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Automatic Exchange of Information (AEOI) for Indonesian Tax Purposes: Economic Analysis of Law Approach

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Abstract *The aim of this paper was to examine the application of the Automatic Exchange of Information (AEOI) agreement through the point of view of Economic Analysis of Law Theory. This study used a normative legal method with a statute approach, conceptual approach, and comparative approach. The result of this study indicated that: first, AEOI has caused a relocation of deposits but has not led to significant repatriation of funds. The least compliant country of AEOI receives incentives in the form of transferring funds from countries that are aggressively implementing AEOI. Hence, in general, it does not change the amount of funds managed abroad. Second, by using game theory: prisoner's dilemma, it is known that the best decision for Indonesia to respond to the AEOI is to conduct a moratorium on the AEOI agreement.*

Keywords Economic Analysis of Law, Automatic Exchange of Information, Taxation

1. Introduction

In 2017, in the state of Baden-Württemberg, Germany, a meeting of the Ministers of Finance and Governors of the Central Banks of the G-20 countries was held. At the meeting, Minister of Finance Sri Mulyani stated Indonesia's readiness to participate in the implementation of cooperation in the exchange of financial information for the benefit of automatic taxation or Automatic Exchange of Information (*hereinafter* AEOI). During the meeting, they agreed that the implementation of AEOI will be carried out starting in September 2017 and no later than September 2018.¹ The Organization for Economic Co-operation and Development (*hereinafter* OECD) since the late 1990s had encouraged countries, especially tax haven countries, to exchange information with other countries. Moreover, after the world financial crisis in 2008, which include several major tax evasion scandals were revealed, one of which occurred at the largest bank in Switzerland in 2008, then in 2009 the G20 leaders declared that the bank secrecy era was over with the AEOI.² Of course, tax authorities whose powers are limited by national jurisdictions will find it difficult to obtain important information about the activities of their taxpayers abroad; therefore, they must cooperate.³ Indonesia

¹ "G20 Segera Mengimplementasi Program Pertukaran Informasi Pajak Secara Otomatis," accessed February 14, 2022, <https://www.kemenkeu.go.id/publikasi/siaran-pers-lama/g20-segera-mengimplementasi-program-pertukaran-informasi-pajak-secara-otomatis/>.

² Stjepan Gadžo and Irena Klemenčić, "Effective International Information Exchange as a Key Element of Modern Tax Systems: Promises and Pitfalls of the OECD's Common Reporting Standard," *Public Sector Economics* 41, no. 2 (2017): 207–26, <https://doi.org/https://doi.org/10.3326/pse.41.2.3>.

³ Tolstopyatenko Gennadi and Ageev Stanislav, "The Roots of Legal Problems Arising in the Course of Automatic Exchange of Information in Tax Matters Between the EU and Russia," *Russian Law Journal* 9, no. 4 (2021): 99–127, <https://doi.org/https://doi.org/10.17589/2309-8678-2021-9-4-99-127>.

hopes that by participating in the AEOI program, there will be no room for Indonesian taxpayers who want to avoid taxes or intentionally save their funds abroad. Participating in this program is an action to prevent other countries from using different secrecy systems and tax systems that are not in line with the AEOI program.

Based on the AEOI agreement in the OECD Tax Law, Indonesia also formulated Government Regulation in Lieu of Law (*hereinafter* Perppu) No. 1 of 2017 concerning Access to Financial Information for Tax Purposes which has subsequently been enacted as a Law (*hereinafter* Law No. 9 of 2017).⁴ According to the Law No. 9 of 2017, stipulated the provisions relating to the granting of authority to the Directorate General of Taxes to gain access to financial information for tax purposes, including access to receive and obtain financial information. This authority also includes financial information outside Indonesia's jurisdiction under the AEOI pattern. The AEOI strategy expects to increase state tax revenues which have been the primary support for financing the State Revenue and Expenditure Budget.

The spirit of the Indonesian government in implementing access to financial information for tax purposes automatically changes the principle of bank secrecy that applies in Indonesia, especially regarding taxation because one of the financial institutions that is obliged to meet the customer's financial information needs is banking, which, in terms of business model, is very dependent on how strong it is in holding the trust of its customers or the fiduciary principle (principle of trust).

⁴ The Republic of Indonesia, "Law Number 9 of 2017 Concerning Enactment of Government Regulation in Lieu of Law Number 1 of 2017 on Access to Financial Information for Tax Purposes to Become Law (State Gazette of the Republic of Indonesia Number 95 of 2017)." (2017).

On the other hand, there are concerns that the OECD Model Convention will not be as effective as imagined for Indonesia. It is ineffective because it will not result in a massive transfer of funds from Indonesian citizens abroad to domestic banks. This problem can be seen in tax revenues in 2018, which did not show a significant increase, whereas tax revenues 2018 did not reach the target as in previous years. Tax revenue in 2018 was only 92% of the set target or Rp. 1,315.9 trillion. Hence, the shortfall of the target of IDR 108.1 trillion in 2018.⁵ Whereas in 2018 Indonesia implemented a tax amnesty policy. Even though from the declaration side, it exceeded the target of Rp. 4,000 trillion, but the repatriation only reached less than 15% of the target of Rp. 1,000 trillion.⁶ It indicated that both Indonesian citizens and Indonesian legal entities who are depositing their funds abroad are not afraid of the AEOI. Meanwhile, on July 5, 2021, the Directorate General of Taxes stated that the government plans to re-establish the Second tax amnesty program.⁷

Law No. 9 of 2017 is a reflection that the law does not exist in a vacuum,⁸ where the surrounding knowledge influences law as a social institution. This has

⁵ "Kinerja Pajak 2018, Lagi-Lagi Tak Capai Target," accessed February 14, 2022, <https://www.cnbcindonesia.com/market/20190103101148-17-48886/kinerja-pajak-2018-lagi-lagi-tak-capai-target>.

⁶ "Amnesti Pajak: Deklarasi Berhasil Namun Repatriasi Gagal - BBC News Indonesia," accessed February 14, 2022, <https://www.bbc.com/indonesia/indonesia-39446034>. See also Putri Anggia, "Provision of Elimination of Tax Administrative Sanctions in Indonesia on 2008 and 2015 Case: Establishment of Tax Law". *JILS (Journal of Indonesian Legal Studies)* 1, no. 1 (2017): 87-104. <https://doi.org/10.15294/jils.v1i01.16570>.

⁷ "Dirjen Pajak: Tax Amnesty Jilid II Mungkin Digelar 2021 - Bisnis Liputan6.Com," accessed February 14, 2022, <https://www.liputan6.com/bisnis/read/4599148/dirjen-pajak-tax-amnesty-jilid-ii-mungkin-digelar-2021>.

⁸ Muh Ridha Hakim, "Implementasi Rechtsvinding Yang Berkarakteristik Hukum Progresif," *Jurnal Hukum dan Peradilan* 5, no. 2 (2016): 227-48, <https://doi.org/http://dx.doi.org/10.25216/jhp.5.2.2016.227-248>.

resulted in approaching legal issues often using a cross-disciplinary approach, one of which is the legal economic analysis approach. In this case, the relationship between law and economics can also be seen in how law uses economics to determine appropriate legal arrangements, especially regarding Indonesia's participation in the AEOI agreement.

Regarding the topics discussed, there have been several previous studies that have described the theory of economic analysis of law, but certain policy operations from this theory are still have not been widely discussed. One of the journals discussed about similar matter was entitled "*Economic Analysis of Law pada Perubahan Kebijakan Kontrak Karya menjadi Ijin Usaha Pertambangan Khusus (IUPK): Studi Kasus PT. Freeport Indonesia*"⁹, where the research focuses on the study of legal economics on changing the contract of work policy to a special mining business permit. It does differ from this research, which focuses on specific legal economic studies related to policies on access to financial information for tax purposes. This study aims to determine the legal implications of AEOI for countries that have previously implemented it and whether participating in an agreement on the exchange of financial information for international tax purposes is the best decision from the economic aspect of Indonesia.

2. Method

The normative-empirical legal research method is the method that used in this study. The type of research approach used is the statutory, conceptual and comparative approaches. The approach to legislation in this research is the

⁹ Isti Sulistyorini and Siti Zulaekhah, "Economic Analysis of Law Pada Perubahan Kebijakan Kontrak Karya Menjadi Ijin Usaha Pertambangan Khusus (IUPK): Studi Kasus Pt. Freeport Indonesia," *Pena Justisia: Media Komunikasi Dan Kajian Hukum* 17, no. 2 (2018), <https://doi.org/http://dx.doi.org/10.31941/pj.v17i2.544>.

provisions relating to access to financial information for tax purposes, both in Indonesia and international organizations. The conceptual approach provides an analytical point of view through legal concepts, theories, and doctrines that develop in view of the Economic Analysis of Law. The approach used to compare the implementation of AEOI in various countries. Hence it can be used as a reference. Sources of legal materials used in the form of primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law no. 9 of 2017 concerning Access to Financial Information for Tax Purposes, AEOI Provisions in the OECD Tax Law, and Singapore bank secrecy provisions. Secondary legal materials are used in the form of books, national and international scientific journals, internet, and newspapers related to the topic of discussion. The technique of analyzing legal materials used a comparative technique with a study analysis using qualitative analysis.

3. Result & Discussion

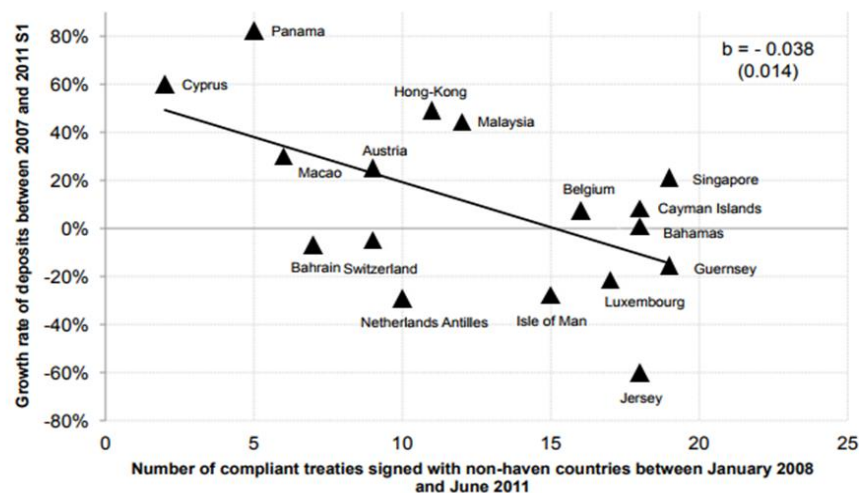
A. Automatic Exchange of Information for the Tax Purposes

As explained above, long before Indonesia decided to participate in this information exchange agreement, several countries had done it bilaterally, especially in Europe. For instance, the information exchange agreement between France and Switzerland. A study related to the impact of the information exchange agreement, namely the reduction in savings of French citizens in Switzerland by 11 percent. However, there was no significant increase in the savings of French citizens in their own country. In fact, an increase in the savings of French citizens in other tax haven countries that did not sign an agreement with France.¹⁰ Research

¹⁰ Niels Johannesen and Gabriel Zucman, "The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown," *American Economic Journal: Economic Policy* 6, no. 1 (2014): 65–91, <https://doi.org/DOI: 10.1257/pol.6.1.65>.

conducted by Niels Johannsen and Gabriel Zucman under the auspices of the London School of Economics found the fact that it is strongly suspected that countries that are not bound by bilateral agreements are the places of escape for those who save their funds.

TABLE 1. Increase in Deposits and Activities of Bilateral Agreements AEOI



The graph above describes the number of agreements made by various countries and the increase in their savings funds from 2007 to 2011 (except Malaysia from Late 2007 and Cyprus which started from 2008). From the graph, Niels and Zucman explain that tax evaders respond to information exchange agreements by transferring funds from one tax haven country to another tax haven countries that does not have a bilateral agreement on information exchange with certain countries or has few agreements.¹¹ They concluded that information exchange cooperation resulted in the relocation of funds from tax haven countries but did not repatriate funds to the fund owner’s country of origin.

¹¹ Johannesen and Zucman, 2014.

For instance, the AEOI bilateral agreement activity was carried out by France, which has entered into an information exchange agreement with 51 countries. The French activity in fact aims to urge its citizens who save funds abroad to be returned home. Instead, it was found that the transfer of deposits in response to the treaty only took place for the benefit of countries that did not participate in the information exchange program. The number of agreements made by France does not necessarily affect savings in tax haven countries that apply the European Union Savings Directive, which is an instrument for exchanging tax information between countries that are members of the European Union. As a result, the ones who experienced an increase in the number of deposits were in other countries that did not implement it and did not have an agreement with France.¹² Even a country as big as France has difficulty optimizing this AEOI, thus indicating that there is no guarantee that the implementation of this AEOI will increase a country's tax revenues, especially for developing countries which of course need political will to take decisive action, including the assets of Indonesian citizens stored abroad.

From the research conducted by Niels and Zuchman, it can be seen that with the existence of AEOI, parties who place their assets abroad (mostly in tax haven countries) to deliberately avoid taxes, can still avoid them by transferring their funds to countries that do not bound AEOI. Implementing this AEOI will be difficult if there are still many countries that are not bound by this AEOI agreement. Moreover, some major developed countries such as the United States (hereinafter US), Canada, and Japan did not sign the agreement.¹³ Concerning the

¹² Johannesen and Zucman, 2014.

¹³ Vokhid Urinov, "Developing Country Perspectives on Automatic Exchange of Tax Information," *Law, Social Justice & Global Development Journal* 1 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2684111.



United States, the OECD states that there is considerable overlap between the objectives and mechanisms under the Multilateral Competent Authority Agreement (MCAA) and the FATCA intergovernmental agreement (*hereinafter* IGAs) that the United States is already in the process of settling with other countries. This means that America has no plans to join the MCAA even though it is the largest financial center in the world. Moreover, states such as Delaware, Nevada, and South Dakota allow foreign investors to set up shell companies that do not require identity verification.¹⁴ Ultimately, any country wishing to engage in an automated exchange of information with these significant powers should discuss it in a bilateral context. It is important to note that bilateral agreements often involve power relations. Generally, large and politically powerful countries do not readily agree to enter such agreements with smaller and less powerful states. For instance, Mexico has repeatedly asked the United States to sign automatic information exchange agreements regarding interest paid by US banks to Mexican residents and vice versa since 2009. Mexico notes that sharing this information will help the Mexican government identify and prevent tax evasion, money laundering, drug trafficking, and organized crime by its residents.

Moreover, there is room for discretion and unilateralism even under MCCA. From a technical point of view, if a country wants to participate in the AEOI program, it must sign the MCAA agreement. As of April 20 2018, there have been around 146 countries that have committed to the MCAA, of which 79 have met the

¹⁴ Ahrens Leo et al., "Capital Taxation and International Cooperation, The Causes and Consequences of Automatic Exchange of Information In: Combating Fiscal Fraud and Empowering Regulators: Bringing Tax Money Back into the COFFERS," *Oxford University Press*, 2021, 112–31, <https://doi.org/doi: 10.1093/oso/9780198854722.003.0007>.

requirements to become participants.¹⁵ MCAA approved establishing administrative cooperation between countries to assess and collect taxes. However, the MCAA has a weakness, namely that there is a prerequisite that the exchange of information between two countries can be carried out if the two countries wishing to exchange information enter into a bilateral agreement.¹⁶ In its press release on 19 November 2014 regarding Switzerland's joining MCCA, the Swiss government announced that: *"The question regarding the countries with which Switzerland should introduce this exchange of data is not affected by the signing of the multilateral agreement; it will be presented to Parliament separately at a later stage."*¹⁷

This means that even though Switzerland follows the MCAA, the countries that are members of it cannot automatically exchange information with Switzerland but must first enter into a bilateral agreement that the parliament approves. At its meeting on October 8, 2014, the Swiss Federal Council also noted that the country contributed actively to the design of the Automatic information exchange Standard by stating, among other things the following: *"in an initial phase, consideration will be given to countries with which there are close economic and political ties and which, if appropriate, provide their taxpayers with sufficient scope for regularization."*¹⁸

¹⁵ "Dukung AEOI, Pemerintah Perkuat Pendekatan Bilateral Dan Multilateral," accessed February 14, 2022, https://m.mediaindonesia.com/amp/amp_detail/156185-dukung-aeoi-pemerintah-perkuat-pendekatan-bilateral-dan-multilateral.

¹⁶ Sidharta Akmam, "Pertukaran Otomatis Dalam Informasi: Perspektif Ekonomi Politik," *Jurnal Hubungan Internasional* 10, no. 2 (2017): 133–46, <https://www.e-journal.unair.ac.id/JHI/article/viewFile/7301/4416>.

¹⁷ "Switzerland Takes Further Step towards Introduction of Automatic Exchange of Information," accessed February 14, 2022, <https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-55327.html>.

¹⁸ Urinov, "Developing Country Perspectives on Automatic Exchange of Tax Information", 2015.

This implies that the signing of the MCAA and its agreement cannot oblige Switzerland to initiate an automatic exchange of information with the signatory parties. The country can still choose the state among the signatory parties that it wishes to exchange information automatically.

There are at least 79 jurisdictions or countries that have agreed to exchange financial information with Indonesia out of 146 jurisdictions that have signed the MCAA. Nevertheless, there are 5 countries that do not require information from other countries because they do not impose taxes/ tax havens countries, namely The British Virgin Island, Bermuda, Cayman Island, Turk and Caicos Island, and Nauru.¹⁹ Indeed, it is possible that Indonesia can obtain financial information for its taxpayers from that country, but as we know that in international law there is a reciprocal principle which in this case essentially other countries wants to get incentives from a given assistance/reciprocal good treatment.²⁰ Bilateral agreements often require this reciprocal implementation because they require voluntary agreements, which are usually based on mutual interests.²¹ Therefore, there is no obligation for the five countries to provide information to Indonesia. In addition, 3 (three) countries are reluctant to submit financial information to Indonesia, namely China, Monaco, and Canada because they have their own jurisdictional rules that must be obeyed. China only chose 3 countries to submit its reports, namely to France, Germany, and England. Meanwhile, Monaco and

¹⁹ "5 Negara Ini Tak Bertukar Informasi Keuangan Dengan Indonesia | Merdeka.Com," accessed February 14, 2022, <https://www.merdeka.com/uang/5-negara-ini-tak-bertukar-informasi-keuangan-dengan-indonesia.html>.

²⁰ Novalinda Nadya Putri, "Penerapan Prinsip Aut Dedere Aut Judicare Dalam Penegakan Hukum Pidana Internasional," *DE LEGA LATA: Jurnal Ilmu Hukum* 6, no. 1 (2021): 139–67, <https://doi.org/http://dx.doi.org/10.30596%2Fdll.v6i1.5537>.

²¹ Riska Marlinda Darmanti and Darmawan Mangkan, "The Implementation of Automatic Exchange of Information as a Tool to Tackle Offshore Tax Evasion: An Experience from Indonesia," *Scientax* 2, no. 1 (October 23, 2020): 100–122, <https://doi.org/10.52869/ST.V2I1.61>.

Canada are constrained by parliamentary approval rules. Even the Bilateral Agreement with America has not been completed because the agreement's provisions are in 2 languages, namely English and Indonesian, since America does not want local filing.²²

According to research conducted by McKinsey, until December 2014 regarding assets under management, it was revealed that there were around Rp. 3.250 trillion assets belonging to Indonesians abroad and Rp.2,600 trillion of which is in Singapore.²³ Last June 2017, Singapore participated in the AEOI by signing the MCAA and stated that it will cooperate with Indonesia to exchange financial information. However, there are various conditions from Singapore in order the Cooperation can be realized, among others, Indonesia already has and applies provisions relating to confidentiality and data protection in accordance with those required by the Global Forum on transparency and exchange of information for tax purposes.²⁴ Other unwritten requirements such as Indonesia must have made a bilateral agreement with Hong Kong, which Indonesia has fulfilled.

In addition, the potential matter to cause legal implications in the form of obstacles in the exchange of information between Indonesia and Singapore is that Singapore implicitly also introduces standard "domestic interest" provisions in Double Tax Arrangements, indicating that Singapore cannot exchange information about taxes that are not levied by its own country or information,

²² "3 Negara Ini Tolak Berikan Dokumen Pajak Perusahaan Ke RI | Kumparan.Com," accessed February 14, 2022, <https://kumparan.com/kumparanbisnis/3-negara-ini-tolak-berikan-dokumen-pajak-perusahaan-ke-ri>.

²³ Erik Nugraha and Audita Setiawan, "Pengampunan Pajak Sebuah Kajian Interpretif," *Jurnal ASET (Akuntansi Riset)* 10, no. 2 (2018): 211–23, <https://doi.org/https://doi.org/10.17509/jaset.v10i2.13401>.

²⁴ "MOF | Press Releases," accessed February 14, 2022, <https://www.mof.gov.sg/news-publications/press-releases/Singapore-Is-Ready-To-Have-An-AEOI-Relationship-With-Indonesia->

which the tax authorities themselves cannot access, because their laws protect bank secrecy.²⁵ Not to mention the existence of article 47 paragraph (8) in the Singapore Banking Act, which provides flexibility to banks to improve the quality of bank secrecy which is higher than that regulated by the Singapore Banking Act. It can be assumed that Singapore's domestic provisions will hinder the information exchange agreement that Indonesia is trying to make with Singapore. As of this writing, the author has not found any literature or information related to the extent of cooperation in exchanging financial information for tax purposes between Indonesia and Singapore after an official statement from the Directorate General of Taxes, Ministry of Finance John Hutagaol claimed that the exchange of information between Indonesia and Singapore started last September 2018.²⁶

B. Economic Analysis of Law Approach in Automatic Exchange of Information

After declaring its participation in the AEOI program in 2017, Indonesia immediately issued a *Perppu* as the basis for the provisions of laws and regulations to accommodate the rapid implementation of AEOI in the same year. The *Perppu* is constitutional, considering that the President is given the right to create a *Perppu*

²⁵ Shiqing Yu, "Still Keeping Secrets? Bank Secrecy, Money Laundering, and Anti-Money Laundering in Switzerland and Singapore," *IALS Student Law Review* 6 (2019): 19-25, <https://doi.org/10.14296/islr.v0i0.4955>. See also Muhtar Hadi Wibowo, "Corporate Responsibility in Money Laundering Crime (Perspective Criminal Law Policy in Crime of Corruption in Indonesia)". *JILS (Journal of Indonesian Legal Studies)* 3, no. 2 (2018): 213-36. <https://doi.org/10.15294/jils.v3i02.22740>; Diadra Preludio Ramada, "Prevention of Money Laundering: Various Models, Problems and Challenges". *Journal of Law and Legal Reform* 3, no. 1 (2022): 67-84. <https://doi.org/10.15294/jllr.v3i1.54837>.

²⁶ "Pertukaran Data Keuangan Dengan Singapura Mulai September," accessed February 14, 2022, <https://nasional.kontan.co.id/news/pertukaran-data-keuangan-dengan-singapura-mulai-september>.

in the case of a compelling urgency as regulated in Article 22 of the 1945 Constitution of the Republic of Indonesia (*hereinafter* UUD NRI 1945). Although some parties doubt or even oppose the issue of the urgency of coercion in the Perppu, there is no firm formulation on the meaning of “force urgency” in the UUD NRI 1945. Hence, the interpretation of the urgency of coercion can be really comprehensive.

For instance referring to the opinion of Padjadjaran University academics Bagir Manan and Susi Dwi Harijanti who defines that the urgency of coercion can be interpreted as an urgent legal need that should be regulated by law, among others because of the possibility that the existing laws have not been regulated, the existing laws are not adequate, including not implementing or changing the provisions of the existing law.²⁷ Hence, it is very difficult to prove that a Perppu is unconstitutional because it does not fulfill the urgency of coercion because its meaning can be so broad. Moreover, the Perppu on Access to Financial Information for Tax Purposes was quickly approved by the House of Representatives of the Republic of Indonesia (*hereinafter* DPR) and stipulated into Law, namely Law No. 9 of 2017. Therefore, the writer wants to examine this AEOI from the point of view of legal economics. Since current law should be more open, rather than aspire to establish law as an autonomous discipline, it reaches out to knowledge from other interrelated disciplines from the social sciences and humanities.²⁸

²⁷ Bagir Manan and Susi Dwi Harijanti, “Artikel Kehormatan: Peraturan Pemerintah Pengganti Undang-Undang dalam Perspektif Ajaran Konstitusi Dan Prinsip Negara Hukum,” *Padjadjaran Journal of Law* 4, no. 2 (2017): 222–43, <https://doi.org/https://doi.org/10.22304/pjih.v4n2.a1>.

²⁸ Hanoch Dagan and Roy Kreitner, “Economic Analysis in Law,” *Yale Journal on Regulation* 38, (2021): 566-588, <https://openyls.law.yale.edu/handle/20.500.13051/8326>.

If it is related to Indonesia's goals as a state, policies related to the economy such as the AEOI must be directed at economic progress that leads to people's welfare. The purpose of the Indonesian state is contained in the Preamble to the 1945 Constitution of the Republic of Indonesia which states that:

"Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice..."

The sentence "*improve public welfare*", "*to educate the life of the people*" and "*social justice*" are vital sentences that emphasize that Indonesia is a country that has the concept of a welfare state. In addition, there is also a provision that a law should be monitored and reviewed on its impacts and benefits for the state as stated in Article 1 point 14 of Law no. 15 of 2019 concerning the Amendment to Law No. 12 of 2011 regarding the Establishment of Laws and Regulations. This arrangement is a fundamental milestone that various laws and regulations in Indonesia were born without compromising their usefulness values. One of the principles put forward in the economic analysis of law is a policy/law that maximizes utility in this case its benefits to society. Therefore, the economic analysis of law approach becomes relevant to be used in assessing the legal implications of AEOI in Indonesia.

According to the *economic analysis of law*, Richard Posner states that economics is a science that explains rational choices whose resources are limited by human desires therefore, it is the task of economics to define or explore the implications of the assumption that a person is a "*rationale maximize*" throughout his life, his

satisfaction can be called “*self-interest*”.²⁹ As a “*rational maximize*” creature, humans will look for ways to maximize profits from existing conditions. Humans will try to get maximum results from the existing conditions. This is close to “*efficiency*” which is one of the pillars in *economic analysis of law*.

Referring to the *game theory* concept from John Nash, it is said that humans must set strategies with the assumption that their opponents will act in their best interests. Nash equilibrium is also non-cooperative equilibrium because each party chooses the best strategy for itself without the cooperation and without thinking about the welfare of society or the other party. This creates inefficiency because each party acts independently. Hence, Nash introduces cooperative equilibrium which occurs when players act in unison and devise strategies that will maximize their mutual outcome. Nash’s concept of equilibrium relies heavily on individual rationality. Each player’s choice of strategy depends not only on his rationality, but also on the rationality of the competitors. A strategy is said to be maximum when it can be carried out to maximize the minimum profit that can be obtained.³⁰

Nash’s concept of efficiency and non-cooperative equilibrium can be analyzed through the *Prisoners Dilemma* game invented by Flood and Dresher in 1950.³¹ The *Prisoners Dilemma* begins its analysis through the story of two criminals who together commit the crimes we call A and B. Afterwards, the police conducted a separate interrogation. Due to they will be interrogated separately, the two detainees are faced with 2 choices whether to confess or not confess. If A and B choose to confess, they will be sentenced to 5 years in prison. If both of them don’t

²⁹ Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business, 2014). p. 3

³⁰ Robert S. Pindyck and Daniel L. Rubinfeld, *Mikroekonomi*, Eight Edit (Jakarta: Erlangga, 2014).

³¹ James R Situmorang, “Penggunaan Game Theory Dalam Ilmu Sosial,” *Jurnal Administrasi Bisnis* 11, no. 2 (2016), <http://hdl.handle.net/123456789/1157>.

admit their actions, then they will only be imprisoned for 1 year. On the other hand, if A admits but B does not admit it or vice versa, then those who are in a position to admit it will be released, but those who do not admit will be imprisoned for 20 years. Broadly speaking, it can be described as follows:

TABLE 2. Example of a Prisoner Dilemma

<i>Prisoner Dilemma</i>		Suspect B	
		Confess	Not Confessing
Suspect A	Confess	(A:5, B:5)	(A:0, B:20)
	Not Confessing	(A:20, B:0)	(A:1, B:1)

This difficult answer choice is called the Prisoner Dilemma. Nash found that the strategically best decision for A and B to choose was to just Confess and Confess. In plain view indeed, the most profitable option is if both of them work together not to admit their actions so that both of them are sentenced to a very minimum sentence of 1 year in prison. The option results in what economists call “*pareto optimality*”, which is individually rational and may be collectively irrational.³² However, rationally, both of them will realize that in this situation there is a possibility for the other party to break their promise because there is a possibility that they will be free from punishment even though the other party is threatened with the longest prison sentence. Nevertheless, in Nash's theory, the

³² Adam Moore, “Intellectual Property and the Prisoner’s Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets,” *Fordham Intellectual Property, Media and Entertainment Law Journal* 28, no. 4 (January 1, 2018), <https://ir.lawnet.fordham.edu/iplj/vol28/iss4/3>.

choice chosen uses the assumption that the opposing party will choose the best strategy for itself.

If the *prisoner dilemma* is applied to the issue of access to financial information for tax purposes, AEOI activities begin with all countries agreeing to the OECD Tax Law. Even between countries can exchange information for tax purposes. *Game theory* is applied to the problem of the best strategy for Indonesia in responding to AEOI developments. It started by dividing into 2 (two) players, namely Indonesia and other countries. The attitude that each group can take is to apply the AEOI or not to apply the AEOI, which of their choices will have the following consequences:

TABLE 3. Prisoner Dilemma in the application of AEOI

Application of AEOI		Other Countries	
		Apply	Not to Apply
Indonesia	Apply	(A:5, B:5)	(A:0, B:20)
	Not to Apply	(A:20, B:0)	(A:1, B:1)

Suppose both Indonesia and other countries choose the strategy of not implementing the AEOI. In that case, the impact will be that each party will remain in the same situation as the AEOI has not been implemented. Indonesia remains on the performance of collecting third party funds and taxes as in the current condition, while other countries also remain in their existing position. Given that the existing position is assumed to be with a figure of each benefiting from third-party funds and taxes of 1 trillion as indicated by number 1 in the table. In this case, a cooperative equilibrium strategy is applied. Especially for other countries in the context of not implementing the AEOI, 2 (two) countries can still be

distinguished, namely tax havens and non-tax havens. The position will be more favorable for countries that have long been tax havens. Especially for a country that has long been a tax haven and has a reputation. Reduction or elimination of taxes by countries that have just implemented does not in itself guarantee the arrival of cross-border funds.³³

In the event that Indonesia and other countries choose a strategy to implement the AEOI consistently, each country will gain more benefits than the strategy of not implementing the AEOI. This is due to an increase in a country's tax revenue but with the risk of a decrease in third-party funds in certain countries. State income from taxes can decrease over time if the country finds problems with tax rates, ease of doing business, Corruption Perception Index, and less competitive infrastructure than other countries that are implementing AEOI. For some of them, Indonesia is still less competitive even with fellow Southeast Asian countries. For instance, in terms of ease of doing business, as of November 2020, Indonesia ranks 73rd compared to Singapore, Malaysia and Thailand, which are in the top 30 in the world.³⁴ In addition, Indonesia's Corruption Perception Index lags behind Singapore, Brunei Darussalam, Malaysia, and even Timor Leste which, is still slightly better.³⁵ From the description of the application of game theory, it can

³³ William J. Moon, "Tax Havens as Producers of Corporate Law," *Michigan Law Review* 116, no. 6 (April 1, 2018): 1081–1100, <https://doi.org/10.36644/mlr.116.6.tax>. See also David Tan, and Lu Sudirman, "Final Income Tax: A Classic Contemporary Concept to Increase Voluntary Tax Compliance Among Legal Professions in Indonesia". *JILS (Journal of Indonesian Legal Studies)* 5, no. 1 (2020): 125-70. <https://doi.org/10.15294/jils.v5i1.37308>.

³⁴ "Begini Perbandingan Kemudahan Berusaha di Indonesia dan Negara Asia Tenggara - Medcom.id," accessed February 14, 2022, <https://www.medcom.id/ekonomi/bisnis/zNA3Gxek-begini-perbandingan-kemudahan-berusaha-di-indonesia-dan-negara-asia-tenggara>.

³⁵ "Indeks Persepsi Korupsi Indonesia Kalah dari Timor Leste | Republika Online," accessed February 14, 2022, <https://www.republika.co.id/berita/qnmuoz428/indeks-persepsi-korupsi->

be seen that the implementation of AEOI creates opportunity costs for Indonesia. Indonesia cannot take advantage of its potential competitive advantage against other countries due to various factors that have been described.

Assuming that each country benefits from an increase in tax revenue of 5 trillion which is indicated by number 5 in the table. This strategy is also cooperative equilibrium. Implementing AEOI together, according to the author, is not the maximum benefit that Indonesia can obtain. The maximum benefit is to take a policy of exiting the agreement or conducting a moratorium on the AEOI agreement. As a *rational maximizer*, indeed, Indonesia should place a position where it will take incentives out of the agreement or conduct a moratorium on the implementation of the agreement. Indonesia will benefit from the maximum incoming third-party funds because it will be considered a “tax haven” country for other countries implementing the AEOI. As described in chapter 3.1. abovementioned, the transfer of deposit funds due to the existence of this AEOI is

indonesia-kalah-dari-timor-leste. In fact, various studies have shown that corruption has a negative effect on the sense of social justice and social equality. Corruption causes sharp differences between social groups and individuals in terms of income, prestige, power and others. *See also* Shubhan Noor Hidayat, Lego Karjoko, and Sapto Hermawan, “Discourse on Legal Expression in Arrangements of Corruption Eradication in Indonesia”. *JILS (Journal of Indonesian Legal Studies)* 5, no. 2 (2020): 391-418. <https://doi.org/10.15294/jils.v5i2.40670>; Suramin Suramin, “Indonesian Anti-Corruption Law Enforcement: Current Problems and Challenges”. *Journal of Law and Legal Reform* 2, no. 2 (2021): 225-42. <https://doi.org/10.15294/jllr.v2i2.46612>; Nurfaika Ishak, Rahmad Ramadhan Hasibuan, Tri Suhendra Arbani, “Bureaucratic and Political Collaboration Towards a Good Governance System”. *Bestuur* 8, no. 1 (2020): 19-26. <https://doi.org/10.20961/bestuur.v8i1.42922>. In fact, in some cases, there are often efforts to block and obstruct law enforcement in corruption cases in Indonesia. *See also* Deni Setya Bagus Yuherawan, “Obstruction of Justice in Corruption Cases”. *JILS (Journal of Indonesian Legal Studies)* 5, no. 1 (2020): 225-56. <https://doi.org/10.15294/jils.v5i1.38575>.

precise to other countries where there is no AEOI bilateral agreement with the country of origin of the deposit owner. The strategy of utilizing this incentive is a non-cooperative equilibrium. It also applies vice versa if other countries apply the same strategy. With increased funding, Indonesia can solve problems of poverty, unemployment, infrastructure, etc. In addition, it should also be emphasized the fact that not all countries in the world agree on the AEOI even 2 (two) world financial centers such as Switzerland and Singapore are not fully subject to the OECD Model Convention, whereas Switzerland explicitly reserves Article 26 of the OECD Model Convention while Singapore implicitly reserves the same article.

They were bearing in mind that in the condition that the majority of countries in the world ratify the OECD Model Convention, the confidentiality of financial data becomes a “rare item” and even a “luxury item”, which certainly increases the economic value. The economic value here can be seen from the extent to which the owners of the funds are willing to get the protection of financial information, both with money and other contributions they can make.³⁶ Confidentiality of financial information is a competitive asset for a country. In the context of many countries ratifying the OECD Model Convention, openness is a common thing, not a rare item, but on the contrary, the law of supply and demand for the confidentiality of financial information is applied which is already a luxurious service due to scarcity and is still needed by the world community. Countries such as Switzerland and Singapore which exclude the application of Article 26 of the OECD Tax Law which is the basis for exchanging financial information for tax purposes do not seem to want to lose the competitive advantage of this AEOI agreement. Not to mention countries that are not part of the AEOI agreement and

³⁶ Fajar Sugianto, *Economic Analysis of Law Seri Analisis Ke-ekonomian tentang Hukum Seri I Pengantar*. (Jakarta: Kencana, 2013), pp. 50-51.

large developed countries that have the bargaining power to refuse agreements to exchange financial information for tax purposes on a bilateral basis.

Therefore, not participating in the AEOI or conducting a moratorium has a high price and competitive assets for countries that can provide it. Countries that are able to provide the confidentiality of financial information are rare goods that can determine the price with high-profit margins. This is an implementation of the economic analysis of law approach by taking into account humans as a *rational maximizer*. In this case, humans try to maximize the usefulness of an item by paying attention to the law of price with demand and the tendency of resources to flow to the highest utility value. Countries that dare to respect privacy by offering solid legal provisions will be winners in the long run.³⁷

4. Conclusion

AEOI led to a transfer of funds between countries that entered into bilateral agreements but did not trigger significant repatriation of funds. On the other hand, countries that are least compliant with AEOI receive incentives in the form of funds transfers from countries that are aggressively implementing AEOI. Hence, in general, it does not change the amount of funds managed abroad. Based on *economic analysis of law* by using study *game theory: prisoner dilemma*, it is known that Indonesia's participation in the AEOI is not the best decision from an economic perspective. The application of AEOI actually causes *opportunity cost* for Indonesia where several factors such as ease of doing business rankings, Corruption Perception Index, infrastructure, and several other things are still not optimal compared to several other ASEAN countries such as Singapore, Malaysia, and

³⁷ Jean-Rodolphe W Fiechter, "Exchange of Tax Information: The End of Banking Secrecy in Switzerland and Singapore," *International Tax Journal* 36 (2010): 55-67, https://www.kellerhals-carrard.ch/docs/de/people/publikationen/Fiechter_ITJ_36-06.pdf.

Thailand. The best decision based on the human principle of “*rational maximizer*” trying to maximize profits is by exiting the agreement or temporarily conducting a moratorium on the AEOI agreement.

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The authors state that there is no conflict of interest in the publication of this article.

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