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СОВРЕМЕННОЕ СОСТОЯНИЕ АВТОМАТИЧЕСКОГО ОБМЕНА ИНФОРМАЦИЕЙ: СФЕРА ПРИМЕНЕНИЯ И ПРОБЛЕМЫ ИМПЛЕМЕНТАЦИИ

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Аннотация

Статья посвящена современному состоянию международного автоматического обмена финансовой и налоговой информацией. Выделены проблемы в сфере применения и имплементации стандарта автоматического обмена информацией, предложенного ОЭСР.

Ключевые слова: автоматический обмен информацией, ОЭСР, проблемы применения стандарта, сфера применения стандарта, банки.

MODERN STATE OF AUTOMATIC EXCHANGE OF INFORMATION: SCOPE OF APPLICATION AND PROBLEMS OF IMPLEMENTATION

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Annotation

The article is devoted to the current state of the international automatic exchange of financial and tax information. The problems in the sphere of application and

implementation of the standard of automatic information exchange, proposed by OECD, are singled out.
Key words: automatic information exchange, OECD, application of the standard, scope of the standard, banks.

The American law on tax reporting on foreign accounts, which earned in 2014[2], was an important step towards the development of international tax legislation. In the wake of the United States, which forced the world to obey the requirements of the FATCA, OECD members (most of which are EU countries) decided on a regular basis to exchange financial information about their citizens' accounts and in the same year developed CRS standards[1].

Now CRS is a reality that many countries have to deal with. However, due to the fact that the automatic information exchange mechanism was formed only recently, the problems connected with it are, although a widely discussed, but little researched topic. As many experts note, CRS is a very multifaceted tool. Nevertheless, that is why it is difficult to say unequivocally whether the scope of its application is sufficient, excessive or insufficient. Objective analysis of CRS allows to identify both a number of situations that the Standard "releases from attention", and the aspects under its excessive regulation.

First of all, considering the scope of the Standard, it should be noted that the transmitted information has relatively small volumes. CRS does not include the exchange of information on the ownership of real estate, the client's safe in banks, etc.[1] It also limits the range of objectives for which the information obtained can be used. It is transferred only to banks and tax authorities. This excludes its use by law enforcement agencies for the purposes of combating money laundering and corruption. Not using this mechanism to identify "illegal" money is in the opinion of many experts the greatest omission of the Standard. In this aspect, of course, we should not forget that due to the FATF actions[3] in all countries of the world, there is a standardized law on combating money laundering, including disclosure of information on accounts, their beneficiaries, etc. at the request of foreign competent

authorities. However, it seems too optimistic to say that "any country in the world is likely to disclose information on a properly issued request from another country (including Russia) in connection with the criminal case of money laundering. Standard also pays special attention to the protection and confidentiality of information. This means that any breach of obligations from the Standard may lead to suspension of information exchange. Thus, it is unlikely that any Country will take such a risk in order to transmit information beyond the scope provided by the FATF[3].

The problem of concealing bank accounts in other financial products, such as insurance and pensions, also remains unsolved. According to the CRS[1], such information should be reported only if they have a "monetary value" for their holders (so-called Insurance Contracts). They include contracts, for which, for example, it is possible to withdraw funds from the policy or provide it as collateral. In this regard, the financiers turned their attention to the option that does not fall under the Standard: non-irrevocable life insurance. Its principle consists in the following: the client pays the award of the recently created offshore company. Legally, the assets are owned by the company, not the client, which in turn belongs to the insurer, which collects quarterly fees. The client cannot directly take cash or use the policy as collateral. Thus, the policy has no monetary value. But the client can use his benefits because he has the unlimited right to use any yacht, house or other asset bought by the company. He can even be an investment portfolio manager. If questions arise from the investigators, they will be provided with information about the company that belongs to the licensed insurer, and not to the tax evader.

It is unlikely that the world's largest insurance companies will sell similar products due to high reputational risks, unlike smaller offshore companies. To solve this problem, it is necessary to include the requirement to report information about all types of insurance services, not only having "monetary value". Undoubtedly, such an initiative can hardly be implemented at this stage, since all states that have signed the Standard are at various stages of its ratification[3].

Finally, it is necessary to reduce the number of cases when non-financial entities are recognized as active (i.e. subject to less stringent reporting requirements). Legal entities that own accounts can be recognized as active or passive NFE, depending on their income and assets. The key consequence of the passive NFE status is that its "controlling persons" must be identified and reported, which is not required in the case of active NFEs. CRS classifies some entities as active NFE even if they are classified as passive according to their income or assets. These include, for example, non-profit organizations and "start-ups". In other words, any person trying to avoid identification can create a legal entity that will own the account. Even if an enterprise invests capital and has income only in the form of interest or dividends, it will be deemed to be an active NFE until it starts direct business activity. Such a privilege shall be valid for up to two years from the date of establishment of the legal entity.

On the other hand, on some issues the scope of the CRS is seen to be excessively broad. For example, as it was said before, CRS does not have a minimum threshold value, when exceeding the previously opened account of an individual (or its new depositary account or insurance contracts having monetary value) will be subject to reporting. Many experts believe that the absence of such a minimum threshold creates a large number of problems for financial organizations. Undoubtedly, this increases the total amount of accounts that fall under the requirements for transfer of information, thereby creating additional costs for financial organizations, which is very expensive in conditions of limited material resources and time for the implementation of the Standard. It is also questionable how valuable information is about these accounts that do not pose a high risk of tax evasion. Establishment of a minimum size that falls under the CRS requirements accounts would save financial organizations from having to incur high costs for the sake of conducting unnecessary checks with questionable practical benefits.

According to the working group created within the framework of the Global Association of Financial Markets, it is necessary to enter in the CRS thresholds similar to those established in the FATCA. At the same time, it is suggested that,

following the example of FATCA, a provision be introduced that checks on accounts (both legal entities and individuals) are not performed until their balance or value exceeds 1000000 or 50000 USD respectively[2].

Separate attention in the framework of the study of the problems of the Standard for Automatic Exchange of Information appears to be necessary for the institution of the trust. Trusts make possible the separation of assets as soon as the settlor transfers them to a trustee to manage them for the benefit of beneficiaries, which may be predetermined or which could choose a trustee at its own discretion (i.e. discretionary beneficiaries, discretionary beneficiaries). Trusts are a serious threat to tax evasion and money laundering, especially because of their lack of transparency and lack of registration. Regardless of whether the trust is a mandatory relationship (contract) or a legal entity in accordance with the applicable law to it, CRS classifies trusts as entities.

CRS establishes a different degree of detail reporting, depending on which of the three possible types of trust is. First, a trust can be a "financial institution", if

(a) it is an investment company (i.e., receives the majority of the income from investing or trading in financial assets, for example, shares, futures, etc.) and

(b) if it is "managed" by another financial institution (for example, a bank).[1]

An exception are pension funds that are not required to provide information (Non-Reporting FI), even if the above two conditions are met. Another exception is the situation where the trustee of the trust is itself a financial organization that falls under the requirements of CRS (reporting FI) and therefore will be required to report information about the trust. This regulation is aimed at eliminating duplication of information provided. Trusts that are financial institutions (FI-trusts) must file accounts for holders of accounts that have a share in the trust or receive debt interest. The share of participation is held by the founder of the trust (settlor), mandatory beneficiaries who received payments in a calendar year, discretionary beneficiaries, as well as any other person who has effective control over the trust.

If the trust is not a financial institution, it can simply be the owner of a bank account. At the same time, it will be classified as a non-financial entity, which in turn

can be active and passive. A trust is considered a passive NFE if its assets and income are predominantly passive (for example, from interest, dividends, capital gains, etc.) Active NFEs are, for example, charitable trusts or trusts operating as if they were commercial companies.

Trusts that are passive NFE are subject to a "look through", that is, financial institutions must "look through" the trust to identify the persons controlling it: trustees, beneficiaries, trust protectors as well as other persons having control over the trust. It seems that this places a very high burden on financial institutions. Moreover, such a decision will have long-lasting consequences for the economy, as the attractiveness of trusts is significantly reduced. In the case of trusts that are active NFE, information is reported only at the level of the trust itself without identifying affiliated entities.

Much attention in the discussions of experts in the industry under consideration is given to the issue of the time frame for the implementation of CRS. The main message is that the goals of CRS will not be achieved if its introduction is carried out in the absence of relevant explanatory material (including those issued by the competent authorities of each participating jurisdiction) and sufficient time for financial institutions.

Developing countries, especially with lower-middle income, need to be able to increase their tax revenues in order to sustain their own development financially. Since, according to statistics, in many developing countries, the percentage of assets exported abroad exceeds the average level, the key to increasing tax revenues is precisely to ensure effective taxation of these foreign assets.

Within the automatic exchange of information, there is considerable variation: states have a number of acceptable options, among which they choose the most suitable. Among the options is present both the conclusion of the Multilateral Agreement (MCAA) and the modification of existing Agreements on the exchange of information. In this regard, some concern is the Model Protocol to the Tax Information Exchange Agreements, as it reveals the tendency of some states to choose the conclusion (or amendment) of bilateral agreements instead of using a

multilateral structure (in particular MCAA). At the same time, the latter option seems more rational in terms of saving resources and time, especially for developing countries.

Moreover, CRS implementation is impossible without the creation of four main components (implementation of reporting requirements and legal verification, creation of a legal basis for automatic information exchange, organization of necessary administrative and technical infrastructure, data protection). The implementation of these preliminary steps, without which the exchange of information cannot be started, is associated with significant financial costs, as well as with the need for expert knowledge in this field. This makes the application of CRS developing countries is very difficult. Only expert support from the OECD is not enough to fulfill this task. Therefore, this problem should also be taken into account.

One of the most urgent issues to date concerning the implementation of CRS is the lack of a well-developed coercion mechanism. However, CRS did not adopt the mechanism of FATCA according to which financial organizations are obliged to withhold tax equal to 30% from any "pass thru payment" carried out by the financial institution in favor of the "recalcitrant account holder" or in favor of a foreign financial organization that does not comply with the requirements of the law "On taxation of foreign accounts".

At the OECD level, there are still no recommendations for imposing collective sanctions, if the jurisdiction refuses to transfer information in one way or another fails to comply with CRS requirements. The enforced coercive measures (stopping automatic exchange of information) can only be valid if both states are really interested in receiving information.

The problem is that the offshore company is not fulfilling CRS requirements does not have negative consequences from what will not be, will receive information from another state (especially if it refers to developing ones), while for the latter information about own tax payers hiding assets in offshore is extremely necessary.

Other types of coercive measures are discussed in the scientific community, in particular the publication of reports (peer reviews) by the Global Forum with a

negative expert evaluation. However, the publication of CRS-based reports in principle entails, for the most part, political, not economic consequences (which, certainly, are a stronger lever in matters relating to the financial sphere).

Another problem related to off-shores relates to the possibility of acquiring fictitious residency certificates. As mentioned earlier, CRS is based on the principle that information about the bank account is sent to the state of which the owner of the account is a resident[1]. However, the latter's acquisition of a fictitious certificate of residency in the offshore will prevent the transfer of information to a country that is really interested in it. In other words, the information will be transferred to a "fictitious" jurisdiction that simply ignores it. Many offshore companies issue certificates of residency for the implementation of a certain investment or simply for a fixed fee. The solution of this problem is quite standard: it is necessary to create a "black list" of jurisdictions that provide residency for money and also oblige financial organizations to pay attention to whether the place of birth of the person is the same residence. If the certificate is issued by a jurisdiction that is on the "black list" then for CRS purposes the place of the previous residence of the person is taken into account.

The subject of much discussion was the fact that the United States did not sign and did not undertake to sign the CRS due to the fact that US has already been automatically exchanging information in accordance with the FATCA since 2015, and also conclude intergovernmental agreements (IGA) with other jurisdictions for this purpose.

For the adoption of the US commitment to CRS it is necessary to amend the legislation, as today it does not require requirements for US financial institutions to collect and provide certain types of information that foreign financial institutions are required to exchange in accordance with FATCA and CRS. However, in the current political situation, the approval of the relevant changes by the US Congress is rendered impossible.

Unwillingness or perhaps inability of the US to sign a CRS entails negative legal consequences which are as follows. According to the CRS competent

authorities participating in the CRS countries are required to publish a list of "participating jurisdictions". Financial organizations of countries absent in these lists will be considered "non-participating". Qualifications jurisdictions as "non participating" has a value in the context of determining passive non-financial organization, contained in Article VIII Part D section 8. These include investment companies that are residents of jurisdictions not using CRS, so they will apply the rules of "look through". In other words, CRS executing financial institutions will qualify as passive nonfinancial legal entities of all account holders that are investment companies managed by other financial institutions from "non-participating jurisdictions". This means that their controlling persons will be identified and information about them will be exchanged. This approach does not corresponded to Model 1 FATCA (on which CRS was generally based), where there is no requirement to "look through" managed investment companies as they are recognized by financial organizations.

It seems very likely that the United States will not participate in the automatic exchange of information. Therefore it is likely that US will not be recognized as a participating jurisdiction by most countries.

Thus, investment companies, including investment funds and trusts in the United States, will be treated as investment companies managed by other financial institutions. Therefore, US investment companies and funds can be regarded as passive NFE and accordingly will have to identify their controlling persons.

According to many practicing lawyers, recognizing the United States as a jurisdiction that does not participate in the CRS will lead to a "logistical nightmare" for the US stock and trust sector.

Thus, we can conclude that the mechanism of automatic exchange of tax and financial information is a multifaceted tool, so that it is unequivocal to say where its scope is sufficient and where excessive is difficult. Nevertheless, even now it can be noted that to improve the mechanism, it is necessary to pay close attention to a number of issues in which the short comings of the mechanism are clearly visible.

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