

# Automatic exchange of personal data in tax matters

Privacy and data protection concerns based  
on *practical examples* of how the system  
works

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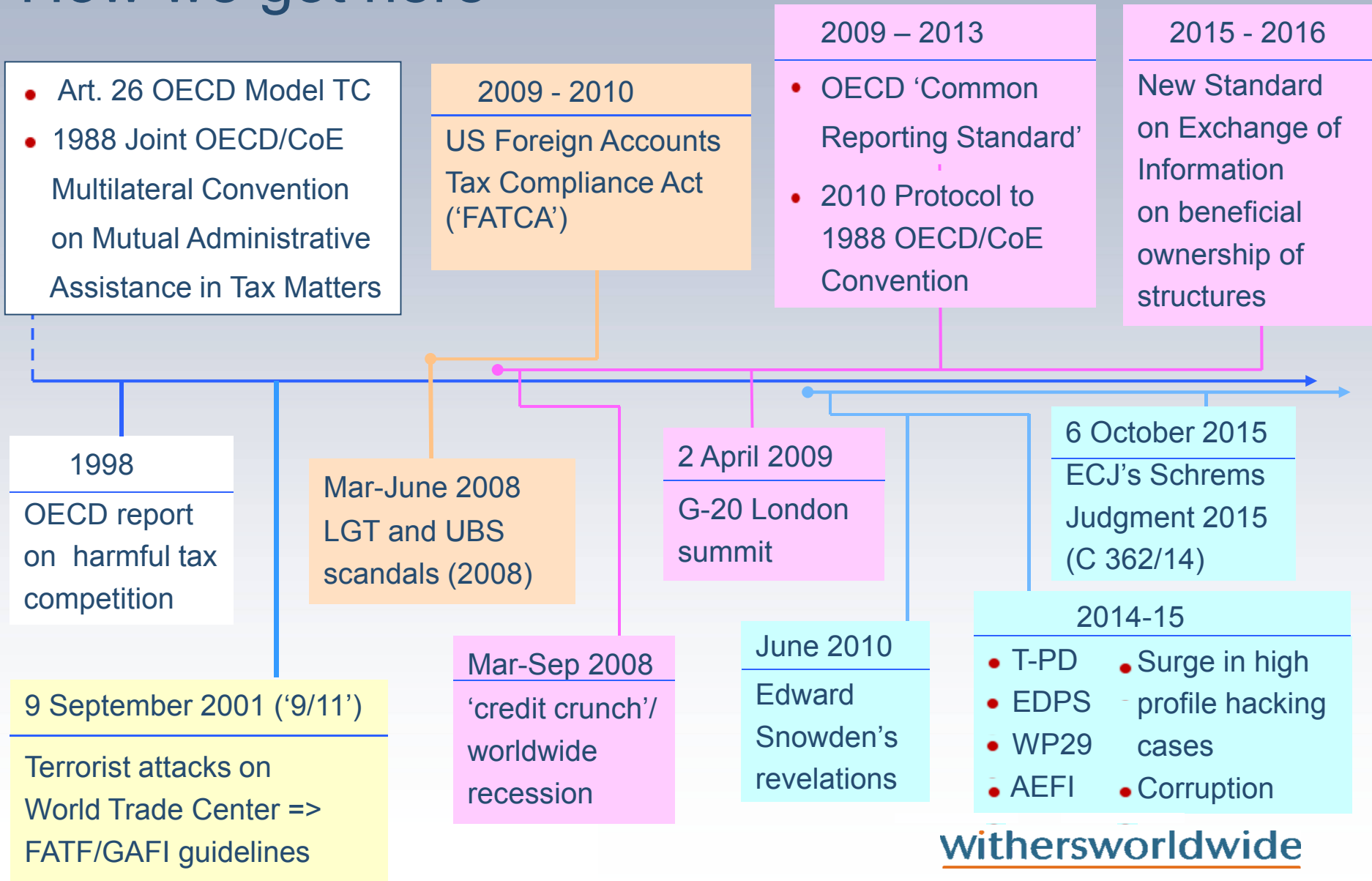
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# Overview

- How we got here
- Practical CRS scenarios
- Current Threats
- Where next?

# How we got here



# How we got here

Art. 26 OECD Model TC  
1988 Joint OECD/CoE  
Multilateral Convention  
on Mutual Administrative  
Assistance in Tax Matters

2009 - 2010

US Foreign Accounts  
Tax Compliance Act  
(‘FATCA’)

2009 – 2013

- OECD ‘Common Reporting Standard’
- 2010 Protocol to 1988 OECD/CoE Convention

1998

OECD report  
on harmful tax  
competition

Mar-June  
LGT and  
scandals

9 September 2001 (‘9/11’)

Terrorist attacks on  
World Trade Center =>  
FATF/GAFI guidelines

Terminology: ‘Financial Institution’ (‘FI’)

‘Financial Account’

‘Account Holder’

‘Custodial Account’

‘Equity Interest’

‘Active/Passive’ NFEs’

‘Controlling Persons’

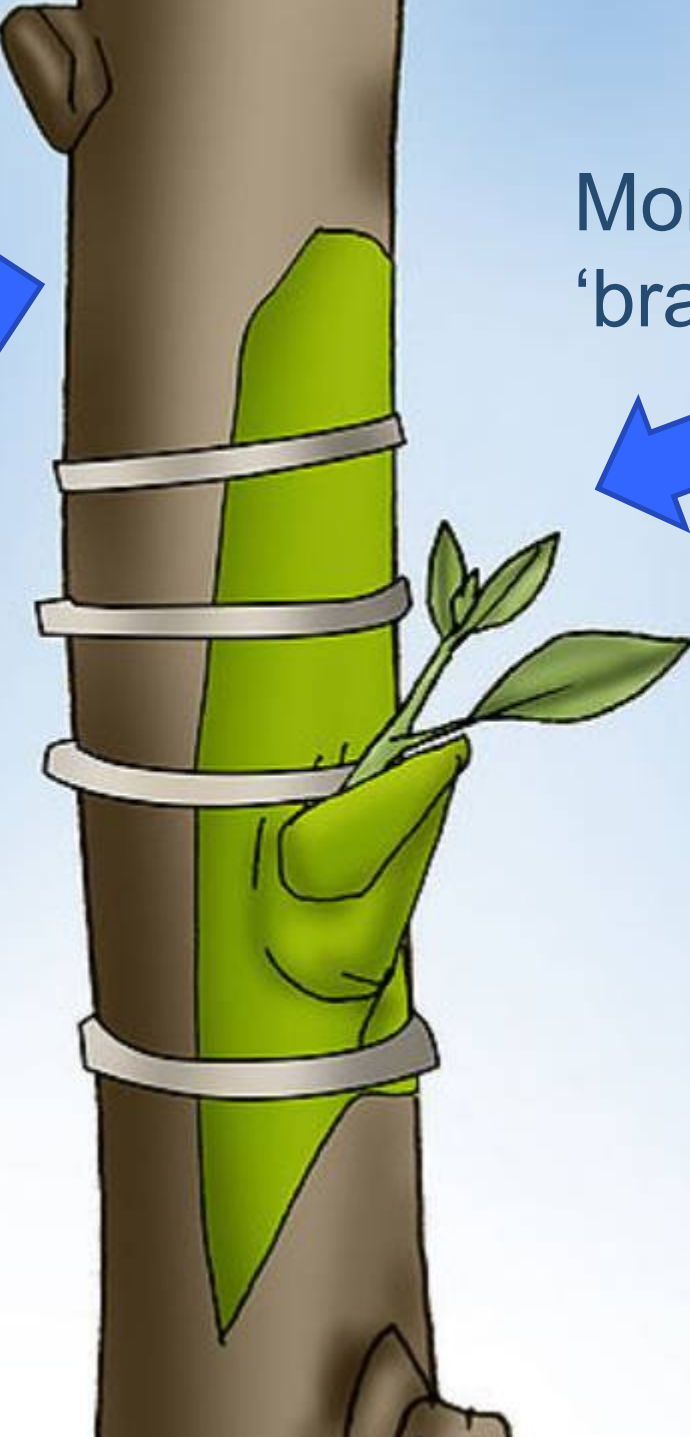
311 pages long Commentary/

121 pages long Implementation HB

A number of ‘FAQs’

(US) Tax tree

Money laundering 'branch'



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- How we got here
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- Scenario 1 - Charities
- Scenario 2 - Individuals without tax liability
- Scenario 3 - Entities (companies, partnerships, trusts, foundations)

# Charity

## Company / Foundation / Trust

'Investment Entity'?

Income mostly from gifts,  
donations, grants, legacies?

Charity is an active Non-Financial Entity (NFE) with no reporting requirements.

Income mostly from  
investments?

Charity is a Non-Financial Entity ('Passive NFE').

*'If your charity is an Investment Entity it will be a financial institution. It must report any relevant payments it makes to tax residents outside the UK to HM Revenue and Customs (HMRC).'*


HMRC guidance, 3 June 2016

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# Charity

Grants to political activists, human rights lawyers, opposition leaders by a 'cash-rich' charity



Threats to personal security

Hostage to fortune

Unworkable in many cases

Fabricated tax evasion charges

e.g. *Fatullayev v Azerbaijan* (ECHR)

- Scenario 1 - Charities
- Scenario 2 - Individuals without tax liability
- Scenario 3 - Entities (companies, partnerships, trusts, foundations)

# Countries without wealth tax or individuals with no taxable income/gain in the relevant year

‘The information to be exchanged is (...):

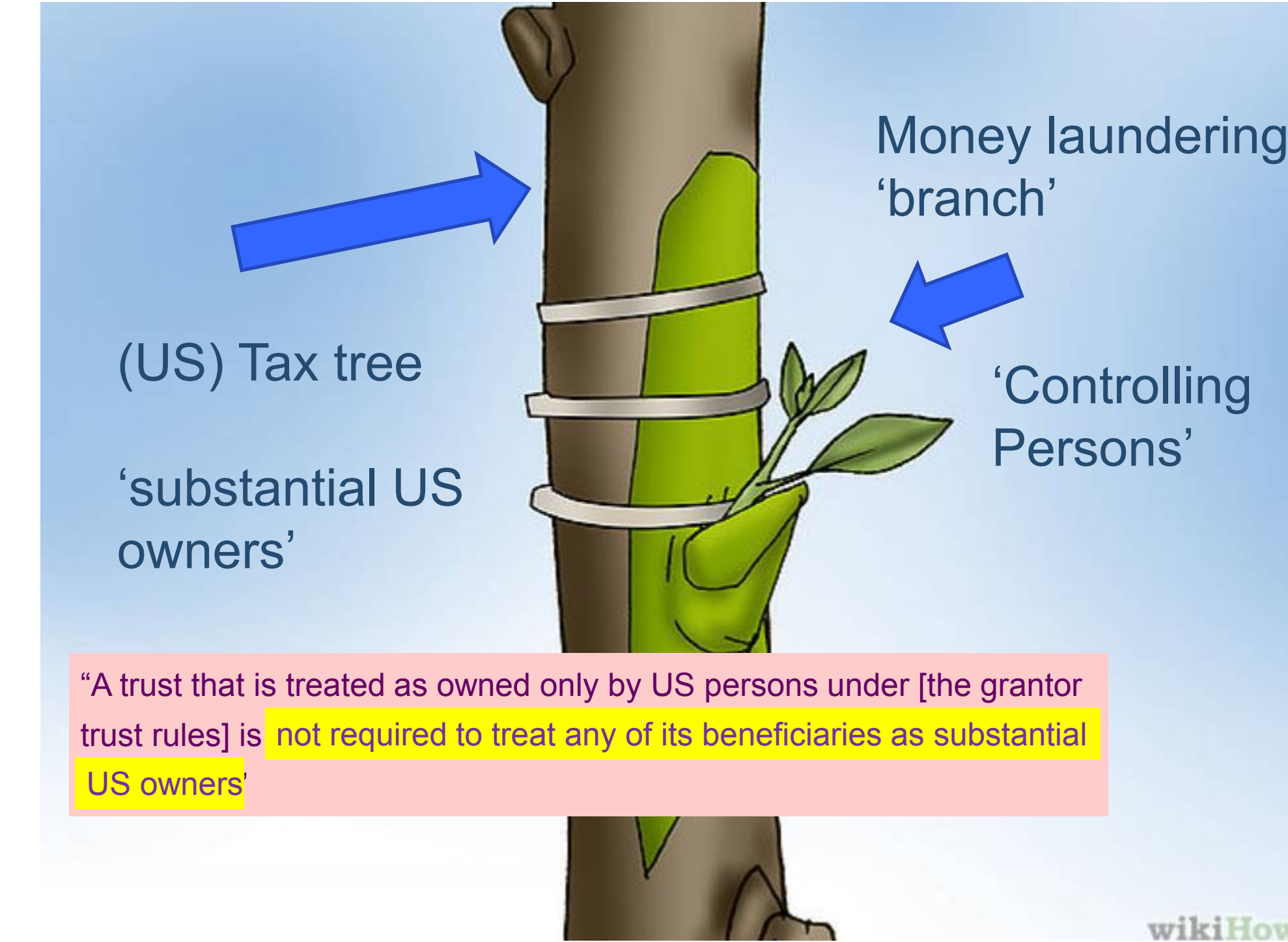
- the name, address, TIN(s) and date and place of birth (...) of each Account Holder of the account, and
- in the case of any Entity that is an Account Holder (...) having one or more Controlling Persons that is a Reportable Person, the name, address, and TIN(s) of the Entity and the name, address, TIN(s) and date and place of birth of each Reportable Person;
- the account number (or functional equivalent in the absence of an account number);
- the name and identifying number (if any) of the Reporting Financial Institution;
- the account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account (...)

- Scenario 1 - Charity
- Scenario 2 - Individual without tax liability
- Scenario 3 - Entities (companies, partnerships, trusts, foundations)

# Countries without wealth tax or individuals with no taxable income/gain in the relevant year

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- the name, address, TIN(s) and date and place of birth (...) of each Account Holder of the account, and
- in the case of any Entity that is an Account Holder (...) having one or more **Controlling Persons** that is a Reportable Person, the name, address, and TIN(s) of the Entity and the name, address, TIN(s) and date and place of birth of each Reportable Person;
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(US) Tax tree  
'substantial US owners'

Money laundering  
'branch'

'Controlling  
Persons'

"A trust that is treated as owned only by US persons under [the grantor trust rules] is not required to treat any of its beneficiaries as substantial US owners"

“The term “Controlling Persons” means the natural persons who exercise control over an Entity. [in accordance with the FATF recommendations]”

CRS Section I.A and Definition D.6

“In the case of a trust, such term means the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust (...).”

CRS Section I.A and Definition D.6

“The settlor(s), the trustee(s), the protector(s)(if any) and the beneficiary(ies) or class(es) of beneficiary(ies) must always be treated as Controlling Persons of a trust, regardless of whether or not any of them exercise control over the trust.”

CRS Commentary, para 133 (p. 198-199)

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## European Court of Justice (C 362/14)

- ‘Legislation permitting the public authorities to have access on a **generalised basis** to the content of electronic communication **must be regarded as compromising the essence of the fundamental right to respect of private life**’
- ‘Legislation that authorises storage of all the personal data on a generalised basis, **without any differentiation, limitation or exception** is not limited to what is strictly necessary.’

6 October 2015  
**ECJ** Schrems  
Judgment 2015  
(C 362/14)

2014-15

- T-PD
- EDPS
- WP29
- AEFI
- Surge in high profile hacking cases
- Corruption

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## European Court of Justice (C 362/14)

- ‘Legislation **not providing for any possibility** for an individual **to pursue legal remedies in order to have access to personal data relating to him, to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection**, as enshrined in Art. [8 of the European Convention on Human Rights and] Art. 47 of the EU Charter of Fundamental Rights

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## European Data Protection Supervisor (Opinion 2/2015)

- ‘We take note of the fact that the implementation of the Global Standard **is considered as necessary to counter tax evasion.**
- **We consider nonetheless that, during the negotiation phase, a number of corrections should have been made to the [EU-Swiss] Agreement in order to better address data protection issues.’**

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## European Data Protection Supervisor (Opinion 2/2015)

- ‘The exchange of information on a certain number of accounts on an annual basis confirms our view that the information exchange is **independent of the detection of any actual risk of tax evasion**, thus questioning the proportionality of the measure itself .
- We note that nothing is said of what happens once tax information is collected and exchanged, namely there is **no mention of any retention period**.

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## AEFI Group of Experts (March 2015)

- ‘**Consideration should be given to a phased approach to implementation. This could be achieved by pushing back reporting by 1 year.**’
- ‘**Ultimately, if the reporting is rushed, the quality of data that governments will be exchanging will be lacking.**’

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## Surge in high profile hacking

- SWIFT (\$91m Bank of Bangladesh) - 2016
- NATO (NY Times, 17 June 2016)
- US Office of Personnel Management (20m individuals)
- Turkish citizenship database (50m individuals) - 2016
- Philippines Electoral Office – 2016
- 2/3 of UK businesses at risk (UK gov’t, 2016)
- UK government pledges £1.9bn over 5 years (2016)
- Sing. decides to disconnect 100k gov’t computers (2016)

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## Corruption – Crony capitalism

- David Cameron - *‘fantastically corrupt countries’*
- Argentina – Minister (José López) found trying to stash \$8.9m in cash at a nunnery at 4am
- Brazil – Petrobras scandal
- United Kingdom – 2007 discontinuation of arms deal enquiry
- China – anti-graft campaign
- Etc.

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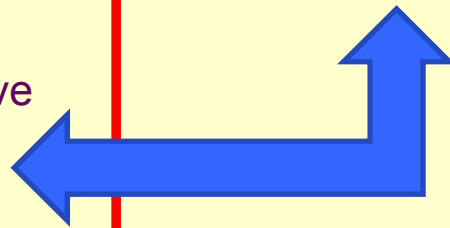
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## Corruption – Crony capitalism

List of countries that have signed up to

- CRS
- The OECD/CoE Multilateral Convention on Mutual Administrative Assistance in Tax Matters

- Transparency International Corruption Perceptions Index
- The Economist Crony-Capitalism Index



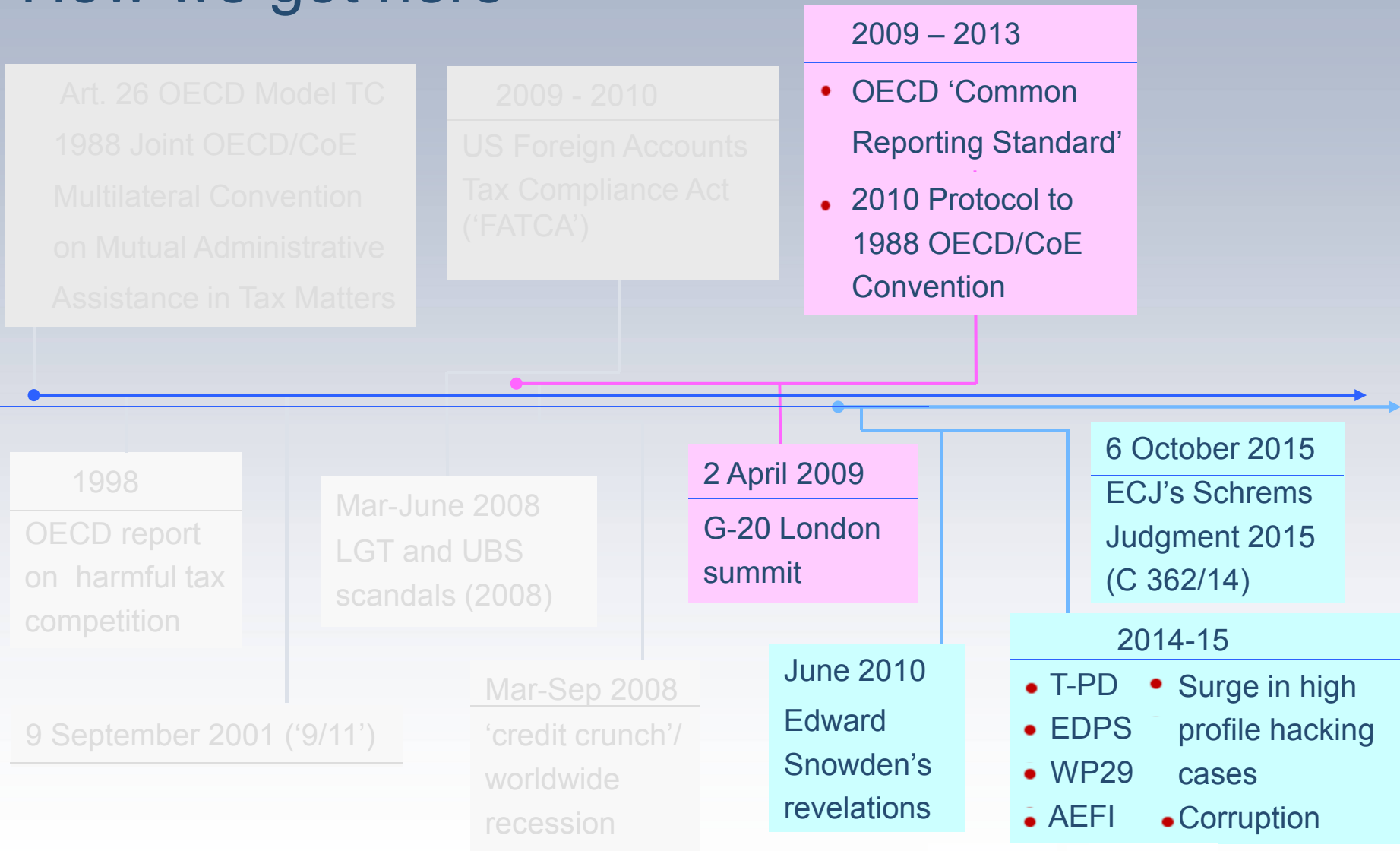
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2015 - 2016

New Standard on Exchange of Information on beneficial ownership of structures

## Beneficial ownership of structures

- 4<sup>th</sup> EU Anti-Money Laundering Directive – Public Registers
- UK public registers on ‘Persons with Significant Control’
- G-5 Letter dated 14 April 2016: ‘a new global standard’
- Exchange of notes between UK government and a number of dependant territories: ‘The Participant will be responsible for ensuring that those interested are **not informed** that a search is in progress or has been conducted and ensuring that the information that a search has been requested is **not made public.**’

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- Political will seemingly unstoppable
- Concerns/Warnings have fallen on *deaf ears*
- Lack of proportionality *a real issue*
- Data security *a real concern*
- CRS is very detailed – *Implementation-ready*
- It's almost too late!
- Urgent, strong response needed!