would share information with US authorities directly after establishing account holders’ consent.<sup>61</sup> In the latter model, foreign governments would only be involved if the IRS requested for information.<sup>62</sup> In the case of significant non-compliance, a withholding tax may be levied on FFIs if the breaches are not remedied within a reasonable time frame (18 months for Model 1, 12 months for Model 2).<sup>63</sup>

Labelled as a ‘game changer’ for international tax cooperation<sup>64</sup>, FATCA paved the way for automatic exchange of information to emerge as the new global standard. Bilateral IGAs have now been concluded between the US and 113 jurisdictions (89 model 1 and 14 model 2) as of May 2017.<sup>65</sup> This in turn has led to support for the formulation of a single global standard – the Multilateral Competent Authority Agreement (MCAA), signed by 51 jurisdictions in October 2014, most of which had already accepted FATCA. In this regard, the ‘universalisation’ of FATCA into a global system of automatic exchange of information was pushed by the EU and OECD, which capitalised on the potential created by the extraterritorial enforcement of FATCA.

By shifting the costs of regulation to FFIs and tax authorities, FATCA has been criticised for its non-reciprocal nature: while the US has received data on American account holders from 2015, it is not obliged to disclose information on non-residents to its treaty partners. By enabling but not fully reciprocating in the IGAs, the US has arguably preserved its competitive advantages relative to other financial centres, which disproportionately bear its costs.<sup>66</sup> However, FATCA has “indirectly constituted an inspirational model for international

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Vermeiren, Mattias, and Wouter Lips. “The Panama Papers and the International Battle Against Tax Havens: Lessons for the EU.” Accessed May 9, 2016. <https://eu.boell.org/en/2016/04/11/panama-papers-and-international-battle-against-tax-havens-lessons-eu>.

<sup>62</sup> Panayi, *supra* note 57.

<sup>63</sup> *Id.*

<sup>64</sup> Emmenegger, *supra* note 56; Eccleston & Gray, *supra* note 56.

<sup>65</sup> Foreign Account Tax Compliance Act (FATCA), <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>.

<sup>66</sup> Hakelberg, *supra* note 54. Only in Model 1 IGAs is reciprocity mentioned, with the caveat that full reciprocity is not currently possible, since the US does not have the necessary domestic regulations to collect the data regarding its non-residents’ account balances, dividends and beneficial ownership of legal entities which it requests from foreign financial institutions. The information provided to the US can be likened to a unilateral transfer of information with partial reciprocity at best, since the US is not bound to undertake the same

cooperation in the automatic exchange of information”, advancing progress towards the objective of AEOI as a new global norm.<sup>67</sup> As seen in the OECD discussion, the OECD’s Common Reporting Standard later built on FATCA to constitute an important pillar of the new global regime, and has indeed been dubbed ‘GATCA’ or the ‘global FATCA’.<sup>68</sup>

Finally, in May 2014, the OECD put in place the Common Reporting Standard (“CRS”), an information standard for automatic exchange of information.<sup>69</sup> As of March 2017, 108 countries are participating in the Convention on Mutual Administrative Assistance in Tax Matters (“CMAATM”), a multilateral instrument to implement the AEOI Standard.<sup>70</sup> The Standard provides for the automatic exchange of information among tax authorities, requiring banks to review interposed legal entities when identifying account holders for information exchange, and also puts in place a peer-review process, administered by the Global Forum, to facilitate the monitoring of the Standard’s implementation domestically.<sup>71</sup>

The Convention on Mutual Administrative Assistance in Tax Matters was developed by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010.<sup>72</sup> In 2009, the Convention was aligned to the international standard on exchange of information on request and opened to all countries.<sup>73</sup> Currently, it is the most comprehensive multilateral instrument available for international tax co-operation with the purpose of tackling tax evasion and avoidance.<sup>74</sup> According to the OECD website, 111 jurisdictions currently participate in the Convention as of May 2017, including 15 jurisdictions covered by territorial extension.<sup>75</sup> This list of jurisdictions includes all G20 countries, all BRIICS, all OECD countries, major financial centres and an increasing number of developing countries.<sup>76</sup>

The legal instruments of the Convention include the Standard for Automatic Exchange of Financial Account Information (also known as the Common Reporting Standard (“CRS”)) and the Multilateral Competent Authority Agreement (“MCAA”). Unlike the Convention, they focus specifically on automatic exchange of financial account information, rather than exchange of information upon request. The CRS is seen as a ‘global’ version of the US-developed FATCA and calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis.<sup>77</sup> It lays out the procedures for doing so, setting out details such as the financial account information that needs to be exchanged, the financial institutions which are required to report, the different types of accounts and taxpayers covered, as well as common due diligence

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obligations as the countries which have entered into IGAs. Such limitations are acknowledged in the Model 1A IGA, with a note emphasising the need for the US government to achieve equivalent levels of AEOI.

<sup>67</sup> Panayi, *supra* note 57.

<sup>68</sup> P.A. Cotorceanu, *Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting under Both FATCA and GATCA*, 21 TRUSTS & TRUSTEES 1050 (2015).

<sup>69</sup> OECD, *Common Reporting Standard (CRS)*, AUTOMATIC EXCHANGE PORTAL (Jul. 15, 2014), <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>.

<sup>70</sup> OECD, *Jurisdictions participating in the Convention on Mutual Administrative Assistance in Tax Matters*, OECD EXCHANGE OF TAX INFORMATION PORTAL (Jul. 29, 2016), [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf).

<sup>71</sup> OECD, *Automatic Exchange of Information: Status of Commitments*, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES (Dec. 11, 2015), <http://www.oecd.org/tax/transparency/AEOI-commitments.pdf>; Hakelberg, *supra* note 54.

<sup>72</sup> OECD, *Convention on Mutual Administrative Assistance in Tax Matters*, <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> OECD, *supra* note 69.

procedures to be followed by financial institutions.<sup>78</sup> The MCAA, which is voluntary, is a template that helps to coordinate the rules of the Convention among states by specifying details of what information will be exchanged and when, helping to make the process more efficient.<sup>79</sup> In the process of information exchange through the legal instruments, the OECD plays a mediating role. After signing the MCAA, each country provides a list of other countries they wish to exchange information with to the OECD, and the OECD monitors the ‘matches’ to establish agreements.<sup>80</sup>

The discussion above has shown how the creation of an international regime was facilitated by the coordination between major powers (i.e. the EU and USA) and the OECD, which is mandated by the G20. Following Drezner, the financial crisis indeed served as a galvanizing event for states to reach agreement on coordinating tax policies via the automatic exchange of information. Although insufficient data on the increase in tax revenue as a result of AEOI is currently available, initial estimates suggest that the cost of implementing it will likely outweigh its benefits, and that states and firms outside the U.S. will disproportionately bear its costs.<sup>81</sup> This suggests that diminished transaction costs are not necessarily an outcome of legal and policy convergence. In fact, in the ‘war against banking secrecy’, the potential costs of putting in place layers of additional compliance regulations seems to have been subordinated to the consensus achieved around the ‘harmful’ effects of tax competition and the negative role played by tax havens.

The next two sections will focus on the domestic effects of legal and policy convergence in Singapore and Switzerland concerning their banking secrecy legislation and domestic policy responses. The existing literature on legal and policy convergence does not sufficiently account for the role of domestic politics in facilitating or resisting convergence. The two cases of Singapore and Switzerland provide illustrate this divergence in domestic political responses when faced with similar international pressures.

### 3. Singapore: Banking secrecy legislation and policy responses

#### a. Statutory and common law duty of confidentiality

Banking secrecy in Singapore is derived statutorily from Section 47 of the Banking Act (Chapter 19), and at common law a contractual duty of confidentiality is implied with respect to the banker-customer relationship.<sup>82</sup> Without a customer’s consent, banks incorporated in Singapore or foreign banks with branches in Singapore cannot divulge information relating to the customer’s account and transactions to third persons unless there is a court order, a public duty of disclosure or the protection of the bank’s own interest requires it.<sup>83</sup> Exceptions to disclosure may be found in the Third Schedule of the Act and include requests for information from a police officer or public officer or a court for the purposes of investigation or prosecution.<sup>84</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> OECD, *International framework for the CRS*, AUTOMATIC EXCHANGE PORTAL (May 2016), <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/>.

<sup>80</sup> Interview with Philip Kerfs, 28 May 2015

<sup>81</sup> Hakelberg, *supra* note 54.

<sup>82</sup> Yun Hui Tan, *Banking secrecy in Singapore*, DENTONS RODYK (Sept. 2014), <http://dentons.rodyk.com/en/insights/alerts/2014/september/1/banking-secrecy-in-singapore>.

<sup>83</sup> Angelo Venardos, *The Global Regulation of Offshore Financial Centres with Reference to Singapore* (2004) (Bond University, Faculty of Law).

<sup>84</sup> Banking Act (Cap 19), s 47. Between 2010 to 2013, IRAS processed 396 requests for information. Of these 396, 52 of them involved bank and trust information subject to a court order. See *Taxman to get easier access to*

In 2001, the Banking (Amendment) Act introduced changes to further liberalise the banking secrecy regime by introducing exceptions to the general rule of confidentiality. In particular, wide powers to obtain information about bank accounts are conferred by legislation,<sup>85</sup> which conflicts with the common law duty of confidentiality. In *Susilawati v. American Express Bank Ltd*<sup>86</sup> the Court of Appeal held that a banker's contractual duty of confidentiality in Singapore is governed exclusively by section 47 and the general common law exceptions do not apply; however, this approach might result in a much lower standard of confidentiality compared to the common law position.<sup>87</sup>

*b. Legal and policy changes under EOI and AEOI*

In April 2009, Singapore was put on the OECD's grey list of territories that had committed to the OECD Standard on Exchange of Information ("EOI") but had not yet substantially implemented the Standard. Singapore renegotiated its tax treaties with 14 countries, and was subsequently upgraded to the "white-list" in November 2009.<sup>88</sup> Singapore also amended its laws to implement the Standard, notably by allowing the Comptroller of Income Tax to compel the disclosure of information protected by secrecy laws.<sup>89</sup>

On 9 May 2013, the Australian Taxation Office, Her Majesty's Revenue and Customs and the U.S. Internal Revenue Service announced plans to share tax information involving trusts and companies; following the acquisition of leaked data from the ICIJ involving the use of entities holding assets in offshore jurisdictions, they identified Singapore as a country thought to harbour the proceeds of tax evasion.<sup>90</sup>

On 14 May 2013, the Ministry of Finance, Monetary Authority of Singapore and the Inland Revenue Authority of Singapore issued a joint statement declaring that Singapore was "significantly strengthening its framework for international cooperation to combat cross-border tax evasion".<sup>91</sup> They announced four key steps: extending EOI assistance to all existing tax agreement partners, without updating individually bilateral tax agreements; signing the Convention on Mutual Administrative Assistance in Tax Matters; allowing IRAS to obtain bank and trust information from financial institutions without having to seek a court order; and concluding with the United States an Inter-Governmental Agreement that would facilitate the FATCA compliance of financial institutions in Singapore.<sup>92</sup> Singapore doubled the number of jurisdictions it would exchange information with, and conducted a critical review of high tax-risk accounts.<sup>93</sup> In July 2013, serious tax crimes were designated as money-laundering

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*guarded data*, PRESSREADER.COM (May 15, 2013),

<http://www.pressreader.com/singapore/today/20130515/281522223606840>.

<sup>85</sup> Venardos, *supra* note 83.

<sup>86</sup> *Susilawati v American Express Bank Ltd*, 2 SLR 737 (sg Court of Appeal 2009).

<sup>87</sup> Tan, *supra* note 82.

<sup>88</sup> Panayi, *supra* note 57.

<sup>89</sup> *AXY and others v Comptroller of Income Tax*, 1 SLR 615 (sg High Court 2015).

<sup>90</sup> Internal Revenue Service, *IRS, Australia and United Kingdom Engaged in Cooperative Effort to Combat Offshore Tax Evasion*, INTERNAL REVENUE SERVICE (May 9, 2013), <https://www.irs.gov/uac/newsroom/irs-australia-and-united-kingdom-engaged-in-cooperative-effort-to-combat-offshore-tax-evasion>.

<sup>91</sup> Ministry of Finance et al., *Singapore to Significantly Strengthen Framework for International Tax Cooperation*, INLAND REVENUE AUTHORITY OF SINGAPORE (May 14, 2013), <https://www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Releases-and-Speeches/Media-Releases/2013/Singapore-to-Significantly-Strengthen-Framework-for-International-Tax-Cooperation/>.

<sup>92</sup> *Id.*

<sup>93</sup> Monetary Authority of Singapore, *Monetary Authority of Singapore Annual Report 2013-2014* Jul. 1, 2014.

predicate offences,<sup>94</sup> and financial institutions were required to conduct reviews regarding tax risk on their clients by June 2014. The definition of a “foreign serious tax offense” was also expanded with effect from 1 September 2014 to send a signal that Singapore was not willing to harbour assets connected to foreign tax evasion.<sup>95</sup> Financial institutions are now obliged to file a suspicious transaction report if they have reasonable grounds to suspect that funds represent the proceeds of tax evasion.<sup>96</sup>

In particular, removing the requirement for a court order had an impact on how exchange of information was carried out in practice. Under the “court-mediated” system of exchange of information (between February 2010 and November 2013) the Standard on Exchange of Information contained a number of safeguards.<sup>97</sup> Since November 2013, however, the Comptroller has had the power to obtain confidential information for other countries from banks and trustees without an order of court. This would preserve secrecy around the exchange of confidential information, since taxpayers would not have to be informed about the foreign request for information, although they would “still have access to the judicial process through a judicial review”.<sup>98</sup>

On 9 December 2014, Singapore and the United States signed an intergovernmental agreement to facilitate the implementation of FATCA in Singapore. Singapore has also committed to implementing the Common Reporting Standard (“CRS”) by 2018.<sup>99</sup> In January 2016, Singapore ratified the Convention on Mutual Administrative Assistance in Tax Matters, which it had signed in May 2013. The Income Tax Act (Chapter 134) was also amended to incorporate exchange of information provisions.<sup>100</sup>

Meanwhile, case-by-case attempts to extract information from Singapore-based financial institutions gathered pace. In February 2016, the U.S. Internal Revenue Service filed a petition asking a federal judge in Miami to force UBS to produce the account records of a U.S. citizen who had moved his assets in his UBS account in Switzerland in 2001 to his UBS account in Singapore in 2002. In May 2016, an agreement was reached, with UBS disclosing the records on the client’s account in Singapore.<sup>101</sup>

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<sup>94</sup> Monetary Authority of Singapore, *Response to Feedback Received - Consultation Paper to Designate Tax Crimes as Money Laundering Predicate Offences in Singapore*, MONETARY AUTHORITY OF SINGAPORE (2013), [http://www.mas.gov.sg/~media/resource/publications/consult\\_papers/2012/Response%20to%20Feedback%20Received%20Designation%20of%20Tax%20Crimes%20as%20ML%20Predicate%20Offences%2028%20Mar%202013.pdf](http://www.mas.gov.sg/~media/resource/publications/consult_papers/2012/Response%20to%20Feedback%20Received%20Designation%20of%20Tax%20Crimes%20as%20ML%20Predicate%20Offences%2028%20Mar%202013.pdf).

<sup>95</sup> Rolf Haudenschild, *The Criminalisation of Foreign Tax Offences in Singapore*, MAROON ANALYTICS (Apr. 2, 2015), <http://blog.maroonanalytics.com/2015/04/the-criminalisation-of-foreign-tax.html>.

<sup>96</sup> PricewaterhouseCoopers, *Tax Lookout: An outlook on recent tax changes* (Feb. 2014), [https://www.pwc.com/sg/en/tax-lookout/assets/taxlookout\\_201402.pdf](https://www.pwc.com/sg/en/tax-lookout/assets/taxlookout_201402.pdf).

<sup>97</sup> Firstly, information could only be obtained on a case-by case basis. Secondly, information could only be obtained on request. Thirdly, fishing expeditions would not be permitted. Finally, the Comptroller of Income Tax had to obtain an order from the High Court, and taxpayers had a right of appeal in court. The information requested had to be foreseeably relevant; and that required clear and specific evidence that there was a connection between the information that was being sought and the enforcement of the requesting state’s tax law.

<sup>98</sup> Wing Leon Kwong, *Understanding the Implications of Tax Transparency*, presented at Compliance in Asian Wealth Management Forum 2016 (2016).

<sup>99</sup> *AXY and others v Comptroller of Income Tax*, 1 SLR 615 (sg High Court 2015).

<sup>100</sup> *Income Tax (Exchange of Information Arrangement) Order 2016 § 34* (sg).

<sup>101</sup> David Voreacos, *Swiss Bank UBS Hands Over Records on U.S. Citizen’s Account in Singapore*, BLOOMBERG.COM (Jun. 23, 2016), <http://www.bloomberg.com/news/articles/2016-06-22/ubs-gives-irs-records-on-u-s-citizen-s-account-in-singapore-iprjhqd9>.

Currently, the Inland Revenue Authority of Singapore (“IRAS”) has signed Competent Authority Agreements (“CAAs”) with nine countries (Australia, UK, Japan, Republic of Korea, South Africa, Norway, Italy, Canada and Finland) on the automatic exchange of financial account information based on the CRS. Singapore and these nine countries will commence the AEOI under the CRS by September 2018, and apply due diligence procedures starting 1 January 2017.<sup>102</sup>

*c. The domestic-international interface: institutional strategies and responses*

In the wake of these international developments, an inter-agency platform was set up comprising of the Ministry of Finance (“MOF”), Monetary Authority of Singapore (“MAS”) and the Inland Revenue Authority of Singapore (“IRAS”). The Attorney General’s Chambers and the Commercial Affairs Department (“CAD”) of the Singapore Police Force were also involved. The rationale for inter-agency collaboration was to leverage on the different perspectives of the different agencies: the Ministry of Finance is in charge of formulating tax policies, while the Inland Revenue Authority of Singapore is in charge of technical issues, such as implementing tax policies and administrating data collection. The Monetary Authority of Singapore takes charge of regulation from the perspective of financial institutions, collecting data from clients and other stakeholders in order to engage them.<sup>103</sup>

Internationally, Singapore is a member of the Global Forum and a vice-chair of the OECD Peer Review Group. Since 2011, Singapore has been participating actively at the OECD and the Global Forum about issues on tax transparency, and was one of the first few countries to push for having a Global Forum. Before Singapore’s involvement, the Forum was more OECD- and G20-led, but Singapore noted the absence of many countries, especially developing countries, and wanted to open up the peer review process to other countries so they could provide feedback on their experiences.<sup>104</sup>

As a small state, Singapore has “pulled weight beyond expectations in terms of participation”, and “regularised [itself] into the world’s club of international standards”.<sup>105</sup> Singapore volunteered to be the vice-chair, and subsequently chair, of the Global Forum’s Peer Review Group, and participated actively from the start, making itself relevant to the global discussion, and contributing to standard-setting. This was consistent with its principle of being a reputable and responsible financial centre committed to tackling cross-border crime. Singapore was also involved in OECD Working Party 10, a technical group involved in implementing technical details of AEOI reporting and explaining them to banks.

In terms of measuring Singapore’s compliance with the standards of Exchange of Information, the increase in exchange of information requests and Singapore’s speed in responding to them is one indicator of how Singapore has performed. Singapore provided 396 requests for information between 2010 and 2013, mostly within 90 days. In terms of OECD ratings, Singapore passed both Phase 1 and Phase 2 peer reviews with a “Largely Compliant” rating.<sup>106</sup>

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<sup>102</sup> DMS Offshore Investment Services, Common Reporting Standard: Implementation In Asia (Dec. 5, 2016), <http://www.mondaq.com/caymanislands/x/549958/Financial+Services/Common+Reporting+Standard+Implementation+In+Asia>.

<sup>103</sup> *Impact of AEOI and transparency on Singapore*, with a government ministry (Oct. 15, 2015).

<sup>104</sup> *Id.*

<sup>105</sup> *Impact of AEOI and transparency on Singapore*, with Stephen Phua (Feb. 19, 2016).

<sup>106</sup> *Singapore*, OECD EXCHANGE OF TAX INFORMATION PORTAL, <http://www.eoi-tax.org/jurisdictions/SG#default>. It is important to emphasise that Singapore’s response to being grey-listed by

#### 4. Switzerland: Banking secrecy legislation and policy responses

##### a. Legislative framework: Swiss Banking Act of 1934

Article 47 of the Swiss Federal Banking Act, on which Singapore's Section 47 is mirrored,<sup>107</sup> makes it a criminal offence for persons to deliberately disclose "confidential information entrusted to them in their capacity as a member of an executive or supervisory body, employee, representative, or liquidator of a bank"<sup>108</sup>. However, as customary law, Swiss bank confidentiality dates back to the 19<sup>th</sup> century.<sup>109</sup> In 2013, a federal popular initiative was launched which aimed to incorporate bank confidentiality in the Swiss Federal Constitution; at present, it is still being debated in parliament.<sup>110</sup>

Exceptions to Swiss bank confidentiality include reporting obligations enshrined in the law. Paragraph 5 of Article 47 lists several reporting obligations based on law that override bank confidentiality.<sup>111</sup> Although general disclosure of protected information to regulators is not permitted, the deviation from banking confidentiality may be permitted in a situation of necessity according to Article 17 of the Swiss Criminal Code.<sup>112</sup> This was relevant in light of the February 2009 order of the Swiss Financial Market Supervisory Authority which allowed FINMA, the Swiss financial regulatory authority, to deliver customer data to US authorities when an indictment of UBS had been threatened.

Switzerland's structural dependence on its largest banks' economic survival meant that criminal indictments would be akin to a 'corporate death penalty'.<sup>113</sup> Therefore, the Swiss Federal Supreme Court, overturning a contrary ruling by the Swiss Federal Administrative Court, held that it had been "lawful" for the Swiss financial regulator to release the names of offshore clients to US authorities because it had been done to avert criminal charges being

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the OECD did not stop simply at making tax reforms domestically. Rather, being grey-listed was the direct impetus for the formation of the Global Governance Group (3G) on Singapore's initiative. According to then-Permanent Representative to the United Nations, Vanu Gopala Menon, Singapore was taken aback by the 'clearly unfair' treatment accorded to small states by the G20 countries, many of them tax havens themselves, and decided to form the Global Governance Group (3G), an informal grouping of small- and medium-sized countries similarly affected by the G20's decision. Today, the 3G comprises 30 members and engages in a dialogue with the G20 on a wide range of issues. The 3G example is a clear illustration of the way in which Singapore, recognizing the reality and implications of the G20 as a new international power broker, sought to develop a mechanism to engage it in order to protect its own interests. See TOMMY KOH ET AL., 50 YEARS OF SINGAPORE AND THE UNITED NATIONS (2015).

<sup>107</sup> Venardos, *supra* note 83.

<sup>108</sup> Conseil fédéral, RS 952.0 Loi fédérale du 8 novembre 1934 sur les banques et les caisses d'épargne (Loi sur les banques, LB) (Jan. 1, 2016), <https://www.admin.ch/opc/fr/classified-compilation/19340083/index.html>.

<sup>109</sup> Gwendoline Godfrey et al., *Bank Confidentiality – A Dying Duty But Not Dead Yet?*, 17 BUSINESS LAW INTERNATIONAL 173 (2016).

<sup>110</sup> Lise Bailat, *Le secret bancaire pour les Suisses s'offre un répit*, LE TEMPS (Dec. 15, 2016), <https://www.letemps.ch/suisse/2016/12/15/secret-bancaire-suisse-soffre-un-repit>.

<sup>111</sup> Godfrey et al., *supra* note 109.

<sup>112</sup> *Id.*

<sup>113</sup> Patrick Emmenegger, *Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters: A Nut Too Hard to Crack?*, REGULATION & GOVERNANCE (2015).



levelled against UBS.<sup>114</sup> Bilateral agreements, such as double taxation agreements, also constitute exceptions to Swiss bank confidentiality laws.<sup>115</sup>

Unlike in Singapore, Swiss law draws a distinction between the domestic and international environment with regard to exceptions in tax matters. In Switzerland, banks have no duty of disclosure vis-à-vis the tax authority, and the onus lies on the taxpayer to submit the relevant information and documentation to the tax authority.<sup>116</sup> In cases of tax fraud or justified suspicion of serious tax offences, the criminal procedure law takes precedence over bank secrecy, but domestically, there is no legal foundation for the lifting of bank secrecy in cases of simple tax evasion.<sup>117</sup> With regard to foreign clients, the situation has evolved significantly and will be discussed in the subsequent section.

*b. Legal and policy changes under EOI and AEOI*

Before 2009, Switzerland's system of information exchange had been limited to instances of tax fraud; since tax evasion was not considered a criminal offence under Swiss law, Switzerland's obligation to exchange information with foreign authorities on tax matters had been limited.<sup>118</sup> In April 2009, Switzerland was also put on the OECD's grey list of territories that had committed to the OECD Standard on Exchange of Information but had not yet substantially implemented the Standard.<sup>119</sup> Switzerland was compelled to accept the OECD standard of information exchange upon request and allow for the exchange of banking and tax information in certain cases. Between April and September 2009, it signed twelve agreements containing clauses on extended administrative assistance in tax matters and was removed from the grey list.

Unlike Singapore, Switzerland initially made piecemeal concessions on the exchange of information, striving to preserve bank secrecy as far as possible. In 2010, the Swiss government argued strongly against automatic exchange of information, stating that it was "out of the question": firstly, it was not efficient, producing primarily data and not money, and secondly, it would unnecessarily invade privacy.<sup>120</sup> At that point in time, the State Secretary for International Financial Matters promoted an alternative system: the regularisation of existing undeclared assets, coupled with a final withholding tax, in what would later be known as the 'Rubik' model.<sup>121</sup> Although Rubik encountered initial (albeit grudging) acceptance, Switzerland found itself increasingly isolated as other European states, including Luxembourg and Austria, also expressed support for sharing of bank information – on the condition that

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<sup>114</sup> "Such an indictment would have led to the bankruptcy of the bank which in turn would have caused serious and virtually uncontrollable economic repercussions for Switzerland... Since FINMA had compelling reasons to believe that not relinquishing the customer data to the U.S. Department of Justice would have seriously impaired Switzerland's financial markets and have led to serious repercussions for the Swiss economy, the action taken by it was shown to be lawful." See Emma Thomasson, *Swiss Court Says Was Right to Give U.S. Bank Data*, REUTERS, Jul. 15, 2011, <http://www.reuters.com/article/uk-ubs-idUKTRE76E3RH20110715>.

<sup>115</sup> Godfrey et al., *supra* note 109.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> JASON CAMPBELL SHARMAN, *HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION* (2006).

<sup>119</sup> Switzerland's foreign minister expressed disappointment that despite being a founding member of the OECD, Switzerland was never included in the discussions on drawing up the list, which he found 'particularly strange'. See "EU Countries Furious at OECD Tax-Haven 'Grey List,'" *EurActiv.com*, April 6, 2009, <https://www.euractiv.com/section/euro-finance/news/eu-countries-furious-at-oecd-tax-haven-grey-list/>.

<sup>120</sup> Michael Ambühl, *Switzerland under pressure from abroad – Switzerland's response*, STATE SECRETARIAT FOR INTERNATIONAL FINANCIAL MATTERS (Oct. 6, 2010), <https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-35505.html>.

<sup>121</sup> *Id.*

Switzerland do so too.<sup>122</sup> Rubik was eventually abandoned in favour of automatic exchange of information; moreover, the concurrent adoption of FATCA by many states provided the institutional and technical framework that would facilitate the implementation of automatic exchange of information.

Therefore, with regard to foreign clients, a different set of rules now applies due to Switzerland's recent international commitments, notably its compliance with Article 26 of the OECD Model Tax Convention,<sup>123</sup> whose implementation is governed by the Swiss Federal Act on International Administrative Assistance in Tax Matters.<sup>124</sup> The effect of these agreements is the abolishment of bank confidentiality for both tax fraud and tax evasion; however, with the proliferation of requests originating from stolen data, questions have been raised in respect of distinguishing between permitted group inquiries and forbidden 'fishing expeditions'.<sup>125</sup> The current position is that the Swiss government can take up requests originating from stolen data if the foreign requesting state had gained access to the data by way of ordinary administrative assistance or through publicly accessible sources.<sup>126</sup>

Currently, Switzerland has agreed to establish Automatic Exchange of Information (AEOI), under which tax information will be sent annually by Swiss authorities to the tax authorities of their bilateral treaty partners (and vice-versa). This means that foreign clients cannot take advantage of bank confidentiality to evade taxes in their country of residence; however, bank confidentiality remains in that Swiss bankers are still bound to an obligation of secrecy with regard to their clients and their accounts.<sup>127</sup> Switzerland started collecting data on 1 January 2017 and the first data exchange should take place in 2018.<sup>128</sup> As of February 2017, it has signed bilateral agreements for automatic exchange of information with 50 jurisdictions as well as with the EU.<sup>129</sup>

*c. The domestic-international interface: institutional strategies and responses*

The Swiss government underwent institutional restructuring in order to better coordinate its competencies in financial and fiscal matters. In 2010, responsibility for international tax affairs thus shifted from the Swiss Federal Tax Administration to a new department created within the Federal Department of Finance, the State Secretariat for International Financial Matters ("SIF"), focusing on fiscal and financial questions and the coordination of these questions.

It is important to note that unlike in Singapore, Swiss policymakers faced the additional hurdle of having to find domestic policy consensus on reforms relating to automatic exchange of information. With two houses of parliament, the referendum mechanism, and a large consultation system, where the biggest party was (and continues to be) the nationalist Swiss

<sup>122</sup> Raphael Minder, *Swiss Banking Secrecy Under Pressure From Europe*, THE NEW YORK TIMES, May 23, 2013, <http://www.nytimes.com/2013/05/24/business/global/swiss-banking-secrecy-under-pressure-from-europe.html>.

<sup>123</sup> OECD, Model Tax Convention on Income and on Capital 2014 (Oct. 30, 2015), <http://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-2015-full-version-9789264239081-en.htm>.

<sup>124</sup> Federal Act of 28 September 2012 on International Administrative Assistance in Tax Matters (Tax Administrative Assistance Act, TAAA), 651.1 CC (ch 2012).

<sup>125</sup> Godfrey et al., *supra* note 109.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> State Secretariat for International Financial Matters, Automatic exchange of information (Feb. 2, 2017), <https://www.sif.admin.ch/sif/en/home/themen/internationale-steuerpolitik/automatischer-informationsaustausch.html>.

<sup>129</sup> *Id.*

People's Party – a staunch supporter of banking secrecy – political consensus was not always forthcoming. For example, in December 2012, the Finance Minister's suggestion that AEOI might have to be considered provoked a public uproar on the part of right-wing populists.

Therefore, it was necessary to base the subsequent policy decision on a report written by independent persons with technocratic expertise. In 2012, the Swiss Department of Finance had created the Brunetti Group of Experts. Led by an economics professor, Aymo Brunetti, and comprised representatives from the government, academia and the private sector,<sup>130</sup> the Group's aims were to address the financial centre's challenges within Switzerland as well as its opportunities abroad based on existing principles for financial market policy.<sup>131</sup> In June 2013, the Group recommended the acceptance of automatic exchange of information, and deemed it to be a subject of great urgency.<sup>132</sup> This gave the government an opportunity to bring up the issue, and to advocate the strategy as one legitimated by experts.<sup>133</sup>

Another important area where the Swiss position had to change was its law on administrative assistance on tax matters. Like Singapore, Switzerland had to introduce an exception to notification, because the principle in Swiss law was that an account holder had to be informed before transmitting information to a foreign authority upon request. This section of the law was modified and took effect in August 2014.<sup>134</sup>

Within the OECD Global Forum, Switzerland faced more obstacles than Singapore did. Notably, the Swiss were initially not able to advance beyond Phase 1 of the Global Forum reviews because they had negotiated additional protocols to the Standard which were considered by the OECD to be not compliant with the Standard. However, international pressure on Switzerland continued to be intense as other states made progress. In November 2013, the jurisdictions which had completed the Phase 1 reviews began to focus their attention on those which had not made progress, applying the concept of a level playing field. So Switzerland had to put in place a system to correct their double taxation treaties. They had to renegotiate these treaties with all their partners.<sup>135</sup>

By 2013, with the signature of the multilateral convention and the renegotiation of agreements, Switzerland had renegotiated about 40 double taxation treaties and also began to make 'pure' treaties of information exchange. In order to progress to the Phase 2 Global Forum peer reviews, Switzerland had to present a supplementary report, which was discussed in Feb 2015 and approved in March 2015. In July 2016, Switzerland finally passed the Phase 2 Global Forum peer review with a 'Largely Compliant' rating – more than three years after Singapore had achieved a similar rating.<sup>136</sup>

Finally, the US Department of Justice concluded, in January 2016, the last of 80 non-prosecution agreements ("NPA") allowing Swiss banks to avoid prosecution for helping their customers evade US taxes, resulting in settlements amounting to about \$1.3 billion.<sup>137</sup> This came at a very high cost for the banks, both in terms of fines and administrative and internal

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<sup>130</sup> *Brunetti group of experts commences work*, SWISS FEDERAL COUNCIL (02.12.2013), <https://www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-51197.html>.

<sup>131</sup> *Id.*

<sup>132</sup> Aymo Brunetti, *Group of Experts on the Further Development of the Financial Market Strategy* (Swiss Federal Council), Dec. 2014.

<sup>133</sup> *Switzerland's responses to Automatic Exchange of Information*, with Patrick Emmenegger (May 12, 2016).

<sup>134</sup> *Switzerland's responses to Automatic Exchange of Information*, with Fabrice Filliez (May 13, 2016).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Suzanne Barlyn, *U.S. Settles Last Swiss Bank Case in \$1.3 Billion Program*, REUTERS, Jan. 27, 2016, <http://www.reuters.com/article/us-swissbanks-taxevasion-settlement-idUSKCN0V52GK>.

costs; moreover, the Swiss Bankers' Association asserted that "the [US Department of Justice's] lack of transparency with regards to the calculation of the fines also leaves somewhat of a bitter aftertaste in terms of whether the fines were really always calculated fairly".<sup>138</sup> It added, however, that "the DoJ's program for Swiss banks, however, remained the only practicable way to be able to look ahead to the future".<sup>139</sup>

## Conclusion

The similarities between Singaporean and Swiss legislation can be seen in Section 47 and Article 47 of the Banking Act in both countries respectively, which provides for statutory banking secrecy. The introduction of automatic exchange of information has tested the robustness of current legislation. In the Singapore case, there is an ongoing tension between the common law contractual duty of confidentiality and statutory provisions permitting exceptions to banking secrecy, particularly the exceptions laid out in Section 47. It is possible that a breach of confidentiality in line with one of the Section 47 exceptions may still be considered a breach of contract, even if it does not attract criminal sanctions.<sup>140</sup>

Insofar as both statutory and contractual provisions apply to uphold bank confidentiality, the situation is similar for Switzerland's Article 47. More recent developments have shed light on the circumstances under which a Swiss public authority can deviate from bank confidentiality. Moreover, whether bank confidentiality for Swiss citizens will remain intact (amidst calls to inscribe it into the Swiss constitution) is currently still being subject to political debate. It is worth pointing out that Swiss authorities had deliberately separated the issue of automatic exchange of information internationally from the issue of domestic banking secrecy in order to overcome domestic political deadlock.<sup>141</sup>

Since being "grey-listed" in 2009, the international responses of Singapore and Switzerland have been relatively similar, although Singapore reacted more quickly to the demands of the OECD. Although both countries were subject to coercive pressures, Singapore's response was more cooperative at the beginning, while Switzerland initially demonstrated domestic resistance to policy and legal convergence. In 2016, both countries ratified the Convention on Mutual Administrative Assistance in Tax Matters, although Singapore, unlike Switzerland, is not a signatory of the Multilateral Competent Authority Agreement, preferring to exchange information through bilateral agreements instead.<sup>142</sup> Both jurisdictions have also introduced exceptions to notification, so that account holders do not need to be informed before transmitting information to a foreign authority upon request.

In terms of its strategic behavior, Singapore took a generally more proactive approach, attempting both to manage the situation domestically and exert its influence internationally. It recognised from the start that automatic exchange of information was inevitable and took the lead to create a system that would protect its interests, both domestically and internationally. With the passing of legislation aimed at making tax evasion a predicate offence to money-

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<sup>138</sup> Vanessa Dubra, *The US Program: where do we stand?*, SWISSBANKING (Mar. 30, 2016), <http://www.swissbanking.org/en/services/insight/1.16/the-us-program-where-do-we-stand>.

<sup>139</sup> *Id.*

<sup>140</sup> Tan, *supra* note 82.

<sup>141</sup> Interview with Emmenegger, *supra* note 133.

<sup>142</sup> OECD, *supra* note 79. The CRS Multilateral Competent Authority Agreement ("MCAA") specifies the details of what information will be exchanged and when. It is a multilateral framework agreement, with the subsequent bilateral exchanges coming into effect between those signatories that file the subsequent notifications under Section 7 of the CRS MCAA.

laundering, regulators adopted an increasingly strict approach and generally complied with overseas regulators' requests for data on foreign citizens, explaining that "the duty to provide information prevails over any duty of secrecy"<sup>143</sup> in reference to Singapore's banking secrecy legislation. Moreover, to deter financial crime, regulators and the courts imposed harsh sentences on institutions and individuals suspected of facilitating illicit financial transactions. In 2016, two Swiss banks in Singapore were shut down for alleged money-laundering offences, and several wealth managers sentenced to jail for abetting such offences.

On the international front, Singapore also acted strategically, acting as first Vice-Chair and then Chair of the Peer Review Group at the OECD. In so doing, Singapore could influence the process of in-depth monitoring and peer review of the implementation of standards of transparency and exchange of information for tax purposes, as well as the methodology and detailed terms of reference of the process, that constituted the mandate of the Global Forum's Peer Review Group.<sup>144</sup>

In contrast, Switzerland appeared to lack an overall coherent strategy for dealing with international pressure, and gradually lost control of events, a situation aggravated by a lack of consensus within the financial industry and intense debates between political parties.<sup>145</sup> Switzerland was faced with three main challenges in 2008: US criminal investigations of Swiss banks, threats posed by FATCA to its banking secrecy, and the threat of blacklisting by the OECD which was pushing for exchange of information.<sup>146</sup> Switzerland could not react to the crisis in a unified manner because of deep divisions in its heterogenous financial industry, with traditional private banks, putting their individual interests first, initially refusing to close ranks to support UBS.<sup>147</sup> By the time they realised that they, too, were under threat (notably when Switzerland's oldest private bank, Wegelin and Co., was shut down after a criminal indictment), the industry had lost control of the agenda, which was now in the hands of political parties.<sup>148</sup> Without consensus from industry interest groups or political parties, the Swiss government could not, on its own, execute radical policy shifts: indeed, it had to keep concessions to a minimum to reduce the chances of exchange of information agreements being rejected by parliament; and despite its doing so, some agreements (for example, the Lex USA) were still rejected by parliament, further reducing policymakers' room for manoeuvre.<sup>149</sup>

In the end, Switzerland did overcome the political deadlock using two strategies: firstly, by relying on independent "working groups" (the Brunetti commissions) to champion the need for compliance, and secondly, by separating the international from the domestic agenda, thus shifting the locus of political debate from confidentiality of foreign taxpayers' assets in Switzerland to the rights of Swiss taxpayers to banking secrecy.<sup>150</sup> This meant that eventually, progress could be made on the international front, while debates remained ongoing on the domestic front.

From a theoretical perspective, the development of international tax transparency suggests that 'rational' economic logic alone does not explain the production of law; law may

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<sup>143</sup> Derren Joseph, *The IRS vs Singapore*, SINGAPORE BUSINESS REVIEW (07 Mar 16), <http://sbr.com.sg/financial-services/commentary/irs-vs-singapore>.

<sup>144</sup> OECD, *supra* note 51.

<sup>145</sup> Katrin Eggenberger & Patrick Emmenegger, *Economic Vulnerability and Political Responses to International Pressure: Liechtenstein, Switzerland and the Struggle for Banking Secrecy*, 21 SWISS POLITICAL SCIENCE REVIEW 491 (2015).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> with Emmenegger, *supra* note 133.

be produced for political ends and may actually incur additional transaction costs – the costs of compliance – for both governments and firms than if convergence had not taken place. Processes of policy and legal convergence may be driven as much by political as by economic factors, with global powers achieving a consensus at the end of the financial crisis to stamp out ‘black money’ in tax havens. In this sense, compliance with new (and constantly evolving) international norms in a process of socialisation driven as much by political (if not more so) as by economic logic. Finally, domestic political processes can influence the speed and extent of policy and legal convergence. In this sense, cooperative and coercive processes may co-exist in the process of convergence – from the Swiss example, initial resistance from some political parties and the financial industry dissipated with the realisation that Switzerland had more to gain than to lose by adopting a policy of compliance. From the Singapore example, cooperation took place right at the start, as a direct response to coercive processes, to the extent that Singapore managed to secure a position as chair of the Global Forum’s Peer Review Group.

Further research can focus on the distribution of transaction costs between, for example, strong states, weak states, and firms, in order to better illustrate the winners and losers behind policy and legal convergence.<sup>151</sup> Moreover, it remains to be seen what could potentially replace the tax-related aspect of banking secrecy, and what new banking models could potentially evolve (which in themselves could potentially trigger regulatory convergence). Indeed, there is no shortage of potential alternatives within an increasingly digitalised world, including bitcoin, cryptography, P2P, shadow banking, and other potentially disruptive mechanisms that could upend traditional banking models; this would also be a promising area of future research.

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<sup>151</sup> *The Biggest Loophole of All*, THE ECONOMIST, Feb. 20, 2016. The loopholes inherent in U.S. reciprocity include the fact that it does not disclose information on account balances or beneficial ownership, and refuses to share data with many countries without a high level of technical standards. Ironically, although the US Treasury has called for more data exchange and corporate transparency, America is using the same argument that Switzerland once used: that difficulties in obtaining congressional approval are delaying the process. However, as the Economist points out, “their reluctance, ostensibly due to concerns about red tape, [may have] more to do with giving America’s financial centres an edge”. It thus remains to be seen whether there is a true level playing field given “how the US has elevated exceptionalism to a constitutional principle”, and if the US will eventually comply, either by their own accord or through EU pressure.

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