

**An analysis of treaties for the exchange of
information for tax purposes impacting the South
African retail sector in the Southern African
Development Community region**

- **J. Murray van Schalkwyk**

VSCJOH006

September 2014

Submitted in partial fulfilment for the degree of Master of Commerce specialising in
Taxation in the field of International Tax

Supervisor: Associate Professor Craig West, Department of Finance and Tax

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1. List of abbreviations

AEOI	Automatic Exchange of Information
ATAF	The African Tax Administration Forum
ATAF MMA	The African Tax Administration Forum Agreement on Mutual Assistance in Tax Matters
BEPS	Base Erosion and Profit Shifting
CRS	Common Reporting Standard
EOI	Exchange of information
EU	European Union
FATCA	Foreign Tax Compliance Act
MNEs	Multinational Enterprises
MTC	Model Tax Convention
OECD	The Organisation for Economic Cooperation and Development
OECD MMA	OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters
PAIA	Promotion of Access to Information Act
POPI	Protection of Personal Information Act
PRG	Peer Review Group
SADC	Southern African Development Community
SADC ATM	SADC Agreement on Assistance in Tax Matters
SARS	South African Revenue Service
TIN	Taxpayer Identification Number
UN	United Nations

2. The history of tax avoidance, tax evasion and the exchange of information (EOI)

Tax avoidance refers to the utilisation of legal methods of arranging the taxpayer's affairs in order to reduce the taxes due. Tax evasion refers to illegal methods of reducing taxes due by not complying with tax laws, including fraud, under declaration of income, and over declaration of expenses.

The Organisation for Economic Cooperation and Development (OECD) states that both tax evasion and avoidance deprive governments of revenues needed to foster growth, job creation and income distribution. Ever since the OECD Base Erosion and Profit Shifting Report (BEPS) was issued in February 2013, it is evident that the perceived line between tax evasion and tax avoidance is becoming blurred, and that tax avoidance is receiving more attention than before.

Multinationals such as SABMiller, Starbucks, Amazon, Google, General Electric, Nike and Apple have come under public scrutiny after an inspection by revenue authorities as to their effective tax rates realised across the jurisdictions in which they operate. The public perception of the morally correct amount of tax payable is, in many cases, detached from the real tax payable based on domestic legislation, taking into account the tax relief granted in both domestic law and double taxation conventions. The public has been angered at revelations that MNEs have created elaborate networks of subsidiaries that have the chief or subsidiary purposes to shift substantial profits to low-tax countries that are perceived to be tax havens, with little or no economic presence of the MNE in those countries. In the European context, countries with favourable tax regimes facilitating such structuring include Ireland, the Netherlands and Luxembourg. These countries have often been used in structures with the traditional tax haven islands such as Bermuda, the British Virgin Isles, Guernsey, and the Isle of Man.

In April 2014, Starbucks announced publically that it would move its European head office from the Netherlands to the UK in order to pay more taxes in the UK, where it has more than 800 shops (Reuters, 2014). This comes as a direct result of public scrutiny on the amount of tax paid in comparison with the underlying economic activity. This issue escalated to a governmental level, and the minimal tax paid by this MNE in the UK led to public boycotts of the stores and extensive debates in the British parliament.

In South Africa, the former Minister of Finance, Pravin Gordhan, highlighted the fact that tax evasion and aggressive tax avoidance are deemed to be major problems that undermined the fiscal sustainability of South Africa and other nations, amid an uncertain recovery from the 2008 recession (Business Day, 2013).

With the increase of economic activity across borders due to globalisation in the 21st century, as well as multinational entities (MNEs) and individuals transacting across borders while holding investments in financial institutions outside their countries of residence, governments are finding it increasingly difficult to enforce their tax laws. As a result they are implementing measures to ensure that their tax bases are not eroded. Traditionally, EOI has been used as a method to identify tax evasion.

Very little EOI between countries took place during the 19th and 20th centuries, as countries were reluctant to exchange tax information with another due to their tax administrations being too heterogeneous, informal and over-secretive. The first EOI treaty was entered into between Belgium and France in 1843.

The OECD began its work on harmful tax competition in the late 1990s, which led to the publication of a number of reports. The underlying theory was that a state could combat the use of harmful tax practices by its residents if that state had sufficient access to information.

3. Bilateral treaties in force and the effectiveness thereof for EOI

The UN, OECD and SADC model tax treaties (MTC's) are all used within SADC as a basis for the negotiation of actual bilateral treaties. Article 26 of these MTCs deals with EOI.

3.1 The change in Article 26 of the OECD MTCs

The wording in Article 26 in the OECD MTCs has changed over the years. The 2003 OECD MTC refers to the exchange of information that is “necessary”. The use of the term “necessary” poses some uncertainties for certain countries as the term is not defined in the 2003 OECD model. Furthermore, reference to the domestic tax laws of the contracting states to define the term (as required under Article 3) does not resolve the matter, as not all countries have a definition of the term contained in their domestic tax laws. States could apply other interpretation principles to define “necessary”, but it leaves the possibility open for different interpretations between different revenue authorities as to what is actually deemed to be “necessary” information to be exchanged. In every situation where there are different interpretations of “necessary” information, there is a hypothetical chance that relevant information exchange could be avoided. These different interpretations of “necessary” information in turn provided some valid protection for the SADC taxpayer, due to the fact that unnecessary but possibly relevant information would not have been exchanged.

The term “necessary” was amended in the 2005 OECD model to refer to the exchange of information that is “foreseeably relevant”. Thus, countries with bilateral treaties signed before 2005 have exchange of information clauses that are limited to the exchange of information that is “necessary” for specific taxes and sometimes only for the purposes of that specific tax treaty. This change was intended to extend the scope of information to be exchanged and provide for exchange of information in tax matters to the widest possible extent (OECD, 2010a: 398). It further provided that bank secrecy and similar rules relating to confidentiality could not be used to avoid the exchange of information, and provided that a state should be willing to use its information-gathering ability to obtain information solely for the purposes of exchange, even if that state had no domestic interest in the information for its own purposes. The change to “foreseeably relevant” was retained in the 2008 and 2010 versions of OECD MTC.

The 2010 OECD MTC commentary mentions the three methods of EOI, which are EOI on request, spontaneous EOI, and automatic EOI. In addition to these methods, the commentary describes the use of other techniques to obtain relevant information, such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information. The exchange of information is not limited only to residents of the contracting states, as stated in Article 26(1), which implies that information exchange may include particulars about non-residents. This may cover information about a third country's resident if it is foreseeably relevant to the requesting state's tax administration, even though such information may have little or no relevance to the third country resident's own tax position (Oguttu, 2014:4). According to the commentary of the 2010

OECD MTC, information may also be exchanged regarding other sensitive information relating to tax administration and compliance improvements, for example analysis and tax risk techniques or tax avoidance schemes. The information obtained should be treated with the necessary level of secrecy and confidentiality, similar to the way information is treated under the domestic laws of the requested state. Courts and other administrative bodies concerned with the assessment or collection of taxes are not permitted to disclose information that is not part of the proceedings, and a contracting party is only allowed such disclosure if allowed as a specific provision in the bilateral treaty.

The taxpayer is offered some protection of the information to be exchanged, where the contracting state is not obliged to supply information or to carry out administrative measures that are at a variance with its own or the other contracting state's domestic law and administrative practices. A contracting state can therefore not take advantage of the information system of the other state if this system is wider than its own, unless that contracting state willingly supplies such information.

Furthermore, in terms of the 2010 OECD MTC, the taxpayer is protected from the disclosure of "any trade, business, industrial, commercial or professional secret or trade process, or disclosure of information which would be contrary to public policy (*ordre public*)". Trade secrets should not be taken in too wide a sense (OECD, 2010a:405), and the disclosure of tax-related information (for instance segmented sales or customer information) would therefore be allowable. A request for information motivated by political, racial, religious persecution and information that constitutes a state secret, which if disclosed would be contrary to the vital interests and accepted customs of the requested state (*orde public*), would be disallowed.

Although the current tax treaty standard of exchanging information that is "foreseeably relevant" prevents fishing expeditions (OECD, 2010a:398), it nevertheless creates a hindrance to exchange of information, as it effectively implies that a country's tax authorities have to already know what they are looking for before they can ask for it (Oguttu, 2014:5). In many cases of EOI by request, the supplying tax authorities would not have all the relevant details readily available and would either limit the number of requests that can be made, or delegate the gathering of such information to a third party such as a bank, a taxpayer or a supplier to a taxpayer.

Legal professional privilege, which protects all communication between a professional legal adviser and his/her clients from being disclosed without permission, does not apply to documents or records delivered to an attorney or solicitor in an attempt to protect such documents or records from disclosure, which is required by law. In South Africa, SARS may be restricted to obtain information subject to legal privilege, but such privilege must be proven. (West & Roeleveld, 2013).

The 2010 OECD MTC Article 26 was incorporated into the 2011 SADC MTC with the only exception being the 2011 SADC model's choice of the word "agreement" in comparison to the 2010 OECD model's word "convention".

3.2 Bilateral treaties applicable to the SADC retail sector taxpayer, and their effectiveness for EOI

The exchange of information articles in bilateral treaties extends the scope of a country's domestic law in the sense that it gives powers that did not generally exist previously under domestic law to the contracting states to exchange information on tax matters based on the treaties (Oguttu, 2014:4). The effectiveness of such exchange is dependent on the availability of information, the access thereto by tax authorities, and the basis for exchange (OECD 2011:23).

Several bilateral treaties are in force between SADC member states. The treaties applicable to a South African retail sector taxpayer trading in the SADC region are listed in Appendix A. The exchange of information article in these tax treaties was compared to the 2011 SADC model. As TIEAs have not been concluded between the SADC states, no analysis was performed on the OECD TIEA model with relation to any concluded TIEAs.

Both the EOI articles in the 2013 protocol to the tax treaty between South Africa and Botswana and the 2013 South Africa-Mauritius treaty agree with the 2010 OECD MTC Article 26, both of which have been ratified in South Africa, but are not yet in force. These two treaties are the only ones containing the updated wording "foreseeably relevant", and which extend the scope of information to be exchanged to taxes of every kind.

The other SADC treaties inspected in Appendix 1 contain the older wording "necessary", as they were concluded long before the change to "foreseeably relevant" in the 2005 OECD MTC. The oldest treaty is the South Africa-Zambia treaty from 1956. The scope of the taxes to which the exchange of information applies in the other SADC treaties is in most cases limited to the taxes in the scope of the specific bilateral treaty and not to taxes of every kind.

Most SADC treaties that were inspected do not contain the provision for overriding bank secrecy, as set out in Article 26 of the 2005 OECD MTC and its later versions (Oguttu, 2014:5), and these treaties do not cater for the effective exchange of tax information held by financial institutions. In the case of South Africa, domestic law allows it to access and exchange information held by financial institutions, even though the requirements may not have been in the older bilateral treaties, and accordingly, no requests for such information have been declined by South Africa. (OECD 2013c:66). The impact of the prohibition of bank information requested from South Africa has therefore been limited.

The older bilateral SADC tax treaties are therefore not deemed to be effective for EOI, and need to be either renegotiated or protocols should be negotiated to include the current standards of exchange of information (Oguttu, 2014:5). Domestic laws in the SADC region will need to be amended in line with the 2010 OECD MTC Article 26 in order for contracting states to supply information that is allowable under all parties' domestic laws (including their domestic laws pertaining to bank secrecy, where the domestic law of the particular jurisdiction would otherwise disallow the exchange).

3.3 EOI deficiencies as identified by the Global Forum peer reviews

The Global Forum consists, at the time of writing, of 121 members, with four SADC countries represented, namely Botswana, Lesotho, Mauritius and South Africa. The OECD appointed the Global Forum in the 2000s as a continuation of its work on harmful tax competition and to coordinate the implementation of the internationally agreed standards of transparency and exchange of tax information. The Global Forum's mandate is to provide an inclusive forum for achieving high standards of transparency and exchange of information in a way that is equitable, and which permits fair competition among all countries (OECD, 2011:9). The ultimate goal of the Global Forum is to ensure that international standards of transparency and exchange of information are in place and operating effectively.

The standards of transparency and exchange of information formulated are:

- the exchange of “foreseeably relevant” information on request for the administration and enforcement of the domestic laws of a treaty partner;
- no restrictions on exchange of information because of banking secrecy or other domestic tax interest requirements;
- respect for taxpayers’ rights; and
- strict confidentiality with the exchange of information.

The Global Forum formed a peer review group (PRG) mechanism for the assessment of the effectiveness of the implementation of the international standards of transparency and exchange of information on tax matters (OECD 2011:35). The peer reviews, which began in 2010, are performed by assessment teams made up of representatives from Global Forum member jurisdictions and the Global Forum Secretariat. In the Southern African Development Community (SADC) region, the financial service centres are considered to be Mauritius and South Africa, and both fall within the scope of the Global Forum for peer reviews. The OECD has been encouraging developing countries to become members of the Global Forum. To become part of the Global Forum and undergo reviews, they must create the legal and administrative environment to comply with the OECD standards. This can be quite costly from the developing country's point of view, as it implies that resources have to be diverted from more pressing domestic tax concerns to training personnel to carry out the peer reviews (Oguttu, 2014:12).

The Global Forum's standards and the peer review reports have done little to strengthen the tax systems or the unveiling or curtailing of illicit financial flows from developing to developed countries. A study by Keen and Ligthart (Keen & Ligthart, 2006) on exchange of information by a number of developed countries in Europe showed that these countries exchanged information to fellow EU countries where their residents are known to migrate, but that they supplied a negligible amount of information to developing countries. Furthermore, it showed that the level of development of a country and physical distance between countries were major determinants of the intensity of information sharing.

3.3.1 Peer review of Botswana

Botswana was not an initial member of the Global Forum, but was identified as a relevant jurisdiction as a result of the establishment of the Botswana International Financial Service Centre (Botswana IFSC), which is intended to serve as another entry point for capital investment into Africa and capitalise on Botswana's reputation as one of the most stable democracies in the region as well as one of Africa's most vibrant economies (OECD, 2010b:7).

The Botswana Phase 1 peer review report notes that it cannot move to the Phase 2 review until it acts on the recommendations to improve its legal and regulatory framework. Certain steps have been taken, such as the ratification of the protocol to the South Africa-Botswana treaty (not yet in force), bringing the exchange of information article in line with both the 2010 OECD Model Tax Convention (2010 OECD MTC) and the 2011 South African Development Community Model Tax Convention (2011 SADC MTC), but some more work is required, especially in the area of the effective exchange of information.

Due to the fact that the Phase 2 review has not commenced, there is no data available regarding Botswana's timely responses to information exchange requests (OECD, 2010:50).

The executive summary of the Botswana Phase 1 shows serious deficiencies in its legal and regulatory framework, which undermines the effective EOI. Areas lacking are the identification of beneficial owners and trustees, bank secrecy, confidentiality rules, underlying document retention and insufficient EOI agreements. Botswana will need to amend its existing domestic laws to give effect to these deficiencies identified, specifically regarding the prohibition of the exchange of bank information and regarding the lack of a requirement to maintain underlying documentation in Botswana (OECD, 2010b:41).

3.3.2 Peer review of Lesotho

Lesotho joined the Global Forum in 2013, but has not undergone a peer review process as yet.

3.3.3 Peer review of Mauritius

Mauritius has undergone Phase 1 and Phase 2 reviews, and reflects an overall rating of "largely compliant" (OECD, 2013b:9). Areas identified as lacking are the transparency of ownership information for non-resident trusts as well as nominee shareholders (OECD, 2013b:8).

In only 5% of information cases requested from the Mauritian Revenue Authority, the response took longer than one year (OECD, 2013b: 84).

Mauritius continues to negotiate new double tax conventions (DTCs) and Tax Information Exchange Agreements (TIEAs). Older treaties applicable to the SADC retailer that do not meet the EOI requirements are currently under renegotiation, notably the South Africa-Mauritius DTC, which has been ratified in South Africa, but not in Mauritius, and the Malawi-Mauritius treaty, which is under negotiation.

3.3.4 Peer review of South Africa

South Africa has undergone a combined Phase 1 and Phase 2 review, and reflects favourable scores in all three review categories (Availability of Information, Access to Information, and Exchange of Information).

South Africa has a vast network of information exchange mechanisms, with more than 90 jurisdictions. Information can be exchanged under DTCs, TIEAs and the OECD Convention on Mutual Administrative Assistance in Tax Matters. South Africa is actively negotiating and renegotiating agreements, expanding its network even further (OECD 2013c:61).

Information exchange requests are actioned by SA in a timely manner, and only in 10% of the cases did the responses take more than 180 days (OECD 2013c:8).

Most of South Africa's existing DTCs were concluded before the update of the OECD MTC in 2005. Therefore they generally do not contain EOI provisions corresponding to Article 26(5), which was introduced at that update, but as noted earlier, as the domestic law permits the collection by the revenue authority of bank information, such an omission is of no significance.

4. The transition from bilateralism to multilateralism and similarities between multilateral instruments applicable to a South African retail taxpayer

Pistone (2014:3) argues that there is a transition from bilateralism to multilateralism in international taxation. The theme stems from the BEPS project, which is seen as a major step towards this transition. Such a transition will mean that nations will need to coordinate efforts, which can lead to the establishment of new global international tax law.

Many governments support the principles in the BEPS report, which contains contemporary international tax topics. One of the action points from the BEPS report is the development of a multilateral instrument, detailed as follows in action point 15:

“Analyse the tax and public international law issues related to the development of a multilateral instrument, to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS, and amend bilateral tax treaties. On the basis of this analysis, interested Parties will develop a multilateral instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution” (OECD 2013a:24).

This BEPS action point calls for the implementation of a multilateral instrument to increase the network of parties connected, and to facilitate administrative assistance for the exchange of information.

Baker (2013:371-373) notes a clear move from exchange of information on request to the automatic exchange of information as from the European summer of 2013, matching the above trends. The G8 Summit at Lough Erne issued its Declaration in June 2013, the first point of which stated that “tax authorities across the world should automatically share information to fight the scourge of tax evasion” (Prime Minister’s Office, 2013). In September 2013, the G20 Finance Ministers Meeting in Moscow reaffirmed the international commitment to move to the exchange of information on an automatic basis (Department of Finance, Canada, 2013).

Within the space of less than a decade, the international norm has moved first to the exchange of information on request and, from there, to automatic exchange of information (Baker, 2013:371-373).

Traditionally, the duty of confidentiality owed by tax officials was respected and the only exception was where specific authorisation is granted to exchange such confidential information. In recent times, this principle has been subject to an increase in the exceptions, as multiple instruments now provide a basis for such exchanges between governments. The fact that there have been exceptions does however not change the original duty of taxpayer confidentiality.

Bilateralism with respect to mutual assistance in tax matters, as preserved mostly in articles 26 and 27 of DTCs, is gradually becoming obsolete (Pistone, 2014:3). As the network of countries complying with internationally agreed standards for fiscal

transparency has increased, a jurisdiction solely relying on bilateral treaties will be exposed to some opposition (Pistone 2014:3).

As is demonstrated in Appendix B, the exchange of information articles in the SADC bilateral treaties inspected echo similar clauses as in the relevant multilateral treaties, and are becoming homogeneous as to their wording and scope (Pistone, 2014:4). This is mainly due to the fact that the OECD model agreement is used as the basis at the time of the conclusion of treaties.

Most developed countries have the conditions in place that can ensure automatic exchange of information, but this is not the case in most developing countries, which makes automatic exchange of information between some developed and developing countries difficult (Oguttu, 2014:6). Information exchange between developing countries within the SADC region will be even more difficult. In all instances it requires heavy dependency on technological, computing and administrative capacity, which include: registries of beneficial ownerships and/or beneficiaries, comprehensive taxpayer identification numbers (TINs), and mandatory reporting of income payments (Oguttu, 2014:6).

4.1 Automatic exchange as the new global standard of information sharing

The main success factors for an effective automatic exchange of financial information are:

- a common standard on information reporting, due diligence and exchange of information;
- a legal and operational basis for the exchange of information; and
- common or compatible technical solutions (OECD, 2014b:7).

Due to the perceived ineffectiveness of traditional bilateral treaties in curbing tax evasion, the move globally is both towards automatic exchange and multilateralism so as to achieve a rapid increase in the frequency of exchange, and to expand the worldwide treaty network, which will facilitate a coordinated approach to information exchange.

The United States has signed inter-governmental agreements (IGAs) (facilitating the United States Foreign Tax Compliance Act (FATCA) requirements) with both South Africa and Mauritius in the SADC region, which will affect the financial institutions in both South Africa and Mauritius that are US citizen account or policy holders. The aim of these IGAs is to improve international tax compliance with respect to US citizens holding offshore bank accounts, and requires the automatic exchange of bank information from financial institutions to their revenue authorities, and onwards to the USA. The IGAs are already enacted and in use in both South Africa and Mauritius. The US Treasury will now view South African and Mauritian financial institutions as being generally compliant with FATCA (SARS, 2014b).

The relevant financial institutions in both South Africa and Mauritius will report the required information to the United States under the legal framework provided by the

double tax agreements between South Africa and the United States and South Africa and Mauritius respectively.

The following multilateral treaties applicable to the SADC retail taxpayer are substantially similar to one another. A detailed analysis is performed in Appendix C.

4.1.1 SADC Agreement on Assistance in Tax Matters (2012 SADC ATM)

The SADC ATM has been signed by nine SADC member countries during 2012, but only signed by South Africa in 2013. While ratified in South Africa, the agreement is not yet in force. The agreement is mainly aligned with the wording in the African Tax Administration Forum (ATAF) Agreement on Mutual Assistance in Tax Matters (ATAF MMA), signed by South Africa on 17 January 2014 and has subsequently been ratified but is not yet in force.

Notable differences between the two agreements are the scope of the taxes covered, and the quorum requirements to enact or amend the agreements. The scope of taxes covered in the SADC excludes customs duties, as the Southern African Customs Union (SACU) member countries are also members of the SADC and are exempt from customs duties for movement of goods within the SACU.

The 2012 SADC ATM excludes custom duties in the scope of taxes covered and the revenue claims in the assistance in collection article. This is due to the fact that SADC has earmarked separate projects and agreements for the establishment of a SADC customs union and the relating exchange of customs information.

The SADC ATM mentions that the language to respond to requests should be mutually agreed on by the parties.

The 2012 SADC ATM contains the additional requirement imposed on the Executive Secretary to register the agreement with the United Nations, the Commission of the African Union and such other organisations as the Council may determine.

In addition, the 2012 SADC ATM requires a two-third majority for any amendments to the agreement.

4.1.2 The African Tax Administration Forum (ATAF) Agreement on Mutual Assistance in Tax Matters (ATAF MMA)

Information received under the ATAF MMA contains a slightly wider use than the 2012 SADC ATM, allowing the Requesting Party to use the information for other purposes if allowed under the laws of both Parties, and the Competent Authority of the Requested Party authorises such use.

Any amendments to the ATAF MMA are allowed only by mutual agreement of all parties.

4.1.3 OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA)

The OECD MMA was gazetted in South Africa on 21 February 2014 and entered into force on 1 March 2014. The MMA agrees in most respects with Article 26 of the 2010 OECD MTC, with some added details. The scope of taxes covered in Article 26, which covers taxes of every kind, is wider than the specific taxes mentioned in the OECD MMA and the SADC ATM, and therefore Article 26 theoretically also includes customs duties, as the ATAF MMA. The scope of persons covered is also different, in that the OECD MMA applies to all parties that are residents or nationals of any of the contracting States. The SADC ATM only applies to SADC members who signed the agreement (currently nine SADC members). Article 26 of the concluded treaties listed in Appendix A will only apply to the two Contracting parties in the bilateral treaty.

The wording “automatic exchange” and “spontaneous exchange” are not mentioned in Article 26 of the 2010 OECD MTC, but it is implied as the obligation rests on contracting parties to exchange foreseeably relevant information on a periodic basis, or when it is obtained. The OECD MMA further requires that each party take the necessary measures to implement systems and procedures in order to gather and transmit such information to each other.

The OECD MMA provides for all forms of administrative cooperation, including simultaneous tax examinations, which can take place at the request of any State, with the proper notification procedures. The SADC ATM allows simultaneous examinations abroad, but requires the Requested Party to inform the taxpayers concerned in advance of the details of the examination. Article 26 or any other article in the SADC MTC does not contain any details of simultaneous tax examinations.

Information received under the OECD MMA contains a slightly wider use, whereby information received by a Requesting Party may be used for other purposes when it is permitted under the laws of the Supplying Party, and the Competent Authority of the Supplying Party authorises such use.

The OECD MMA mentions that requests for assistance and answers thereto shall be drawn up in one of the official languages of the OECD and of the Council of Europe or in any other language agreed bilaterally between the Contracting States concerned. Article 26 or 27 of the 2010 OECD MTC makes no mention of languages in the article itself, but the OECD commentary on Article 27 paragraph 1.7 suggests that information provided should be translated in a language that was mutually agreed on.

The OECD MMA contains strict rules on confidentiality and proper use of information, and permits automatic exchange of information. One of its main advantages is its global reach (OECD, 2014b:7). Automatic exchange under the OECD MMA requires a separate agreement between the competent authorities of the parties, which can be entered into by two or more parties, thus allowing for a single agreement with either two or more parties (OECD, 2014b:8).

Although there has been an increase in the number of countries that have signed the OECD MMA, significant work in administrative capacity building is still required for many developing countries, before they can be admitted as parties to the OECD MMA (Oguttu, 2014:14).

Of all the multilateral instruments applicable to the SADC region, the OECD MMA provides the most detailed provisions of automatic exchange and administrative cooperation for revenue authorities. South Africa is currently the only SADC member that is a signatory to the OECD MMA. Other SADC countries can choose to enter into multilateral treaties to include the latest standards for the effective exchange of information, thereby expanding the network of treaty partners, which will facilitate effective exchange of information.

5. Potential impact of exchange of information treaties and relevant reports on a SADC retailer and SADC financial institutions

5.1 Infringement of a taxpayers' rights

Pistone (2014:5) argues that the focus of revenue authorities should remain on tax evaders, and should not turn into a disproportionate bonfire of all basic values embedded in customary international law. He mentions that the increased relevance of automatic exchange of information in cross-border tax matters should lead the scientific community to increase efforts to identify minimal standards and best practices for the protection of taxpayers' rights.

South Africa has a modern constitution that entered into effect in 1997, as does the other countries within SADC where the retail taxpayer trades (Angola, Namibia, Botswana, Swaziland, Lesotho, Mozambique, DRC, Malawi, Madagascar, Mauritius and Zambia). All these constitutions afford certain basic rights to the citizens of SADC.

The SADC Tribunal seated in Windhoek, Namibia, was inaugurated in 2005, and was a court and the highest policy institution of SADC. During the 2012 SADC summit, it was resolved to limit the jurisdiction of the Tribunal to "disputes between member states". This meant that both individuals and companies are barred from bringing cases to the Tribunal. Until 2012, only individuals had approached the Tribunal. SADC has since disbanded the Tribunal.

A taxpayer operating in SADC would therefore have to pursue any potential infringement of rights using the correct constitutional avenues within each SADC country.

5.1.1 Rights to privacy, confidentiality and prevention to possible leakages

According to the South African Constitution, everyone has the right to privacy, which includes the right not to have:

- their person or home searched;
- their property searched;
- their possessions seized; or
- the privacy of their communications infringed (Constitution of the Republic of South Africa, 1996: Chapter 2, Section 14(d)).

Violations of a person's privacy have also been laid down in case law (*De Beers Holdings (Pty) Ltd. vs. CIR, 1986:1SA 8A*). In its simplest form, the right to privacy includes the right to be free from intrusion and interference by the state and others in one's personal life (*Chaskalson et al, 1994:18-1*).

The Protection of Personal Information Act (POPI) has been signed into law in South Africa, but the effective date for all aspects has not yet been gazetted (some were made effective from 11 April 2014). It will govern the acquisition and storage of personal

information, and emphasises security, integrity and confidentiality of personal information. As such, entities need to implement reasonable, appropriate, technical and organisational measures to protect personal information, and to guarantee that the information gathered is used solely for its intended purpose. Information may never be sold to third parties.

If information is provided to SARS under any tax act, it should always be treated in confidence, and should never be disclosed to third parties or used for purposes other than for tax. Taxpayers need to ensure they are tax compliant by registering and making full and proper disclosure of their income in the knowledge that the information disclosed by them is safeguarded in South Africa based on the secrecy provisions.

The Constitutional right of access to information gives the assurance that third parties cannot access taxpayer information. Such protection is complemented by the compulsory protection of SARS's records by the Promotion of Access to Information Act (PAIA) Section 35, and further reinforced in case law wherein stringent requirements are to be met before courts will order the disclosure of tax information to third parties. These requirements have now mostly been amended in the PAIA Act. Where the general public benefit derived from the lawful disclosure of relevant information outweighs concerns about individuals' privacy, specific disclosure provisions may be allowed.

There are certain allowable exceptions to the obligation to protect taxpayer information, because information collected by revenue authorities could be fundamental to the proper functioning of other arms of government, such as criminal investigations, or the prevention of tax avoidance and tax evasion. In certain cases taxpayer information could be important to criminal investigations, and it would then be in the best interest of the public that the information is disclosed to law enforcement agencies within certain limits. This will create the possibility for bilateral information sharing between revenue authorities and law enforcement agencies.

The South African Constitution contains a general limitation clause in Section 36, which limits certain rights in the Bill of Rights in terms of law of general application if those limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (Constitution of the Republic of South Africa, 1996: Chapter 2, Section 36). Any such limitation must therefore be reasonable and may only be made with good cause, and should also be less restrictive. Information may therefore only be disclosed under this limitation clause if it is considered to be of benefit to a democratic society in terms of human dignity, equality and freedom.

The OECD elaborates on the rights to privacy and confidentiality, particularly regarding tax administration. The right to privacy is at its core the protection against unlawful or unreasonable interference in private life, such as the unreasonable search of homes and retrieval of information that is not necessary to determine the correct amount of tax due (OECD, 2003:5). The right to confidentiality may be derived from the general right to privacy, as demonstrated in a European Commission on Human Rights case (Lunvall vs. Sweden, 1985), where the court ruled that the general publication of tax information was an interference with the right to a private life. Confidentiality is the assurance that tax information will only be used for the purposes that are specified in tax legislation (OECD 2003:5).

The majority of treaties and exchange of information instruments contain strict provisions that should ensure that the exchanged information is kept confidential. These treaties limit the persons to whom the information can be disclosed, and restricts the purposes for which the information may be used. The rights of the taxpayer in respect of exchange of information are always governed by the domestic laws of the exchanging states. The domestic laws of the state in which the information has its origin are decisive for the retrieval and disclosure thereof to the other state. Upon receipt of such information, the domestic laws of the recipient state will then be decisive on how the information is used and to whom it may be disclosed.

The OECD Guide on Confidentiality, *Keeping it Safe* (OECD, 2012), sets out best practices related to confidentiality and provides some practical guidance on how to ensure an adequate level of protection. Before entering into an agreement to exchange information automatically with another jurisdiction, it is essential that the receiving jurisdiction has the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received and that such information is used only for the purposes specified in the instrument.

In developing countries the introduction of automatic exchange could pose a problem since their systems may be prone to leakages, by means of technical failure or human corruption.

Exchanged information leaked to the media may lead to a serious reputation risk for a taxpayer, especially in the case of incomplete or inaccurate information, where the taxpayer had no opportunity to amend the errors. Tax strategy has evolved from being isolated tax-related matters to what, in essence, is an area that could pose a major reputational risk to a company.

The risk of leakage and unfavourable media coverage could drive taxpayers to assess their offshore structures, within the context of a sustainable corporate policy as well as the company's public image and reputation, which could be damaged. Of key importance is the existence of adequate substance and commercial activity within a region, appropriate transfer prices, sufficient underlying transfer pricing documentation, tax rulings, and business rationale justifying the existence of these offshore structures. The taxpayer would also consider using the existing voluntary disclosure programmes (VDPs) offered by revenue authorities in cases where any of the aforementioned items cannot be substantiated or justified.

5.1.2 Right to just administrative action

The Constitution (Constitution of the Republic of South Africa, 1996: Chapter 2, Section 33) awards the right to just administrative action on taxpayers in the following terms:

“(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative actions has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must:

- provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- promote an efficient administration.”

The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA) gives effect to the right to administrative justice. Actions taken by tax administration that may materially and adversely affect taxpayer rights must, in the absence of exceptions provided in PAJA, comply with the following fairness requirements as stipulated in Section 3:

- adequate prior notice of intended administrative action;
- a prior hearing and a reasonable opportunity to make representations before a decision is taken;
- clear grounds for a decision;
- adequate notice of any right of review or internal appeal, where applicable; and
- adequate notice of the right to request reasons for the decision.

The right to administrative action entails that both parties' sides must be heard when a dispute arises. The right further entails that SARS will act in accordance with its rulings and notes based on the doctrine of legitimate expectations (PAJA, 2000:Section3).

SARS has specific provisions that allow it to deviate from the fairness requirements, such as prior hearing and prior notice, in any of the following circumstances:

- where such departure is reasonable and justifiable in the circumstances of a specific matter; and
- where SARS is authorised by the empowering provisions to follow procedures that are fair, but different from the listed fairness requirements, for instance where no prior notice of an application for civil judgement for the recovery of tax is required if SARS is satisfied that giving notice would prejudice the collection of tax.

The PAJA ensures that any unreasonable exercise of a power or performance of a function is properly reviewed.

5.1.3 Right to access to information, and the rectification thereof

Another fundamental right that is contained in both the Constitution¹ and PAIA is the right to access to information.

The Constitution of the Republic of South Africa, 1996, Chapter 2, Section 32 reads:

“Everyone has the right of access to:

- any information held by the state; and
- any information that is held by another person and that is required for the exercise or protection of any rights.”

National legislation must be enacted, and may provide for reasonable measures to alleviate the administrative and financial burden on the state. The right to access information is applicable if the taxpayer requires such information in order to protect or exercise any right under the Bill of Rights.

The PAIA contains a listing of specific information that is allowed to be requested from the Commissioner, as well as the necessary procedures to follow to obtain it. Examples of taxpayer information that could be requested include bill of entries, tax returns, assessments, declarations, financial statements, other taxpayer information collected from various sources, and evaluative records.

The PAIA manual (SARS, 2000) contains the categories of requests for access to information that will be rejected:

- Mandatory protection of privacy of a third party who is a natural person
- Mandatory protection of certain records of SARS
- Mandatory protection of commercial information of a third party
- Mandatory protection of certain confidential information and protection of certain other confidential information of a third party
- Mandatory protection of safety of individuals and protection of property
- Mandatory protection of police dockets in bail proceedings and protection of law enforcement and legal proceedings
- Mandatory protection of records privileged from production in legal proceedings
- Defence, security and international relations of the Republic
- Economic interests and financial welfare of the Republic and commercial activities of public bodies
- Mandatory protection of research information of a third party and protection of research information of a public body
- Operations of public bodies
- Manifestly frivolous or vexatious requests or substantial and unreasonable diversion of resources

If a taxpayer does not receive a response about a request for information within 30 days, he may appeal within 60 days (The Promotion of Access to Information Act, 2000: Section 22(1) and 74).

Public bodies are under no obligation to grant the general public access to information, but such bodies need to produce a PAIA manual that should be accessible to the public.

SARS has the right to refuse a request for access to information held by them (PAIA: Section 35) for enforcing legislation concerning the collection of revenue, as defined in Section 1 of the SARS Act, 1997.

Regarding the right to request information works in tandem with the right to administrative justice contained, De Waal et al (2001:521) write:

“The principal purpose of furnishing reasons is to justify the administrative action that has been taken. This is a different purpose to that of providing the information on which the administrative action is based.”

Under the PAIA there may be cases where the Commissioner denies a taxpayer’s request for information. In such circumstances the internal appeal procedure should be followed, or the taxpayer may proceed to the court (PAIA: Section 35) to secure the release of the required information.

Croome (2010:202) states that other democratic countries do not commonly deny access to records on the grounds contained in the PAIA. Taxpayers could argue that the authorities could achieve their objectives with less draconian methods than denying access to records, but they are unlikely to succeed with these arguments, proving that the fundamental right in Section 32 of the Constitution was undermined, referring to the limitation of rights contained in Section 36 of the Constitution. He further proposes that legislature should amend the PAIA to increase the minimum levels of information that public bodies should publish, such as internal policy manuals.

Where information is exchanged between revenue authorities and the taxpayer is not informed of such exchange, there is no way for the taxpayer to check the validity and accuracy of such information.

It is therefore imperative that taxpayers verify all information submitted and check on a periodic basis if the information submitted has been recorded accurately.

It is possible to amend incorrect tax returns in South Africa via electronic filing without the requirement for a formal objection and appeal process. If no original assessment has been made, SARS allows the submission of an amended tax return.

The OECD MMA contains the obligation of a party that received information to advise the party that has provided the information if such information received about a person’s tax affairs appears to be in conflict with information already in its possession. This obligation was also included in the Model Competent Authority Agreement (OECD 2014b:26) and contains the obligation in Section 4 for a Competent Authority to notify the other Competent Authority when the first-mentioned Competent Authority has reason to believe that an error may have led to incorrect or incomplete information reporting or there is non-compliance by a Reporting Financial Institution with the applicable reporting requirements and due diligence procedures that are consistent with the Annex (OECD, 2014b:26).

This obligation affords some comfort to the taxpayer that errors and omissions will be identified and addressed on a timely basis.

5.1.4 Right to access to the courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum (PAIA, Section 34). Aggrieved taxpayers therefore have the right to approach a court if they are of the opinion that the powers afforded to SARS unreasonably and unjustifiably limit their Constitutional rights (Croome & Olivier, 2010:10). Section 34 of the Constitution will apply in cases where a taxpayer seeks to challenge the Constitutional validity of a provision in a fiscal statute or commence review proceedings against the Commission, based on decisions made by his officials (Croome, 2010:255).

A taxpayer has a right to a fair hearing (*Pharmaceutical Society of SA v Minister of Health; New Clicks SA (Pty) Ltd v Tshabalala-Msimang*, 2005). The applicant should prove that a Constitutional right has been limited (Woolman, 2007:34), which entails that the specific situation should be shown to fall under the ambit of a particular Constitutional right, and that the right or practice he or she wishes to challenge impedes the exercise of the protected activity (Woolman, 2007:34). The impeding practice must be in terms of law of general application, for which the following four features need to be identified: parity of treatment, non-arbitrariness, accessibility and clarity (Woolman: 2007:34).

The court will continue to the next stage of the analysis when the taxpayer proves that certain practices or procedure of SARS are impeding a taxpayer's Constitutional rights. The court will then inspect whether the limitation is reasonable and justifiable as contained in Section 36 of the Constitution. Section 36 states that:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

2. Except as provided in Subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights. If it is found to be a reasonable and justifiable limitation, the impediment will be permitted, and if not, the practice will be deemed unconstitutional.

The Constitution will not ensure that all litigants are protected against incorrect decisions, but litigants are entitled to the fairness and not the correctness of the court proceedings (Cheadle, Davis & Weaving, 2002:622). To summarise, Section 34 entrenches the principles of natural justice in respect of court procedures, and also with regard to appropriate other tribunals.

The Superior Courts Act, 2013 (Act No. 10 of 2013) restructured and reorganised the court systems and the various High Courts into a single High Court of South Africa by consolidating and rationalising the laws governing the superior courts (the Constitutional Court, the Supreme Court of Appeal and the High Court). A division of the High Court is now situated in each South African province. It also altered the administration and financial management of the courts. The Act came into force on 23 August 2013, and is associated with the Constitution Seventeenth Amendment Act of 2012.

In OECD member countries aggrieved taxpayers have to resort to a hierarchical range of appeals procedures that will enable them to contest the merits of a tax assessment. The description of country practices in Part IV shows that normally an appeal will first be lodged with an administrative tribunal, in some cases consisting of lawyers and experts; in others of specifically designated tax officials only. Taxpayers in the OECD may challenge tax assessments and administrative rulings issued to the taxpayer (Venter, 2000:12).

5.1.5 Rights to be notified

The right to be informed is not a separate constitutional right in South Africa, but a taxpayer is expected to have a right to be informed and notified regarding information held by the state concerning them in conformity with Article 32 of the Constitution, as discussed in 4.1.3.

The commentary to the OECD MTC mentions that certain countries are required by law to notify their taxpayers who are subject to an enquiry prior to the release of that information to another country. Such notification procedures may alleviate common mistakes, for instance a taxpayer whose identity is mistaken, as well as facilitate information exchange by allowing taxpayers who are notified to cooperate voluntarily with the tax authorities in the requesting State.

Notification procedures causing undue delays may not be applied in a manner that would undermine efforts of a requesting State in the prevention of the tax avoidance or tax evasion.

Automatic exchange of information involves many taxpayers and it would be unrealistic to grant all taxpayers proper notification rights as well as the right to object. However, in the case of spontaneous exchange or exchange on request, a specific taxpayer is identified, and in such situations there seems to be no reason why taxpayers should not be given notification and the right to object. In Germany the right of a taxpayer to be heard concerning information to be given is specifically set out in Abgabenordnung (Baker & Groenhagen, 2001:43).

Revenue authorities may inform their residents or nationals before transmitting information concerning them in accordance with Article 4(3) of the 2011 Convention on

Mutual Administrative Assistance in Tax Matters. This gives any of the parties the option by means of a declaration to be addressed to one of the depositories, and should be in accordance with the requirements in the party's domestic legislation.

None of the inspected SADC countries have a legal requirement for prior notification of taxpayers. This is also highlighted in the Global Forum Peer Review reports of Botswana (OECD, 2010b:35), South Africa (OECD, 2013c:52) and Mauritius (OECD, 2013b:62).

The peer review standards advocate that prior notifications can unduly delay the exchange of information, and the right of the taxpayer to be informed is therefore not recognised.

The only cases where prior notification is mentioned are in the multilateral treaties where the SADC ATM allows simultaneous examinations abroad, but requires the Requested party to inform the taxpayers concerned in advance of the details of the examination.

5.2 Additional investment in IT systems, secure data storage, sufficient Internet bandwidth and a global standard of reporting information

With regard to information received from taxpayers in digital form, revenue authorities will have to deal with the collection, storage, processing (due diligence) and onward transmission of such big datasets.

Information will need to be validated and subjected to due diligence procedures to ensure that accurate information is transmitted. The speed, availability and accessibility of the Internet in the SADC region could pose a problem, and sufficient work-around strategies should be put into place.

The taxpayer should always ensure that all data agrees with the underlying accounting records, and validate such information before completing and transmitting a tax return or a form requesting certain tax information. The information should also be validated against previously submitted information to verify its accuracy.

5.3 Adherence to the global standards of reporting of tax information

Action point 13 of the BEPS report, calls for the development of a country-by-country report, which would require the SADC taxpayer to report segmental information at a country level to the relevant revenue authorities as part of each country's required transfer pricing documentation. The country-by-country report will require information on the global allocation of income, economic activity and taxes paid, and this report will be exchanged between revenue authorities. The SADC retail taxpayer will therefore need to ensure that sufficient evidence is retained to substantiate the taxes paid in relation to the economic activity in each country.

The existence of multiple instruments for the exchange of information creates a series of problems. The information to be exchanged under the different instruments is not always identical, and the modalities of exchange, for example electronic forms that have

been developed, are not identical. An important task will therefore be for revenue authorities to develop common standard and common modalities for information exchange in the most effective form (Baker, 2013:372).

The OECD's Common Reporting Standard (CRS), released on 13 February 2014, calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. A total of 42 countries have committed to adopting the CRS.

The CRS will address the requirements that are similar to those laid down by FATCA, and describes the types of financial account information to be exchanged, identifies the financial institutions in scope, and the common due diligence procedures to be followed. The expectation is that early adopters of the CRS will undertake the necessary due diligence obligations and will start reporting in 2017.

Implementation of the CRS standard will require the translation thereof into domestic laws of all the regions, as well as the signing of a competent authority agreement between revenue authorities based on the agreement model included in the CRS.

The South African Revenue Service (SARS) is currently developing the Business Requirement Specification (BRS) as South Africa is a signatory of the OECD MMA and an IGA (FATCA-compliant agreement). This will entail the implementation of the necessary data standards to the existing IT systems in order to facilitate compatibility of the automatic exchange of information between countries.

The data sets need to be uniform and must comply with the correct Extensible Markup Language (XML) standards. The electronic transfer of financial data based on XML is becoming a standard for information exchange in most developed countries. The CRS XML Schema is designed to be used for the automatic exchange of financial account information between Competent Authorities (OECD 2014b:231). This XML standard is further included in the Model Competent Authority Agreement in the OECD CRS in Section 3, which orders Competent Authorities to automatically exchange information as agreed in Section 2 of the agreement in XML.

The initial focus is on the reporting of interest, dividends, account balances, income from certain insurance products, sales proceeds and other income from financial assets.

This will have a major effect on financial institutions in South Africa and Mauritius, who will need to comply with the reporting requirements shifted on them by their respective revenue authorities. It could potentially also increase the compliance burden that could be shifted to the SADC retail taxpayer to periodically complete the required reporting in the correct XML format.

5.4 Retention of supporting documents

It is essential for a taxpayer operating in different countries to retain supporting documents of accounting records in the required official language, including detailed bank statements.

Requests for submission of supporting documents may be made by a revenue authority, as an aftermath of a request for information from another revenue authority, if the former does not have such information in its possession.

When failing to submit supporting documents requested by a revenue authority, a taxpayer may incur penalties and fines.

As the volume of transactions is ever increasing, electronic retention of documents will become vital for taxpayers. This will ensure that taxpayers have the ability to easily search and supply information that is requested. The retention of documents should be in line with the domestic law requirements. The retention policy of a company should always be to retain supporting documents for the periods prescribed by law, and it may be extended based on a taxpayer's own tax policy.

Currently there are discrepancies regarding document retention within the multilateral convention, with signatories to the convention having different document retention requirements in their own domestic laws.

The retailer should therefore take a cautious and prudent approach, and ensure that documents are retained for the maximum possible period in the multiple territories that it operates in.

5.5 Reporting third-party information and the collection of outstanding taxes

Under domestic legislation in South Africa, outstanding taxes can be collected from employers or from retirement funds, and if the outstanding taxes are not paid over, the parties can become personally liable for such outstanding taxes. Estate agents and lawyers are required by law to submit third-party tax reports bi-annually, detailing all the third-party financial transactions that have passed through their accounting records.

In the Van Kets court case (CSARS v. Werner van Kets, 2011), information was requested by the Australian Tax Office (ATO) from SARS regarding a South African third party and an Australian tax resident and their links with a non-resident company (RLCF). The court held that such information had to be exchanged by Van Kets even though it was information regarding a third party. This demonstrated the effectiveness of information exchange mandated by the tax treaty between South Africa and Australia.

The court maintained that in South Africa, Section 108 of the Income Tax Act 1962, read together with Section 231(2) to (4) of the Constitution of the Republic of South Africa, provides that once a tax treaty is signed by the national executive and brought into effect by means of a notice in the *Government Gazette*, it forms part of the Income Tax Act 1962 and ranks equally with domestic law. Therefore, the tax treaty provisions

should be merged with the Income Tax Act 1962 and read as a whole. Consequently, the domestic law articles had to be interpreted so as to be compatible with the provisions of the tax treaty.

Where outstanding taxes are due, a revenue authority may request the assistance of another revenue authority for the collection of such taxes. In the case of South Africa it is therefore possible that SARS could contact a taxpayer registered in South Africa for the settlement of outstanding taxes payable to a foreign revenue authority.

5.6 Increased frequency of exchange of information instances

The increase in the automatic flow of taxpayer information between revenue authorities provides a very powerful tool in combating tax evasion (Baker, 2013:371). It could in turn lead to additional periodic or ad hoc requests from revenue authorities to taxpayers to report and clarify additional information, or request missing or incomplete information.

Revenue authorities will need to schedule and dedicate resources in order to deal with each form of exchange of information. A possibility could arise for the outsourcing of such exchange requests to third-party service providers, but this will have some additional cost implications that exchanging parties will need to agree upon in advance.

In a setting where a system of automatic exchange is agreed upon between a developed country and developing country, the latter may insist on the inclusion of tax information that is not relevant to the developing country, and may not have been available in the first instance. In such cases tax authorities that do have such details of a particular information exchange case on hand will then be forced to request the missing information from the taxpayers or from suppliers to taxpayers.

In practise there have been cases where value added taxation supplier data was requested by the Mauritian Revenue Authority from the SADC retail taxpayer, which was used to check the completeness of the output VAT declaration of the supplier.

The increase in the frequency of exchange of information requests will lead to an additional compliance burden on the SADC retail taxpayer, for which additional resources will be required to obtain such information, and the checking thereof against previously filed tax information.

5.7 Tax treaties and reporting different languages

English may not be an official language in certain of the SADC countries where the taxpayer is trading. This is the case in Angola and Mozambique, where the official language is Portuguese, and in Madagascar and the Democratic Republic of the Congo, where one of the official languages is French. The monthly and annual tax returns are required to be completed in Portuguese and French.

The SADC MTC does not contain a specific clause about authentic languages. When treaties are entered into between parties, and authenticated in two or more languages, the following text normally appears at the bottom of the treaty, for instance in the case of the 2007 South Africa-Mozambique treaty: “done in duplicate at Pretoria, this 18th day

of September 2007, in the English and Portuguese languages, both texts being equally authentic”.

Disputes can arise regarding the different interpretations of the treaties in each of the different languages. This is for instance the case in the 2007 South-Africa Mozambique treaty where there is a difference in interpretation of the Portuguese text regarding royalties when compared to the English text of the same article.

Article 33 of the Vienna Convention on the Law of Treaties, which is authoritative on international tax regarding languages, states that in the first instance the text should be treated as equally authoritative in each language, unless the treaty provides or the parties agree otherwise that in a case of divergence a particular text shall prevail. It further states that when a comparison of the authentic texts discloses a different meaning, firstly that articles 31 and 32 should be applied to interpret the treaty in good faith and in accordance with the ordinary meaning of the terms, taking into account supplementary texts and agreements, which does not leave the meanings of it ambiguous, obscure, absurd or unreasonable. If this however does not remove the ambiguity, the meaning that best reconciles the texts, having regard to the objects and purpose of the treaty, shall be adopted. In the case of ambiguity, where there is a possibility of reconciling the two interpretations, one must be interpreted by the other, which in practice involves the search for a shared or common meaning in the two enactments (Maisto, 2005:45).

Official versions of the OECD MTC are available in English and French, and a translated copy in other languages such as Portuguese, and will be the first starting point to uncover the true contextual meanings of treaties in such languages.

Another foreseeable language problem would be in the case of the exchange of information from one revenue authority to another where the supplied information is in English and the requested information is in either Portuguese or French, or vice versa, in the case of dealings with Angola, Mozambique, the DRC or Madagascar.

This will ultimately lead to additional time and costs in order to translate the information into the required language. It is not clear on whom this additional translation and cost burden will fall, as it could be the applicant state, or the requested state, or in extreme case the taxpayer. It could be argued that this will entail additional costs, and based on the OECD MMA and the SADC ATM such additional costs could be seen as extraordinary costs that should be borne by the Applicant State, unless otherwise agreed.

The OECD MMA lays down the rules for the “service of documents”, which requires a Requested State to comply with its domestic law. In particular, it gives the obligation on the Requested State to translate the documents into an official language of the addressee, or to request the documents to be translated by the Applicant State. South Africa has however entered a specific reservation in its enacted version of the OECD MMA and will not provide assistance with regard to the service of documents as described in Article 17 of the OECD MMA, apart from complying with Paragraph 3 requiring a Party to effect the service of documents directly through the post on a person within the territory of another Party.

The best solution would be for revenue authorities to mutually agree on the language to be used for the reporting of the exchange of information and who should bear the costs of any translation.

5.8 Different financial year-ends

There is no alternative other than to have a December year-end for accounting and tax purposes in the SADC countries Angola and the Democratic Republic of Congo (DRC).

It implies that tax information might not be available from a requested state for the periods required by the applicant states, such as Angola and the DRC.

The requested state will in turn obtain the information from the taxpayer for the periods in question. Such requests could become periodic requests based on the requirements and the specific circumstances.

The OECD Common Reporting Standard (CRS) requires financial institutions to annually report bank account financial information pertaining to 31 December of the prior year by September. The information may be of some value for receiving revenue authorities with taxpayers with financial year-ends other than 31 December, but the transmission will not include the whole tax year, for instance where the tax year ends on 30 June. The balances of bank accounts will therefore never be available for periods other than 31 December.

5.9 Verification that the legal framework is in place to mandate information exchange and to ensure confidentiality in both requestor and requested states

Revenue authorities will need to have a process in place to check that before information is automatically exchanged the necessary legal frameworks are in place to mandate such an exchange. Furthermore, there should be checks in place to ascertain if the confidentiality and secrecy requirements will be maintained in the requesting state, based on their domestic laws, and also based on historical experience.

There is a concern that when information is exchanged automatically, the potential for error in exchanging large quantities of taxpayer information globally possesses risks of breaching the confidentiality provisions (Stewart, 2012:175).

5.10 Recovery of additional costs for gathering information, and further negotiations between competent authorities for the sharing of such costs

The OECD Global Forum has not properly addressed the costs relating to the exchange of information (Oguttu, 2014:12). The costs of normal information requests are usually charged to the requested state. Both the OECD MMA and the SADC ATM mention that extraordinary costs should be borne by the Applicant State, unless otherwise agreed. Contracting Parties may therefore mutually agree on the costs for obtaining and providing information in response to a request. The competent authorities may also

establish a scale of fees for the processing of requests that would take into account the amount of work involved in responding to a request.

Providing open avenues for determining the costs for information exchange poses some challenges. The fact that the competent authorities can determine the scale of fees for processing requests depending on the amount of work involved implies that a competent authority may decline a request where the requesting party does not agree to pay the costs of providing the assistance. If jurisdictions are allowed to ask for fees for exchanging information, this may open opportunities for corruption and lack of transparency (Meinzer, 2012:18).

Where an automatic exchange of information system is set up, it will be challenging to distinguish between ordinary and extraordinary costs. This is due to the fact that the largest deployment of systems and resources takes place in the initial setup stage. It may therefore be argued that in such asymmetric situations developed countries interested in receiving sophisticated items of information on an automatic basis should mutually agree with the developing countries to finance the costs of such a setup, or if need be change the allocation of taxing powers and the relating withholding taxes imposed on certain classes of taxable income. Another possibility could be to agree on a reimbursement of costs based on the service received.

Other possibilities for the mutual agreement of costs are cost-sharing agreements, cost-plus agreements, and revenue-sharing agreements.

The 2010 OECD MTC contains no specific mention of costs for complying with requests for assistance. Based on the OECD MMA, extraordinary costs should be borne by the Applicant State, unless otherwise agreed.

In finding a fair distribution of costs for information requests, the number of requests and the status of the requesting county needs to be considered, where it could be that more than often smaller developing countries will be required to provide information to rich, developed countries for the preservation of their tax bases (Oguttu, 2014:12).

Developing countries are less likely to need tax information from developed countries, and if by mutual agreement a developed country would pay for the majority of costs relating to the information exchange from a tax haven country, the latter would be more likely to cooperate even though they have no direct benefit themselves, apart from not being labelled as uncooperative.

A possible long-term effect could be the raising of tax rates by the competent authorities in order to recover the additional costs caused by automatic exchange of information.

5.11 Ownership and bank information

One of the key areas that are investigated by the Global Forum in the peer reviews is the ownership of legal entities and trusts. This information should be available to revenue authorities, and if relevant, such ownership information should be exchanged.

With the advent of automatic exchange of information, revenue authorities may require detailed ownership information on an annual or semi-annual basis. In the case where partnerships contain trusts as shareholders, the details of trustees and beneficiaries

should be maintained and be readily available when they are to be reported to or requested by revenue authorities.

In South Africa, SARS has unlimited access to bank information, and can request any bank to hand over information related to in- and outflows of money in any bank account.

Once the OECD Common Reporting Standard (CRS) is implemented, reporting financial institutions (including banks) will have to report annually detailed information on reportable accounts, which includes interest, dividends, account balances, income from certain insurance products, sales proceeds from financial assets and other income generated on the accounts. The look-through principle applies, and financial institutions will therefore have to look through passive entities and report on the relevant controlling persons and beneficial owners. The following details, which are listed in the CRS Annex (OECD 2014b:18), should be reported annually by September of the subsequent year for the period ended 31 December: name, jurisdiction of residence, Taxpayer Identification Number (TIN), date and place of birth, account number, name and identifying number of the reporting financial institution, account balance, currency, interest, dividends, other income, proceeds from the sale of assets of each account holder, controlling persons (legal owners) and beneficial owners.

Competent authorities will need to notify each other in the event of incorrect or incomplete reporting or non-compliance by a financial institution, and the former own the responsibility to address errors, which should be rectified by the means mandated by domestic law.

Financial institutions will need to update their records periodically in order to identify the controlling persons (legal owner) and beneficial owners of the accounts and the relating income. This can prove to be challenging for pre-existing accounts, as the client database may be severely deficient. Under the CRS Model Competent Authority Agreement it will not be required for financial institutions to report the TIN or date of birth if such TIN or date of birth is not in the records of the Reporting Financial Institution and is not otherwise required to be collected by such Reporting Financial Institution under domestic law. However, a Reporting Financial Institution is required to use reasonable efforts to obtain the TIN and date of birth with respect to re-existing Accounts by the end of the second calendar year following the year in which such Accounts were identified as Reportable Accounts.

Financial institutions will in turn request all missing information from the account holders, as changes can occur in the residency or controlling relationships at any time during the year.

Financial institutions will be required to perform due diligence procedures for the identification of reportable accounts, which distinguish between individual accounts and entity accounts (including trusts), and another distinction between pre-existing accounts and new accounts.

The following table highlights the due diligence procedures to be performed as a minimum to identify reportable accounts. Jurisdictions may choose to perform additional procedures, or to limit procedures to account holders with residencies in territories where an exchange of information instrument is in place.

	Individual bank accounts	Entity (including trusts) bank accounts
Pre-existing bank accounts	All accounts to be reviewed, with an enhanced electronic and paper record review to be performed on high-value accounts (balance > USD 1,000,000 as per 31 December) and less elaborate review to be performed for low-value accounts. In both cases the permanent residence address will need to be tested.	Financial institutions will need to determine if an entity is a reportable person. If so, any passive Non-Financial Entities' (NFE) controlling persons and beneficial owners and their residencies should be identified. Pre-existing accounts below USD 250,000 will not be subject to review.
New bank accounts	Utilising self-certification procedures	The same procedure as above, without the USD 250,000 threshold applied, as it is easier to obtain self-certification for new accounts.

Source: OECD Common Reporting Standard, Section III, p. 20-23

Countries implementing the CRS and entering into CRS Model Competent Authority Agreements should first ensure that sufficient administrative capacity and processes are in place to ensure the confidentiality of data received and to avoid misuse of data transmitted. They should further establish that domestic laws are amended to ensure that revenue authorities have unlimited access to bank information, that banks are permitted to obtain missing financial information from their clients, and that clients are obliged to respond to such requests in a timely manner. In practice this will mean that certain jurisdictions may be unable to enter into CRS Agreements until they meet these requirements.

6. Conclusion

Based on history and recent international tax developments, global revenue authorities have identified a need for the exchange of taxpayer information to identify both tax evasion and tax avoidance. This will impact SADC tax payers and financial institutions for the identification and reporting of such information, and revenue authorities to share such information in appropriate circumstances.

The challenge for financial institutions and revenue authorities will be to align systems and data standards with one another and to create both resources and IT capacity in order to meet the demands that the signing of multilateral treaties for exchange of information will require. Significant work in administrative capacity building is still required for developing countries in the SADC region before they can be admitted as parties to the OECD MMA. Investing in such administrative capacity building would mean a cost saving in the long run, as the costs of engaging in a multilateral convention should be lower than entering into additional bilateral treaties.

Conversely, taxpayers also need to adjust their own tax systems in order to identify reportable information, and be prepared to comply with ad hoc or periodic requests from revenue authorities, even if it involves the tax affairs of third parties.

Bilateral treaties applicable to the SADC region are to be renegotiated, as they are dated and do not contain the latest EOI article. Some work has already been done with regards to certain South African and Mauritian treaties, but these amended treaties are not in force as they were not ratified by both parties as yet. Once the SADC treaties are amended with the latest EOI article and ratified by both parties or when the OECD MMA is signed by the other SADC members, there will be legal grounds for an increase in automatic information exchange of South African taxpayers' tax information with all of its treaty partners.

In the SADC context, only three members have undergone a Global Forum peer review. Of the three SADC members, South Africa has shown the most favourable score, and this could mean that EOI requests could be channelled towards South Africa, as EOI has been proven to be effective and timely. Mauritius will need to address some issues with the transparency of ownership information for non-resident trusts as well as nominee shareholders. A future peer review of Lesotho will identify any shortcomings in its current system for EOI. Botswana will need to address the peer review action points raised by the Global Forum in order to move on to the Phase 2 review. Revenue authorities in other countries in the SADC region will need to comply with the transparency and exchange of information requirements of the Global Forum in order to be effective parties when signing treaties and protocol amendments for the exchange of information. This would involve an extensive revamp in existing administrative systems and treaties in accordance with the most recent OECD MTC and OECD MMA, which would remove bank secrecy and the potential for fishing expeditions.

There will be a lot of pressure on financial institutions in South Africa and Mauritius to report reportable bank account information to the United States in terms of the FATCA legislation, as well as to comply with automatic exchange of information to other treaty partners, as these two countries within SADC have the most comprehensive treaty networks.

As the world moves from bilateral EOI towards automatic EOI, the volume of transactions involved will increase exponentially. This increases the risk for the infringements of a South African retail taxpayer's rights to privacy, confidentiality, just administrative action, access to information and access to courts. Additional investment in IT systems for taxpayers, financial institutions and revenue authorities will be crucial to handle and keep up with this increased information demand. The information needs to be collected and reported using the agreed XML data standards, and retained by the taxpayer for the maximum period (eight years in the case of Botswana) as required by the bilateral and multilateral treaty network. Taxpayers will also need to record information for cases where the current financial year-ends are different to the reporting periods required.

It is unclear how the additional costs for the EOI will be recovered by revenue authorities in the absence of a cost-sharing agreement between revenue authorities. This could possibly lead to an increase in future tax rates to absorb such costs.

As a consequence of the OECD CRS requirements imposed on financial institutions, taxpayers will be required to report additional information in the case of new information or incomplete existing information identified by financial institutions. Taxpayers should therefore prepare to have relevant details available regarding any changes to their detailed shareholding and group structure, TIN numbers, dates of birth, beneficial owners, reporting structure, head office and permanent residency for tax purposes. In the case of a passive NFE in a group structure, the residency of the controlling persons and beneficial owners would have to be identified and recorded. All the above information will most probably become reportable by taxpayers to both their banks as well as to their revenue authorities.

Taxpayers will need to stay abreast of changes in the international trends and recommendations in the aftermath of BEPS and the CRS, as treaty models, bilateral treaties as well as domestic laws will no doubt all be amended. The goal of a taxpayer should always be to remain compliant in a tax sense and profitable in a commercial sense by eliminating the cost of avoidable non-tax compliance.

The move towards improved transparency could also create true multilateralism with increased tax planning opportunities for taxpayers by removing a number of grey areas in international tax.

The Latin phrase *veritas omnia vincit* translated means that the truth conquers all. Truthful and transparent collection, reporting and sharing of taxpayer information from SADC taxpayers, financial institutions and revenue authorities are paramount for the future effectiveness of EOI.

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8. Appendix A – Comparison of treaties relevant to a South African retail sector taxpayer trading in the SADC region with the SADC MTC with regard to exchange of information (Article 26)

Treaty	Article 26.1 SADC MTC – foreseeably relevant information / taxes of every kind and description / not restricted to residents in the treaty	Article 26.2 SADC MTC – Information should be treated as secret in accordance with domestic law / only disclosed to bodies concerned with the assessment, collection, enforcement or prosecution of taxes, and courts/judicial decisions.	Article 26.3 SADC MTC– Information exchange should not be contrary to or unobtainable under domestic laws and admin practice of both states, and should not disclose trade, business, industrial, commercial or professional secret, trade process, or information contrary to public policy/ordre public.	Article 26.4 SADC MTC – Information should be gathered and exchanged even though the supplying state itself has no need for it for its own tax practices. Such requests may not be declined solely because the supply state has no interest in such information.	Article 26.5 SADC MTC – A supply state may not decline to supply information based on the fact that information is held by a bank, financial institution, nominee or a person acting in an agency/fiduciary capacity, or because it relates to ownership interests in a person.
South Africa-Botswana DTC protocol	✓	✓	✓	✓	✓
South Africa-DRC DTC	X	✓	✓	X	X
South Africa-Lesotho DTC	X	✓	✓	X	X
South Africa-Mauritius DTC	X	✓	✓	X	X
South Africa-Mauritius DTC (ratified, in South Africa, but not in Mauritius)	✓	✓	✓	✓	✓

8. Appendix A – Comparison of treaties relevant to a South African retail sector taxpayer trading in the SADC region with the SADC MTC with regard to exchange of information (Article 26)

Treaty	Article 26.1 SADC MTC – foreseeably relevant information / taxes of every kind and description / not restricted to residents in the treaty	Article 26.2 SADC MTC – Information should be treated as secret in accordance with domestic law / only disclosed to bodies concerned with the assessment, collection, enforcement or prosecution of taxes, and courts/judicial decisions.	Article 26.3 SADC MTC– Information exchange should not be contrary to or unobtainable under domestic laws and admin practice of both states, and should not disclose trade, business, industrial, commercial or professional secret, trade process, or information contrary to public policy/ordre public.	Article 26.4 SADC MTC – Information should be gathered and exchanged even though the supplying state itself has no need for it for its own tax practices. Such requests may not be declined solely because the supply state has no interest in such information.	Article 26.5 SADC MTC – A supply state may not decline to supply information based on the fact that information is held by a bank, financial institution, nominee or a person acting in an agency/fiduciary capacity, or because it relates to ownership interests in a person.
South Africa-Malawi DTC	X	✓	X	X	X
South Africa-Mozambique DTC	X	✓	✓	X	X
South Africa-Namibia DTC	X	✓	✓	X	X
South Africa-Swaziland DTC	X	✓	✓	X	X
South Africa-Zambia DTC	X	✓	X	X	X
Mauritius-Botswana DTC	X	✓	✓	X	X
Mauritius-Lesotho DTC	X	✓	✓	X	X

8. Appendix A – Comparison of treaties relevant to a South African retail sector taxpayer trading in the SADC region with the SADC MTC with regard to exchange of information (Article 26)

Treaty	Article 26.1 SADC MTC – foreseeably relevant information / taxes of every kind and description / not restricted to residents in the treaty	Article 26.2 SADC MTC – Information should be treated as secret in accordance with domestic law / only disclosed to bodies concerned with the assessment, collection, enforcement or prosecution of taxes, and courts/judicial decisions.	Article 26.3 SADC MTC– Information exchange should not be contrary to or unobtainable under domestic laws and admin practice of both states, and should not disclose trade, business, industrial, commercial or professional secret, trade process, or information contrary to public policy/ordre public.	Article 26.4 SADC MTC – Information should be gathered and exchanged even though the supplying state itself has no need for it for its own tax practices. Such requests may not be declined solely because the supply state has no interest in such information.	Article 26.5 SADC MTC – A supply state may not decline to supply information based on the fact that information is held by a bank, financial institution, nominee or a person acting in an agency/fiduciary capacity, or because it relates to ownership interests in a person.
Mauritius-Madagascar DTC	X	✓	✓	X	X
Mauritius-Mozambique DTC	X	✓	✓	X	X
Mauritius-Namibia DTC	X	✓	✓	X	X
Mauritius-Swaziland DTC	X	✓	✓	X	X
Mauritius-Zambia DTC	X	✓	✓	X	X

9. Appendix B – Comparison between the African Tax Administration Forum (ATAF) Agreement on Mutual Assistance in Tax Matters (ATAF MMA) and the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012)

Article in SADC treaty	SADC ATM 2012	ATAF MMA	Comments
Article 1 Definitions	✓	✓	
Article 2 Object	✓	✓	
Article 3 Taxes Covered	X	X	The SADC ATM excludes custom duties in the scope of taxes covered, due to the fact that SADC has earmarked separate projects and agreements for the establishment of its SADC customs union and the relating exchange of customs information.
Article 4 Exchange of Information	✓	✓	
Article 5 Tax Examinations Abroad	✓	✓	
Article 6 Simultaneous Examinations	✓	✓	
Article 7 Assistance in Collection	X	X	The scope of what is included in a revenue claim is slightly wider in the ATAF MMA, which includes “duty increases” and “surcharges”.
Article 8 Confidentiality	X	X	Information received under the ATAF MMA contains a slightly wider use, whereby information received by a Requesting Party may be used for other purposes when such information may be used for such other purposes under the laws of both Parties, and the Competent Authority of the Requested Party authorises such use.
Article 9 Costs	✓	✓	

9. Appendix B – Comparison between the African Tax Administration Forum (ATAF) Agreement on Mutual Assistance in Tax Matters (ATAF MMA) and the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012)

Article in SADC treaty	SADC ATM 2012	ATAF MMA	Comments
Article 10 Implementation Legislation	✓	✓	
Article 11 Other International Agreements or Arrangements	✓	✓	
Article 12 Mutual Agreement Procedure	✓	✓	
Article 13 Depositary	X	X	The SADC ATM has the additional requirement imposed on the Executive Secretary to register the agreement with the United Nations, the Commission of the African Union and such other organisations as the Council may determine.
Article 14 Notifications of Competent Authorities	✓	✓	
Article 15 Ratification and entry into force	X	X	The agreements have different criteria imposed for when these will enter into force. The ATAF MMA mentions that five members are required to submit their instruments of ratification, whereas the SADC ATM mentions ten members. Furthermore, the SADC ATM mentions that a SADC Member State may only become party to the agreement by accession.
Article 16 Amendment	X	X	The agreements contain different criteria for amending these. The SADC ATM requires a two-thirds majority to approve amendments, whereas the ATAF MMA requires full mutual agreement by the Contracting Parties.

9. Appendix B – Comparison between the African Tax Administration Forum (ATAF) Agreement on Mutual Assistance in Tax Matters (ATAF MMA) and the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012)

Article in SADC treaty	SADC ATM 2012	ATAF MMA	Comments
Article 17 Accession	✓	✓	
Article 18 Signature	✓	✓	
Article 19 Withdrawal	X	X	The ATAF MMA has an additional requirement imposed on the withdrawing party to comply with any request made in terms of this Agreement prior to the notice of intention to withdraw.

10. Appendix C – Comparison between the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA) enacted in South Africa, the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012), and Article 26 and 27 of the SADC MTC

Article in the OECD MMA treaty	OECD MMA	SADC ATM 2012	Article 26/27 of the SADC MTC	Comments
Annex A, Article 2 and Reservations – Taxes to which the Convention would apply	✓	✓	x	<p>The SADC ATM applies to all taxes, with the exception of customs duties. The OECD MMA specifically lists all the taxes applicable, which excludes customs duties. Article 26 of the SADC MTC mentions taxes of every kind, and theoretically therefore also includes customs duties.</p> <p>The OECD MMA contains specific reservation paragraphs listing specific taxes (local authority, social security, motor vehicles and moveable goods) and service of documents obligations that are excluded from the agreement. Any changes to Annex A taxes should be deposited with the Secretary General of the OECD.</p>
Article 1 – Object of the Convention and persons covered	x	x	x	<p>The OECD MMA applies to all parties with persons affected that are residents or nationals of any of the States. The SADC ATM only applies to SADC members who signed the agreement (currently nine SADC members). Article 26 of the SADC MTC will only apply to the two Contracting parties in the bilateral treaty.</p>
Article 3 - Definitions	✓	x	✓	<p>The OECD and Art 26 of the SADC MTC contain a specific definition of the term “national”, which is not defined or used in the SADC ATM.</p>
Article 4 – EOI general provision to exchange	✓	✓	✓	

10. Appendix C – Comparison between the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA) enacted in South Africa, the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012), and Article 26 and 27 of the SADC MTC

Article in the OECD MMA treaty	OECD MMA	SADC ATM 2012	Article 26/27 of the SADC MTC	Comments
foreseeably relevant information				
Article 5 – EOI on request and obligation to obtain such information if not available in the tax files	✓	✓	✓	
Article 6 – Automatic EOI	✓	✓	✓	The wording “automatic exchange” is not mentioned in Art 26 of the SADC MTC, but it is implied as the obligation rests on contracting parties to exchange foreseeably relevant information on a periodic basis.
Article 7 – Spontaneous exchange of information	✓	✓	✓	The wording “spontaneous exchange” is not mentioned in Art 26 of the SADC MTC, but it is implied as the obligation rests on contracting parties to exchange foreseeably relevant information when it is obtained. The OECD MMA further requires that each party shall take the necessary measures to implement systems and procedures in order to gather and transmit such information.
Article 8 – Simultaneous tax examinations	✓	✓	x	Article 26 (or any other article) in the SADC MTC does not contain any details of simultaneous tax examinations.
Article 9 – Tax examinations abroad	✓	x	x	The OECD MMA details that simultaneous tax examinations can take place at the request of any State, with the proper notification procedures. The SADC ATM allows simultaneous examinations abroad, but requires the

10. Appendix C – Comparison between the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA) enacted in South Africa, the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012), and Article 26 and 27 of the SADC MTC

Article in the OECD MMA treaty	OECD MMA	SADC ATM 2012	Article 26/27 of the SADC MTC	Comments
				Requested party to inform the taxpayers concerned in advance of the details of the examination. Article 26 (or any other article) in the SADC MTC does not contain any details of simultaneous tax examinations.
Article 10- Conflicting information	✓	x	x	The OECD MMA contains the obligation of a Party that received information to advise the Party which has provided the information, if such information received about a person's tax affairs appears to be in conflict with information in its possession. No such requirements exist in the SADC ATM or in the SADC MTC.
Article 11- Recovery of tax claims	✓	✓	✓	
Article 12- Measures of conservancy	✓	x	✓	Both the OECD MMA and Article 27 of the SADC MTC require that at the request of the applicant State, the requested State shall, with a view to the recovery of an amount of tax, take measures of conservancy even if the claim is contested or is not yet the subject of an instrument permitting enforcement.
Article 13- Documents accompany the request	✓	x	x	The OECD MMA details the documents to accompany a request for administrative assistance: (a) a declaration that the tax claim concerns a tax covered by the Convention and, in the case of recovery, that subject to paragraph 2 of Article 11, the tax claim is not or may not be contested; (b) an official copy of the instrument permitting enforcement in the applicant

10. Appendix C – Comparison between the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA) enacted in South Africa, the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012), and Article 26 and 27 of the SADC MTC

Article in the OECD MMA treaty	OECD MMA	SADC ATM 2012	Article 26/27 of the SADC MTC	Comments
				State; and (c) any other document required for recovery or measures of conservancy. Such details are not included in the text Article 27 of the SADC MTC, but are discussed in the commentary to the article.
Article 14 – Time limits	✓	x	x	The OECD MMA orders that the time limits for the enforcement and the recovery of tax claims should be governed by the domestic laws of the applicant State.
Article 15 - Priority	✓	x	x	The OECD MMA mentions that tax claims in the recovery of which assistance is provided shall not have in the requested State any priority specially accorded to the tax claims of that State even if the recovery procedure used is the one applicable to its own tax claims.
Article 16 – Deferral of payment	✓	x	x	The OECD MMA mentions the requested State may allow deferral of payment or payment by instalments if its laws or administrative practice permit it to do so in similar circumstances, but shall first inform the applicant State.
Article 17 – Service of Documents	✓	x	x	The OECD MMA lays down the rules for the “service of documents”, that a Requested State needs to comply with domestic law. In particular, it places the obligation on the Requested State to translate the documents into an official language of the addressee, or to request the documents to be

10. Appendix C – Comparison between the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA) enacted in South Africa, the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012), and Article 26 and 27 of the SADC MTC

Article in the OECD MMA treaty	OECD MMA	SADC ATM 2012	Article 26/27 of the SADC MTC	Comments
				translated by the applicant State. South Africa has however entered a specific reservation, and will not provide assistance with regard to the service of documents as described in Article 17 of the OECD MMA, apart from complying with paragraph 3 requiring a Party to affect the service of documents directly through the post on a person within the territory of another Party.
Article 18- Information to be provided by the applicant State	✓	x	x	The OECD MMA details the specific details to be furnished as part of a request for assistance, which includes the names of the persons from whom information is required, and the format in which the response should be made.
Article 19 – Deleted				
Article 20 – Response to the request for assistance	✓	x	x	The OECD MMA lays down the obligations of the requested State to inform the applicant State of the actions taken, or a reason why a request has been declined. The Applicant State may prescribe a format in which the request for information should be supplied if it satisfied that the requested State is in a position to do so.
Article 21- Protection of persons and limits to the obligations to provide	✓	✓	✓	

10. Appendix C – Comparison between the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA) enacted in South Africa, the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012), and Article 26 and 27 of the SADC MTC

Article in the OECD MMA treaty	OECD MMA	SADC ATM 2012	Article 26/27 of the SADC MTC	Comments
assistance				
Article 22 - Secrecy	✓	X	X	Information received under the OECD MMA contains a slightly wider use, whereby information received by a Requesting Party may be used for other purposes when it is permitted that such information may be used for such other purposes under the laws of the Supplying Party, and the Competent Authority of the Supplying Party authorises such use.
Article 23- Proceedings	✓	✓	✓	
Article 24 – Implementation of the Convention	✓	✓	✓	
Article 25- Language	✓	✓	x	The OECD MMA mentions that requests for assistance and answers thereto shall be drawn up in one of the official languages of the OECD and of the Council of Europe or in any other language agreed bilaterally between the Contracting States concerned. The SADC ATM mentions that the language to respond to requests should be mutually agreed upon by the parties. Article 26 or 27 of the SADC model makes no mention of languages in the article itself, but the OECD commentary on Article 27 suggests that information provided should be translated in a language that was mutually agreed upon.

10. Appendix C – Comparison between the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA) enacted in South Africa, the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012), and Article 26 and 27 of the SADC MTC

Article in the OECD MMA treaty	OECD MMA	SADC ATM 2012	Article 26/27 of the SADC MTC	Comments
Article 26 - Costs	✓	✓	x	The SADC Model contains no specific mention of costs for complying with requests for assistance. Based on the OECD MMA and the SADC ATM, extraordinary costs should be borne by the applicant State, unless otherwise agreed.
Article 27 – Other international agreements or arrangements	✓	✓	x	The SADC Model contains no specific mention of limitations of other international arrangements.
Article 28 – Signature and entry into force of the Convention	✓	✓	✓	
Article 29 – Territorial application of the Convention	✓	x	x	The SADC model will only be applicable to the two parties of the bilateral treaty, the SADC ATM only to the signatories of the SADC agreement, and the OECD MMA to the territories agreed to by each State.
Article 30 - Reservations	✓	x	x	The OECD MMA specifically grants the ability to reserve the types of taxes it will not provide assistance for, not to provide assistance in the recovery of certain tax claims, or to not provide assistance in the service of documents.
Article 31 – Denunciation	✓	✓	✓	

10. Appendix C – Comparison between the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD MMA) enacted in South Africa, the SADC Agreement on Assistance in Tax Matters (SADC ATM 2012), and Article 26 and 27 of the SADC MTC

Article in the OECD MMA treaty	OECD MMA	SADC ATM 2012	Article 26/27 of the SADC MTC	Comments
Article 32 – Depositories and their functions	✓	✓	✓	