

# A **PRACTICAL GUIDE** ON EXCHANGE OF INFORMATION FOR DEVELOPING COUNTRIES



*Leading Africa In  
Tax Administration*



AN ATAF PUBLICATION – 2013



# FOREWORD

Increases in global trade, the movement of finance, goods and people require revenue administrations across the world to up their game. Potential revenue gains or losses can be high when there is not adequate international co-operation. Given the current economic context, where national budgets are under severe pressure, it is more important than ever that all countries show their determination to combat tax fraud and evasion, and to improve information exchange in tax matters, in full respect of taxpayer's rights.

One critical development is that more and more countries are committing to the international standard of transparency and effective exchange of information and joining the Global Forum on Transparency and Exchange of Information for Tax Purposes. As part of the 2010 Seoul Multi-Year Action Plan on Development, the G20 Leaders requested the Global Forum to "enhance its work to counter the erosion of developing countries' tax bases. An increasing number of African countries are now members of the Global Forum and are also joining the Convention on Mutual Administrative Assistance in Tax Matters. In addition, ATAF has already put forward ambitious proposals in the form of the ATAF Agreement on Mutual Assistance in Tax Matters to enable participating African Revenue Administrations to assist each other to counter tax evasion.

To help developing countries benefit from the new international cooperative environment, ATAF and the OECD's Task Force on Tax and Development have collaborated closely to develop this practical "how to" Guide on Exchange of Information.

The purpose of the Guide is to describe to competent authorities new to exchange of tax information, what the process has to offer and to provide practical guidance to implement exchange information in an effective and efficient manner. We hope the Practical Guide will be helpful to ATAF members and also other developing countries to exchange of information effectively and reduce cross border tax evasion and base erosion.

The collaboration on this guide is just one of many important international tax issues on which ATAF and the OECD are working closely together as long term partners. We are delighted that the OECD and ATAF have signed in October 2012 in Cape Town a Memorandum of Co-operation, agreeing to work together to improve tax systems in Africa. Joint activities are planned for work in the areas of tax incentives for investment, transfer pricing, exchange of information, taxpayer education, and collection of African revenue statistics and support for the proposed Tax Inspectors Without Borders (TIWB) initiative.



Logan Wort

**Executive Secretary**  
**African Tax Administration Forum (ATAF)**

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# TABLE OF CONTENTS

<b>1. INTRODUCTION</b>	1
<b>2. PURPOSE OF THE GUIDE</b>	2
<b>3. WHAT LEGAL BASIS CAN DEVELOPING COUNTRIES USE FOR EXCHANGE OF INFORMATION FOR TAX PURPOSES?</b>	2
Double Tax Conventions (DTCs)	2
Tax Information Exchange Agreements (TIEAs)	3
Regional agreements providing for Assistance in Tax Matters	3
The Multilateral Convention on Mutual Administrative Assistance in Tax Matters	3
Other instruments	4
<b>4. WHAT DOES EXCHANGE OF INFORMATION HAVE TO OFFER TO DEVELOPING COUNTRIES?</b>	4
4.1 Exchange of information can assist in the detection of tax evasion and avoidance	5
4.2 Exchange of information and Transfer pricing audits	6
4.3 Detection of Potential Abuse of tax incentives targeted at foreign direct investment	6
4.4 Use of requests as a source of intelligence	7
4.5 Other forms of exchange that may be of interest to developing countries	7
<b>5. WHAT ARE THE PRINCIPLES GOVERNING EXCHANGE OF INFORMATION?</b>	10
5.1 Who has the authority to Exchange Information?	10
5.2 Who are the Persons covered by exchange of information?	12
5.3 What are the taxes covered by exchange of information?	13
5.4 What are the tax years covered by exchange of information?	14
5.5 Obligation to provide Foreseeably Relevant Information	14
5.6 Limitations to the Obligation to Exchange information requested	16
<b>6. HOW TO EXCHANGE INFORMATION IN PRACTICE</b>	17
6.1 Exchange of information upon request: How to Make a Request and how to respond to a Request for Information	17
6.2 The relevance of spontaneous exchange	26
<b>7. ENSURING THE CONFIDENTIALITY OF INFORMATION EXCHANGED FOR TAX PURPOSES</b>	28
7.1 Legal framework to protect the tax confidentiality of information exchanged	29
7.2 Administrative Policies and Practices must be in place to protect the tax confidentiality of information exchanged	29
7.3 Disclosure rules	30
7.4 Use of information received for other than tax purposes for instance to counteract serious crimes (corruption, money laundering etc.)	31
7.5 Legal requirement to notify the taxpayer concerned about the request for information	31
7.6 Tax confidentiality provisions take precedence over freedom of information legislation	32
<i>Checklist for tax administrations to determine whether tax confidentiality issues are adequately addressed</i>	32
<b>8. ORGANISATIONAL ASPECTS AND PROCESSES</b>	33
8.1 Getting started	33
8.2 Organisation of EOI Units	33
8.2.1 Human resources in the EOI Unit	34
8.2.2 Financial resources	35
8.2.3 IT Resources	35
8.3 Processes	35
8.4 Record Keeping	37
8.5 Statistics on EOI and Evaluation Reports	40
<b>9. THE KEY ROLE OF TAX AUDITORS IN EOI</b>	41
9.1 Guidance should be provided to tax auditors on when and how to make requests	42
9.2 Training and Awareness on EOI	43

<b>ANNEX 1: Article 26 on Exchange of Information of the OECD Model Tax Convention</b> .....	44
<b>ANNEX 2: Table summarising the possible forms of mutual assistance under Article 26 of the OECD Model Convention, the Model Agreement on Exchange of information (TIEA) and the Convention on Mutual Administrative Assistance in Tax Matters</b> .....	45
<b>ANNEX 3: Case Studies based on Actual Cases of Exchange</b> .....	46
Case study 1: Exchange of information on a High Net Worth Individual.....	46
Case study 2: Exchange on request Services Re-invoicing Scheme.....	46
Case study 3: Exchange on request Suspected Unreported Income – Assets Identification.....	46
Case study 4: Exchange on request in a transfer pricing audit.....	47
Case study 5: Spontaneous exchange of information.....	47
Case study 6: Exchange of information for VAT purposes: Cross-border sale of software.....	47
<b>ANNEX 4: Optional Model Templates</b> .....	48
4.1 Exchange of information feedback form (specific request).....	48
4.2 Optional Model Template for Requests for Information under a Tax Information Exchange Agreement .....	49
<b>ANNEX 5: EOI Glossary of Terms</b> .....	51
<b>ANNEX 6: Relevant Websites</b> .....	56



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## 1. INTRODUCTION

Individuals and companies are increasingly conducting business across borders, making foreign direct investments and carrying out international financial transactions as globalization and technological developments continue to provide new opportunities. Yet tax sovereignty stops at the border and tax administrations are increasingly in need of information from foreign jurisdictions in order to administer and enforce their tax laws. Tax evasion and tax avoidance including base erosion and profit shifting are significant global challenges for both developed and developing countries. The recent financial and economic crisis has also brought into the spotlight the use of tax havens by certain taxpayers to escape their tax obligations and has emphasised the need for countries to cooperate to safeguard their tax receipts.

In recent years, there has been a dramatic change in the level of tax cooperation throughout the world. In response to the G20 call in Washington, in November 2008, commitments have been made by many jurisdictions worldwide to eliminate obstacles to information exchange in tax matters by agreeing to the international standard on transparency and exchange of information (hereafter “the international standard”). The international standard requires jurisdictions to provide information exchange on request, where the information is “foreseeably relevant” for the administration or the assessment of the taxes of the requesting party and regardless of any rules the jurisdiction may have on bank secrecy or a domestic tax interest. The international standard is included in the 2002 Model agreement on Exchange of information (Model TIEA), in Article 26 of the OECD Model Tax Convention and in Article 26 of the UN Model Tax Convention. The Global Forum on Transparency and Exchange of Information for tax purposes (GFTEOI or Global Forum), which (at time of writing) has 118 members, is mandated to promote the universal, rapid and consistent implementation of the standard through a process of in depth monitoring and peer review. With this in mind, the Global Forum has developed Terms of Reference which are used by its assessment teams as the standards and key elements against which jurisdictions’ legal and administrative frameworks and their actual implementation of the standards are assessed<sup>1</sup>. The Exchange of Information Portal of the Global Forum<sup>2</sup> tracks the expansion of the network of agreements to the standard. The Global Forum, whose members include many developing countries, provides training and technical assistance on implementing the international standard to its members. The international standard has also influenced the Convention on Mutual Administrative Assistance in Tax Matters (hereafter the Multilateral Convention). It was amended by a 2010 Protocol which aligns it to the international standard and opens it to all countries. This change reflects the call of the G20 in London in 2009 to make it easier for developing countries to secure the benefits of this new cooperative tax environment. It is truly a global instrument to combat international tax evasion. Since 2009, over 800 Tax Information Exchange Agreements (TIEAs) and Double Tax Conventions (DTCs) to the standard have been signed including by a growing number of developing countries. At the G20 Cannes Summit of November 2011, all G20 countries had signed or stated their intention to sign the Multilateral Convention. More and more countries are adhering to this instrument which is the most powerful tool for international tax cooperation between countries<sup>3</sup>.

The report by United Nations Conference on Trade and Development (UNCTAD) on “Global and Regional Foreign Direct Investment Trends” (2012) shows that developing and transition economies attracted over 50 percent of the world’s foreign direct investment in 2010 and, for the first time, outperformed developed economies. On the other hand the United Nations Economic Commission for Africa (UNECA) has estimated that about \$50bn is illegally exported from the African continent every year through tax evasion, incorrect invoicing, import over-pricing, and exports under-

**TAX EVASION AND TAX AVOIDANCE INCLUDING BASE EROSION AND PROFIT SHIFTING ARE SIGNIFICANT GLOBAL CHALLENGES FOR BOTH DEVELOPED AND DEVELOPING COUNTRIES**



800

**TAX INFORMATION EXCHANGE AGREEMENTS HAVE BEEN SIGNED SINCE 2009**

\$50  
BILLION

**ILLEGALLY EXPORTED FROM THE AFRICAN CONTINENT EVERY YEAR THROUGH TAX EVASION, INCORRECT INVOICING, IMPORT OVER-PRICING, AND EXPORTS UNDER-PRICING**

<sup>1</sup> The Global Forum’s Terms of Reference reflect the principles of Transparency and effective exchange as reflected in the 2002 Model Agreement on Exchange of Information in Tax matters and its commentary and in Article 26 of the OECD Model Tax Convention on Income and Capital and its commentary as updated in 2004.

<sup>2</sup> [www.eoi-portal.org](http://www.eoi-portal.org)

<sup>3</sup> The updated list of signatures and ratifications is at <http://www.oecd.org/ctp/eoi/mutual>

pricing. Developing countries are confronted with a number of challenges: how to detect offshore non-compliance; how to deal effectively with transfer pricing issues, particularly if they want to avoid the risk of losing out on tax revenues from cross-border transactions carried out by multinational enterprises; how to tackle cross border VAT fraud etc. Exchange of information is one of the most effective tools to combat cross border tax evasion and avoidance but up to now, developing countries have made limited use of information exchange. Reasons for this include the lack of a legal basis for information exchange within their legal framework, a lack of awareness on part of tax administrations of the potential of exchange of information to detect tax evasion and avoidance and the lack of knowledge about effective implementation of exchange of information.

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COUNTRIES IN  
THE EFFECTIVE  
IMPLEMENTATION  
OF THEIR EOI  
INSTRUMENTS**

## **2. PURPOSE OF THE GUIDE**

Developing countries are now starting to benefit from the new environment for international cooperation by expanding their EOI networks: by entering into Double Tax Conventions (DTCs) with their new trading partners, entering into TIEAs, regional tax agreements and adhering to the Multilateral Convention. The ATAF<sup>4</sup> Working Group on Exchange of Information and Tax Treaties identified the need for a practical guide on EOI to assist developing countries in the effective implementation of their EOI instruments. The present Guide has been designed jointly by the OECD Task Force on Tax and Development and the ATAF Working Group on EOI and Tax treaties to respond to this need.

The Guide presents the legal and practical tools available for exchange of information to assist developing countries obtain the benefits from international cooperation. It describes the key principles governing exchange of information and how the particular forms of exchange of information can assist in the detection of tax evasion and avoidance. It provides guidance on how to implement exchange information in an effective manner while ensuring the tax confidentiality of information exchanged. It also advises on the operational aspects of exchange of information in terms of organization, processes, human resources and IT support. It also describes the key role played by tax auditors in exchange of information and identifies the need for ongoing training for tax auditors in EOI. The Guide can be used for training. It is not prescriptive and is intended to help developing countries gain real benefits from effectively exchanging information in practice. It does not affect the obligations of countries under legally binding EOI instruments.

## **3. WHAT LEGAL BASIS CAN DEVELOPING COUNTRIES USE FOR EXCHANGE OF INFORMATION FOR TAX PURPOSES?**

It is not possible to exchange tax information between countries without having a legal basis for doing so. Developing countries may have different legal instruments at their disposal for exchange of information purposes: DTCs which include an Article on EOI generally based on Article 26 of the OECD/UN Model Convention (hereafter the Model Tax Convention), Tax Information Exchange Agreements (TIEAs), Regional Tax Agreements or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (hereafter the Multilateral Convention).

### ***Double Tax Conventions (DTCs)***

DTCs are important not only to provide certainty to investors on the allocation of profits from international business activities and to avoid double taxation but also to provide for exchange information to assist in the implementation of the DTC and in administering or enforcing the domestic tax law of the contracting States.

The EOI provisions of DTCs are generally based on Article 26 of the OECD or UN Model Tax Convention (see Annex 1). They provide for information to be exchanged

<sup>4</sup> African Tax Administration Forum – see [www.ataftax.net](http://www.ataftax.net)



in a range of different ways (exchange on request, spontaneous exchange, automatic exchange, as well as simultaneous tax examinations, tax examinations abroad and industry wide exchange).

### **Tax Information Exchange Agreements (TIEAs)**

A number of developing countries have TIEAs<sup>5</sup> in force, and others are starting to negotiate such agreements. TIEAs are largely based on the 2002 OECD Model Agreement on Exchange of Information on Tax Matters (hereafter Model TIEA). TIEAs differ from DTCs in that they are only concerned with exchange of information. The Model TIEA provides for exchange of information on request and tax examinations abroad principally for direct taxes but TIEAs may also cover other taxes such as VAT and provide for forms of exchange other than exchange on request.

**TIEAS DIFFER FROM  
DTCs IN THAT THEY  
ARE ONLY CONCERNED  
WITH EXCHANGE OF  
INFORMATION**

### **Regional agreements providing for Assistance in Tax Matters<sup>6</sup>**

A legal basis for exchange may also be found in regional agreements such as:

- The Eastern African Community Income Tax Treaty of 30 November 2010<sup>7</sup>: Article 27 of the EAC Treaty provides for Exchange of Information.
- The Règlement UEMOA<sup>8</sup> (Union Economique et Monétaire Ouest Africaine) N° 08/CM/UEMOA on rules to avoid double taxation within the UEMOA and on assistance in tax matters:  
Chapter V of the Règlement UEMOA provides for exchange of information on request and spontaneous exchange as well as for assistance in tax collection.
- The SAARC<sup>9</sup> (South Asian Association for Regional Cooperation) Limited Multilateral Agreement on Avoidance of Double Taxation and Mutual Administrative Assistance <http://www.saarc-sec.org>  
Article 5 and 6 of the SAARC Agreement provide for exchange of information as well as assistance in tax collection.
- The Agreement Among the Member States of the CARICOM<sup>10</sup> for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion <http://www.caricomlaw.org/Details.aspx?EntryId=140>  
Article 24 of the Agreement provides for exchange of information.
- The ATAF Multilateral Mutual Assistance Treaty (not yet in force).
- The SADC<sup>11</sup> (Southern African Development Community) Agreement on Assistance in Tax Matters (signed on 16 August 2012 but not yet in force) creates an avenue for exchange of information on request, spontaneous, simultaneous tax examinations and tax examinations abroad. It also provides for assistance in tax collection.

### **The Multilateral Convention on Mutual Administrative Assistance in Tax Matters**

The Multilateral Convention is a powerful tool for mutual assistance in tax matters.

<sup>5</sup> See [www.eoi-tax.org](http://www.eoi-tax.org)

<sup>6</sup> Some of these instruments were developed before the international standard was established. As a consequence they do not necessarily meet the international standard.

<sup>7</sup> Tax Treaty Between the Governments of The Republics of Kenya, Uganda, Burundi, Rwanda and The United Republic of Tanzania (not yet in force) and MOU on Exchange of Information.

<sup>8</sup> Members are: Benin, Burkina Faso, Ivory Coast, Guinea, Mali, Niger, Senegal and Togo.

<sup>9</sup> SAARC has a membership of 7 Member States: the People's Republic of Bangladesh, the Kingdom of Bhutan, the Republic of India, the Republic of Maldives, the Kingdom of Nepal, the Islamic Republic of Pakistan and the Democratic Socialist Republic of Sri Lanka.

<sup>10</sup> The Parties to the Agreement are: Antigua & Barbuda, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts & Nevis, Saint Lucia, St. Vincent & The Grenadines, Trinidad & Tobago.

<sup>11</sup> SADC has a membership of 15 Member States, namely: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

It provides for a single legal basis for bilateral and multi-country cooperation. The Multilateral Convention provides for extensive forms of cooperation among competent authorities on a wide range of taxes. It covers all forms of compulsory payments to government except for customs duties. It applies to taxes on income, profits, capital gains, VAT and net wealth levied at the central government level. It also covers local taxes, compulsory social security contributions, estate and inheritance or gift taxes. It provides for exchange of information (including exchange on request, spontaneous exchange and automatic exchange), simultaneous tax examinations, tax examinations abroad and assistance in recovery including measures of conservancy and the service of documents. The Multilateral Convention can play a key role in the exchange of information in the field of indirect taxes, especially at a time when cross-border VAT fraud has become an issue of increasing concern. By acceding to the Multilateral Convention, countries can undertake bilateral or multilateral simultaneous tax examinations covering both direct and indirect taxes. The Multilateral Convention can also be used for joint audits.

At 5 December 2012, the Convention had 41 signatories<sup>12</sup> (Argentina, Australia, Belgium, Brazil, Canada, Czech Republic, Colombia, Costa Rica, Denmark, Finland, France, Ghana, Georgia, Germany, Greece, Guatemala, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea, Malta, Mexico, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovenia, South Africa, Spain, Sweden, Tunisia, Turkey, Ukraine, the United Kingdom, and the United States) and the number of signatories continues to grow. The process for countries to be invited to sign the Convention is available at <http://www.oecd.org/ctp/eoi/mutual>.

When EOI instruments are in place the competent authorities may wish to enter into Memoranda of Understanding (MOUs or Working Agreements) for the practical implementation of exchange of information. These MOUs may cover specific procedures for exchange, timelines for providing information, the identification of designated representatives as competent authorities, the allocation of costs etc. These MOUs may be publicly available in some countries.

#### **Other instruments**

Competent authorities may request information under a DTC, TIEA or the Multilateral Convention for civil or criminal tax matters provided, of course, that the information is requested for purposes covered by the relevant instrument. In addition exchange of information for criminal tax matters can also be based on bilateral or multilateral treaties on mutual legal assistance (to the extent that they also apply to tax crimes)<sup>13</sup>, and in some countries on domestic legislation for the granting of such assistance.

#### **Examples of multilateral treaties on mutual legal assistance that also apply to criminal tax matters**

The South African Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters (2000), The Inter-American Convention on Mutual Legal Assistance in Criminal Matters (as extended by the Optional Protocol of 23 May 1993)

41

THE NUMBER OF  
SIGNATORIES THE  
CONVENTION HAD ON  
5 DECEMBER 2012

## **4. WHAT DOES EXCHANGE OF INFORMATION HAVE TO OFFER TO DEVELOPING COUNTRIES?**

Exchange of information can assist tax authorities in various ways including in detecting tax fraud, tax evasion and avoidance and in the implementation of DTCs: for the proper allocation of profits between associated enterprises and to ensure that taxpayers claiming the benefits of their DTCs are actually entitled to such benefits.

<sup>12</sup> See the list of signatures and ratification at <http://www.oecd.org/ctp/eoi/mutual>

<sup>13</sup> See the Catalogue of the Main Instruments on International Co-operation against Tax Crimes and Other Financial Crimes on [www.oecd.org/ctp/taxcrimes](http://www.oecd.org/ctp/taxcrimes)

For instance, where the source country is considering whether to grant the exemption provided in the Article on royalties of a DTC, that country may ask the country where the recipient of the royalties claims to be resident, whether he is in fact a resident and the beneficial owner of the royalties.

The types of information that can be exchanged are quite varied: information on income, bank information, transfer pricing information, ownership information, etc. Information exchanged may include copies of tax returns, bank statements, accounting records, copies of a contract, tables, diagrams, copies of invoices, letters etc. The information may be maintained in a paper form or electronic form. The information may be directly available to the tax administration (tax return, amount of taxes paid, etc) or held by a third party (e.g. taxpayer, employer, financial institution, company, foundation or trust).

The exchange of non-taxpayer specific information may be useful in detecting tax avoidance and evasion for instance information about tax evasion schemes likely to be marketed or used in another country, tax administration's risk analysis strategies and experiences in auditing transfer pricing issues arising in a particular economic sector.

#### **4.1 Exchange of information can assist in the detection of tax evasion and avoidance**

The tax administrations of developing countries are confronted with many challenges such as the loss of revenues from assets held offshore, typically by wealthy individuals. Assets held abroad may be derived from legal income that has illegally escaped tax or from illegal income. Once held offshore the income derived from those assets can also escape tax in the country of residence of the owner.

A request for information to a treaty partner may be helpful to detect tax evasion and avoidance, as shown in the following examples:

##### *Unreported income*

###### **Example**

Taxpayer T, a resident of Country A, pays interest on a loan made by Company C which is resident in Country B. Taxpayer T claims not to be the beneficial owner of Company C. Tax auditors suspect that Taxpayer T is the beneficial owner of Company C and that the "loan" was actually an attempt to repatriate previously unreported income earned in Country A. This could be because Company C does not require any collateral or security for the loan or the credit conditions depart in some way from what is typically agreed between unrelated parties).

In this situation, the competent authority in Country A may typically request the following information to assist with its examination:

- Accounting records/financial statements of Company C for the relevant years;
- Relevant contracts and the related bank information showing the transfers, and copies of signature cards on Company C's accounts;
- All documents indicating the source of the funds if the financial statements show that Company C did not have the necessary capital to make the loan;
- Information on the identity of shareholders and/or beneficial owners in Company C; and
- Formation documents for Company C.

##### *False deductions*

This category of evasion typically involves a taxpayer claiming a deduction in computing profit for an expense that purports to be a genuine business expense

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TAX EVASION AND  
AVOIDANCE**

paid to a third party supplier of goods, services or finance. A taxpayer may for example claim a deduction against profit for “advisory services” provided by a third party. In reality, the services may not have been provided at all, and the payments may be made to an offshore entity controlled by the taxpayer. A request for information to the country where the company is located may assist in identifying this form of tax evasion.

#### *Concealed residence*

A wealthy individual claims not to be resident for tax purposes in a given country. A request for information sent to the competent authority of the country where the taxpayer claims to be resident, may assist in establishing the true tax residence.

#### *Tax avoidance schemes*

Exchange of information can assist in detecting tax avoidance and in particular aggressive tax planning<sup>14</sup> (ATP) schemes which often involve artificial and complex arrangements. The schemes may involve circular movements of funds, a discrepancy between economic risk and the size of a claimed tax benefit, the use of entities, instruments and transactions that are classified differently in different countries. ATP schemes may also make use of foreign shell or conduit companies or other arrangements, often in no or low tax jurisdictions, to shift, hide or access untaxed income.

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TAX AVOIDANCE  
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INVOLVE ARTIFICIAL  
AND COMPLEX  
ARRANGEMENTS**

#### *Use of conduit companies*

EOI instruments allow countries to request information on the owners of conduit companies (e.g. such beneficial ownership information may be recorded in order to meet the requirements of anti-money laundering rules); accounting records and underlying documentation for a conduit company and bank information relating to a conduit company's accounts with banks or other financial institutions in the other jurisdiction.

#### *VAT evasion schemes*

If the relevant EOI instrument covers VAT, exchange of information may be useful to detect VAT fraud, and to share strategic information on VAT evasion schemes, (see case study in Annex 3).

## **4.2 Exchange of information and Transfer pricing audits**

The determination of transfer prices is often very fact-intensive and having the right information is vital to the successful implementation of transfer pricing rules, both in risk assessment/case selection, and in the course of an audit. There are various sources of information that are useful in transfer pricing: documentation, data and other information from taxpayers, public and private databases, company websites etc. While exchange of information is not the primary source of information for tax auditors addressing transfer pricing issues, it can provide assistance concerning transactions within a multinational enterprise (see case study in Annex 3).

## **4.3 Detection of Potential Abuse of tax incentives targeted at foreign direct investment**

Many developing countries have tax incentives to attract foreign direct investment or promote exports. Tax revenues may be lost as some investors may improperly claim incentives or shift income from related taxable firms to those qualifying for favorable tax treatment. Tax incentive programmes may

<sup>14</sup> See <http://www.oecd.org/tax/aggressivetaxplanning/>

be open to abuse from tax avoidance schemes. Exchange of information may assist in identifying these abuses.

#### Example

The tax administration suspects that a domestic company re-labels domestic investments as foreign direct investment or that it sells businesses to foreign subsidiaries disguised as new investors in order to take advantage of tax incentives targeted at foreign direct investment. A request for information to the country of the foreign subsidiary may assist in determining that the investment does not qualify to benefit from the tax incentive.

#### 4.4 Use of requests as a source of intelligence

A request for information itself often contains information that may be relevant to identify a tax risk in the country to which the request is made. Information in a request may be helpful for instance to detect taxpayers who have not filed a tax return or have defaulted in respect of their tax payment obligations. It may identify taxpayers who have been involved in cross border aggressive tax planning arrangements, false invoicing cases, identity theft and identity fraud cases or taxpayers who have carried out independent personal services abroad and not reported these for tax purposes. The tax authority of the requested country may then wish to establish whether the taxpayer(s) so identified possesses substantial assets in the country (e.g. real estate, cash, and shares) that may indicate a tax liability in the requested country.

#### 4.5 Other forms of exchange that may be of interest to developing countries

##### *Spontaneous Exchange<sup>15</sup>*

Spontaneous exchange of information is the provision of information to another contracting party that is foreseeably relevant to that other party and that has not been previously requested. It should be considered when there are grounds for suspecting that there may be a significant loss of tax in another country. A typical instance would be when there are grounds for suspecting artificial transfers of profits between related companies.

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OTHER PARTY AND  
THAT HAS NOT  
BEEN PREVIOUSLY  
REQUESTED**

#### Example

A tax auditor in Country A discovers that payments for “advisory services” by Company A to an associated entity in Country X are excessive – the associated entity has no employees and so is unable to provide any of the purported services. In this case, the Competent Authority in Country A, aware that a sister company of Company A is carrying out similar functions in Country B, might inform the Competent Authority in Country B, since they may be exposed to the same risk of excessive payments.

##### *Tax Examinations Abroad<sup>16</sup>*

Tax examinations abroad provide for the presence of representatives of the competent authority of the requesting country on the territory of the requested country in order to obtain information. This is only possible if there is an EOI instrument between the two countries and if it is authorised under the law of the requested country. If this is the case, authorised representatives of the foreign

<sup>15</sup> For more information see 6.2 and the Module Spontaneous Information Exchange (<http://www.oecd.org/dataoecd/15/44/36647914.pdf>) of the OECD EOI Manual.

<sup>16</sup> For more information see the module Tax Examinations Abroad (<http://www.oecd.org/dataoecd/16/0/36648066.pdf>) of the OECD Manual on EOI.

tax administration can enter the requested country:

- to interview individuals or examine a person's books and records;
- to be present at interviews or examinations carried out by the tax authorities of the requested jurisdiction – in accordance with procedures mutually agreed by the competent authorities.

The competent authority may invite a representative of its counterpart to attend the interview of the taxpayer or even to be present in a tax examination provided this is possible under its domestic law. In some countries, the foreign representative's presence during a tax audit is admitted only if the taxpayer does not object to it. In others, such presence may be regarded as an infringement of that country's sovereignty or contrary to its policy or procedure. Given that developing countries may have limited resources to respond to requests, this form of exchange can be a useful alternative to the use of their own resources to gather information and free them from the costs implications they may otherwise face.

#### *Simultaneous tax examination*<sup>17</sup>

A simultaneous tax examination is an arrangement by two or more countries to examine simultaneously and independently, a taxpayer or taxpayers in whom they have a common or related interest. The examinations are carried out by each country on its own territory with a view to exchanging any relevant information which they obtain. This form of exchange is often used to facilitate exchange of information in transfer pricing audits and also where tax avoidance or evasion schemes involving low tax jurisdictions are suspected. Developing countries may find benefits in undertaking bilateral or multilateral simultaneous tax examinations in transfer pricing cases for instance. Some countries have reported the benefits of undertaking multilateral simultaneous examinations of sister companies in the case of transfer pricing audits.

**A SIMULTANEOUS  
TAX EXAMINATION IS  
AN ARRANGEMENT  
BY TWO OR MORE  
COUNTRIES TO EXAMINE  
SIMULTANEOUSLY  
AND INDEPENDENTLY,  
A TAXPAYER OR  
TAXPAYERS IN WHOM  
THEY HAVE A COMMON  
OR RELATED INTEREST**

Countries interested in this form of mutual assistance generally enter into a MOU on the basis of their EOI instrument. A Model MOU can be found in the Module on simultaneous tax examination of the OECD Manual on EOI.

#### *Joint audits*<sup>18</sup>

A joint audit differs from a simultaneous tax examination in that it provides for two or more countries to join together to carry out a single audit of a taxpayer, with each country receiving the same information and presentations from the taxpayer. To the extent allowed by their domestic law, developing countries may also consider joint audits for instance when they have difficulty understanding similar or related transactions of a multinational enterprise that uses complex structured transactions. In both joint audits and simultaneous examinations, tax administrations must ensure that the competent authority is part of the joint audit team, or that competent authority status in relation to exchanging information is properly delegated to those who will participate in the STE or joint audit. More information on joint audits can be found in the Module on joint audits of the OECD Manual on EOI.

**AN INDUSTRY-WIDE  
EXCHANGE OF  
INFORMATION DOES NOT  
CONCERN INFORMATION  
ABOUT SPECIFIC  
TAXPAYERS BUT ABOUT  
A PARTICULAR INDUSTRY  
OR ECONOMIC SECTOR**

#### *Industry-wide exchange of information: bilateral or multilateral sharing of information*<sup>19</sup>

An industry-wide exchange of information does not concern information about specific taxpayers but about a particular industry or economic sector (e.g.

<sup>17</sup> For more information see the module Simultaneous Tax Examinations (<http://www.oecd.org/dataoecd/16/1/36648057.pdf>) of the OECD Manual on EOI.

<sup>18</sup> For more information see the Module on joint audits: the Forum on Tax Administration joint Audits Participants Guide (<http://www.oecd.org/dataoecd/16/39/47468438.pdf>) in the OECD Manual on EOI.

<sup>19</sup> For more information see the Module Industry-wide Exchange of Information (<http://www.oecd.org/dataoecd/15/42/36648040.pdf>) of the OECD Manual on EOI.



the banking sector, the pharmaceutical industry, the oil and mining industry or the fishing sector). An industry-wide exchange involves representatives of contracting parties meeting to discuss the way in which a particular economic sector operates, the financing schemes, the way prices are determined and the tax evasion trends identified. The purpose of industry-wide exchange of information is to combine data on industry practices and operating patterns and share intelligence to identify key tax risks. The benefits are a more effective review of tax returns of taxpayers operating within the chosen industry, which in turn allows for an improved use of auditor resources. Specific requests can then supplement an industry-wide exchange and may lead on to a simultaneous tax examination or a joint audit of taxpayers operating within the industry.

Bilateral and multilateral industry-wide exchange can be particularly useful in sharing knowledge and expertise. Not all information exchanged will require the protection of tax confidentiality provisions so experts on the industry can be invited to take part in these exchanges to better understand how that industry operates. The costs of outside experts can then be shared among the countries participating in the industry-wide exchange.

#### **Example of industry-wide exchange on the pharmaceutical industry**

An industry-wide exchange on the pharmaceutical industry can cover the following issues: position of the drug in the market (is it protected by patent/ does it have a brand value?); transfer pricing methodologies followed; transfer pricing ranges; comparable sets of data (e.g. geographic markets, accounting for variations in product mix/turnover and different function/ asset/risk profiles); treatment of R&D (what tax incentives are available, cost sharing arrangements).

#### *Automatic exchange of information<sup>20</sup>*

Automatic exchange (also called routine exchange) involves the systematic and periodic transmission of large volumes of taxpayer specific information by the source country to the residence country concerning specific categories of income or events. For example it may cover income a taxpayer has received from dividends, interest, royalties, salaries or pensions, or it may concern changes of residence, the ownership of immovable property, the purchase or disposition of immovable property, or the provision of VAT credit refunds. Given the volumes of information involved, this type of information needs to be exchanged in a standardised manner.<sup>21</sup>

Some developing countries may receive this type of information but may not have at present the capacity to match automatically all the information received against taxpayers' returns but the information can still be useful for tax purposes.

#### **Example**

The competent authority of Country Y receives from the competent authority of Country X an encrypted CD Rom which includes records concerning interest and dividends received from entities in Country X by residents of Country Y during the previous tax year.

The tax authorities of Country Y will decrypt the CD using the information provided by the competent authority of Country X and proceed to a process

**AUTOMATIC EXCHANGE  
(ALSO CALLED ROUTINE  
EXCHANGE) INVOLVES  
THE SYSTEMATIC  
AND PERIODIC  
TRANSMISSION OF  
LARGE VOLUMES OF  
TAXPAYER SPECIFIC  
INFORMATION BY THE  
SOURCE COUNTRY  
TO THE RESIDENCE  
COUNTRY CONCERNING  
SPECIFIC CATEGORIES  
OF INCOME OR EVENTS**

<sup>20</sup> See also the OECD Report Automatic exchange of information: What it is, how it works, benefits, what remain to be done (<http://www.oecd.org/ctp/exchangeofinformation/automaticexchangeofinformationreport.htm>)

<sup>21</sup> The tool kit on automatic exchange including standards and user manuals are available at [www.oecd.org/tax/eoi/toolkit](http://www.oecd.org/tax/eoi/toolkit)

of matching the records received against the tax returns for the given tax year to determine whether the foreign source income has been reported. This process is usually automated.

Developing countries may not at present have the capacity to automatically match the records they may receive automatically from certain countries. They can however refer to the user guides on automatic exchange on [www.oecd.org/tax/eoi/toolkit](http://www.oecd.org/tax/eoi/toolkit) to understand how the received data are structured. They can then manually identify the records showing taxpayers having received income over a certain threshold for instance and with manual matching check whether those taxpayers have filed a return and if so whether they have or not reported this foreign source income. They may contact the taxpayers concerned if no return has been filed or if the foreign income has not been reported.

## 5. WHAT ARE THE PRINCIPLES GOVERNING EXCHANGE OF INFORMATION?

Exchange of information is governed by a number of principles provided for in the relevant international EOI instruments. The wording of EOI provisions may differ from one EOI instrument to the other as they were negotiated at different points in time and it is important to refer each time to the EOI instrument applying to the particular case. The exchange of information must take place between the competent authorities identified in the instrument. The exchange must concern persons and taxes as provided by the EOI instrument. The information exchanged must be kept confidential and must be used only for the purposes provided for by the EOI instrument. The obligation to provide requested information applies to foreseeably relevant information but there are certain limitations to the obligation to exchange.

### 5.1 *Who has the authority to Exchange Information?*

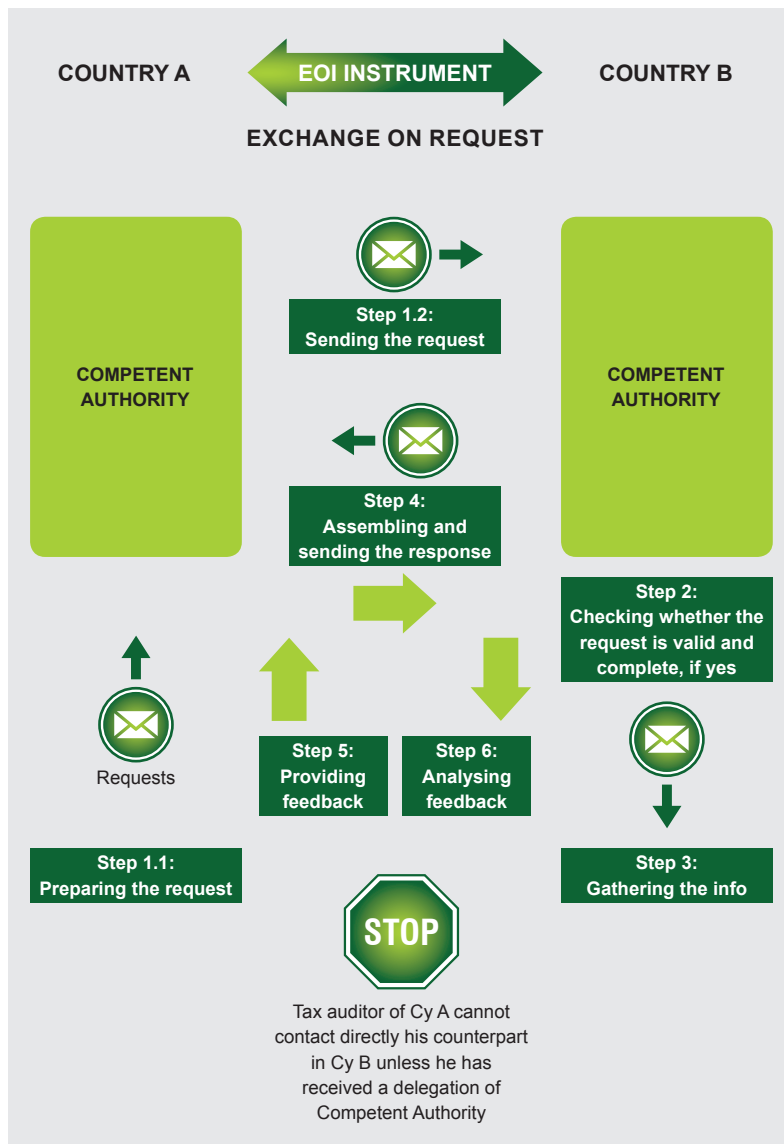
“Competent authority” is a term used in exchange of information instruments to identify the person who represents the State/jurisdiction in the implementation of the instrument. The term “competent authority” normally applies to the Minister of Finance, the Commissioner or an authorised representative.

In the case of a DTC, the competent authority acts as the official point of contact not only for exchange of information purposes, but also for mutual agreement procedures (MAPs). There may be delegation of competent authority for different functions (e.g. exchange of information, assistance in tax collection, mutual agreement procedures). The competent authority (Minister of Finance or Commissioner typically designates representatives who will have the authority to exchange information. This will generally be done by an official letter addressed by the competent authority to the designated representative or by an order. When signing an EOI instrument it is important to provide EOI partners with the details of the competent authority and designated representatives. It is also important to provide updates whenever needed.

Exchange of information can only take place between the competent authorities or their authorised representatives. This ensures that the rules applicable to exchange of information (and in particular the confidentiality of information exchanged) are respected and consistently applied. By-passing the competent authorities would constitute a breach of tax confidentiality. A tax auditor cannot contact directly his counterpart to exchange information unless he has been delegated appropriate competent authority status. The involvement of the competent authority in exchange of information on request can be divided in different steps, which are illustrated on the next page. The steps are described in more detail in Section 6.

**EXCHANGE OF  
INFORMATION CAN ONLY  
TAKE PLACE BETWEEN  
THE COMPETENT  
AUTHORITIES OR  
THEIR AUTHORISED  
REPRESENTATIVES**





#### Identification of Competent Authority for EOI and their representatives

When signing an EOI instrument it is important to provide EOI partners with the details of the competent authority and designated representatives. It is also important to provide updates whenever needed. The names of the competent authorities for mutual agreement procedures (MAPs) are made public as taxpayers need to know to whom to make requests for MAPs. The OECD MEMAP website contains Country Profiles for MAPs which include the identity of competent authorities for MAP purposes<sup>22</sup>.

The identity of the designated competent authorities for EOI does not have to be made public as it is not needed by taxpayers and it is up to each country to decide whether or not to make public their own list of competent authorities for EOI. The list of competent authorities of ATAF countries is available to ATAF tax officials on the ATAF website [www.ataftax.net](http://www.ataftax.net). The list of competent authorities for exchange on request of the members of the Global Forum is available on a password protected page of the Global Forum Exchange of Tax Information Portal [www.eoi-portal.org](http://www.eoi-portal.org).

**THE LIST OF COMPETENT  
AUTHORITIES FOR  
EXCHANGE ON REQUEST  
OF THE MEMBERS OF  
THE GLOBAL FORUM  
IS AVAILABLE ON A  
PASSWORD PROTECTED  
PAGE OF THE  
GLOBAL FORUM  
EXCHANGE OF TAX  
INFORMATION PORTAL**

<sup>22</sup> [www.oecd.org/ctp/memap](http://www.oecd.org/ctp/memap)

### Types of Delegation of Competent Authority

Countries use a variety of different representatives designated as having Competent Authority status for EOI purposes. Competent Authority for EOI is commonly delegated to:

- The International Tax Service of the Ministry of Finance
- The International Office of the Tax Administration
- The Director of the International Large Taxpayer Directorate or Director of Tax Audit Department
- The Risk and Intelligence Department
- Regional Tax Authorities
- Tax Attachés at embassies abroad

### 5.2 Who are the Persons covered by exchange of information?

The persons covered by exchange of information are individuals, companies and any other body of persons (e.g. trusts and foundations). Exchange of information is not limited to the residents of the EOI partners.

#### DTCs

Under Article 26 of the OECD/UN Model Tax Convention, exchange of information is not restricted by Article 1 (i.e. to the persons resident in the contracting states) which means that contracting states can provide information on their residents as well as information on residents of a third country when that information is held by their authorities or is in the possession or control of persons within their territorial jurisdiction.

#### Example

##### Article on exchange of information in the DTC between Botswana and South Africa

The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions, in particular for the prevention of fraud or evasion of such taxes, in so far as the taxation there under is not contrary to the Convention. The exchange of information **is not restricted by Articles 1 and 2.**

Some older DTCs may limit the scope of exchange to the residents of the contracting states in which case the Article does not include the clause “The exchange of information is not restricted by Article 1”. These DTCs are not in line with the international standard on exchange of information.

#### TIEAs

Under the Model TIEA, as provided by Article 2, the obligation to provide information is not restricted by the residence or the nationality of the person to whom the information relates or by the residence or the nationality of the person in control or possession of the information requested.

#### Multilateral Convention

Article 1 of the Multilateral Convention also provides that a Party has the obligation to provide administrative assistance whether the person is a resident or national of a Party or any other State.

**THE PERSONS  
COVERED BY  
EXCHANGE OF  
INFORMATION  
ARE INDIVIDUALS,  
COMPANIES AND  
ANY OTHER BODY  
OF PERSONS**

### 5.3 What are the taxes covered by exchange of information?

#### DTCs

Article 26 of the OECD/UN Model Tax Convention provides that information exchange applies to taxes “of every kind and description” and goes on to state that the exchange is not limited by Article 2 (Taxes Covered). This means that under a DTC including this wording, information can be exchanged on taxes that are not covered by the Convention, for instance for VAT purposes.

Some older DTCs may not cover ‘taxes of every kind and description’ and may be limited to the taxes covered by the Convention i.e. taxes on income and capital. For example Article 25 of the DTC between Senegal and Canada does not include the phrase “the exchange of information is **not restricted by Article 2**”.

#### TIEAs

TIEAs cover, at a minimum taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes) unless both parties agree to waive one or more of them. A Contracting Party may decide to omit any or all of the four categories of direct taxes from its list of taxes to be covered but it would nevertheless have an obligation to respond to requests for information with respect to the taxes listed by the other Contracting Party (assuming the request otherwise satisfies the terms of the Agreement). The Contracting Parties may also agree to cover taxes other than the four categories of direct taxes, for instance VAT which is included in the TIEA between the Cayman Islands and South Africa.

**DTCs and TIEAs may differ concerning taxes covered by EOI. Reference should be made to the relevant instrument to determine which taxes are covered by exchange of information in a particular case.**

#### Multilateral Convention

The Multilateral Convention covers all forms of compulsory payments to government except for customs duties. It applies to taxes on income, profits, capital gains, VAT and net wealth levied at the central government level. It also covers local taxes, compulsory social security contributions and estate, inheritance or gift taxes.

#### Multilateral Convention

The Multilateral Convention is flexible in that it provides for the possibility to enter reservations regarding: (i) administrative assistance of any kind in respect of taxes other than those on income, profits, capital gains or net wealth imposed at the central government; (ii) recovery of tax claims or administrative fines, including measures of conservancy; (iii) administrative assistance in respect of tax claims in existence before the entry into force of the Convention; (iv) the service of documents; and (v) the use of postal services in the service of documents. These reservations can be withdrawn at a later point in time.

**For information on the taxes covered for a Party to the Convention see Annex A in their List of Declarations, Reservations and other Communications (<http://www.oecd.org/ctp/exchangeofinformation/name,207669,en.htm>)**

**THE MULTILATERAL  
CONVENTION COVERS  
ALL FORMS OF  
COMPULSORY PAYMENTS  
TO GOVERNMENT  
EXCEPT FOR  
CUSTOMS DUTIES**

#### 5.4 What are the tax years covered by exchange of information?

##### *DTCs*

Under a DTC, a request for information can be made concerning information that existed prior to the entry into force of the Convention, as long as the assistance with respect to this information is provided after the Convention has entered into force and the provisions of the Article have become effective.

Any restrictions on the ability of a requested Contracting State to obtain information from a person for its own domestic tax purposes at the time of a request (for example, because of the statute of limitations under the requested State's domestic law) must not restrict its ability to use its information gathering measures for information exchange purposes. Where the requested Contracting State has attempted to obtain the requested information but finds that the information no longer exists following the expiration of a domestic record retention period, then it is not obliged to provide the information. However, where the requested information is still available notwithstanding the expiration of such retention period, the requested State cannot decline to exchange the information available<sup>23</sup>.

##### *TIEAs*

TIEAs often provide for different years covered for exchange of information in criminal tax matters and exchange of information in all other tax matters and it is therefore important to refer to the Article on entry into force of the relevant TIEA. For instance the TIEA between South Africa and Jersey entered into force on 12 February 2012. It has effect for criminal matters on that date but only in respect of taxable periods beginning on or after that date or when there is no taxable period, all charges to tax arising on or after that date.

##### *Multilateral Convention*

Unless agreed otherwise by the Parties, the Multilateral Convention has effect for administrative assistance only in relation to future tax periods. For tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party, the Multilateral Convention has effect as soon as it enters into force and therefore applies for previous tax years. It is possible to make a reservation on the date of effect of the Convention for criminal tax matters, restricting it to taxable periods from the fourth year before the entry into force of the Convention.

**UNLESS AGREED  
OTHERWISE BY  
THE PARTIES, THE  
MULTILATERAL  
CONVENTION  
HAS EFFECT FOR  
ADMINISTRATIVE  
ASSISTANCE ONLY IN  
RELATION TO FUTURE  
TAX PERIODS**

**For information on the Reservations of the Parties to the Convention see the List of Declarations, Reservations and other Communications (<http://www.oecd.org/ctp/exchangeofinformation/name,207669,en.htm>)**

#### 5.5 Obligation to provide Foreseeably Relevant Information

The obligation to exchange information concerns any information requested that is foreseeably relevant for the administration or enforcement of the domestic laws concerning the taxes covered by the exchange provisions of the relevant instrument and in the case of a DTC, for carrying out the provisions of the Convention. Where the information in possession of the competent authority is not sufficient to reply to a request, it must take all relevant information gathering measures to obtain the information. The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest

<sup>23</sup> See paragraph 19.7 of the Commentary in Update To Article 26 of the OECD Model Tax Convention and its Commentary ([http://www.oecd.org/ctp/exchangeofinformation/120718\\_Article 26-ENG\\_no cover \(2\).pdf](http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf))

possible extent and, at the same time, to clarify that it is not possible to engage in “fishing expeditions”. This obligation is subject to certain limitations but in no case can the requested party refuse to provide information because it has no domestic tax interest in such information or because the information is held by a bank or other financial institution.

The standard of “foreseeable relevance” was clarified in the 2012 Update of Article 26 of the OECD Model Tax Convention<sup>24</sup>:

- The Standard requires at the time the request is made there is a reasonable possibility that the information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information;
- The requesting State determines foreseeable relevance of the request (but an explanation must be provided); once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination;
- In cases where the requesting state does not provide the name or address (or both) of the taxpayer, it must include in the request other information sufficient to identify the taxpayer;
- Group requests can meet the standard of foreseeable relevance<sup>25</sup>.

The standard of “foreseeable relevance” can be met in respect of a group of taxpayers that are not individually identified provided the requesting State gives:

- A detailed description of the group and the facts and circumstances that led to the request;
- An explanation of the applicable law and why there is reason to believe that the taxpayers in the group have been non-compliant with that law supported by a clear factual basis; and
- Shows that the requested information would assist in determining compliance by the taxpayers in the group. Usually, although not necessarily, a third party will have actively contributed to the non-compliance of the taxpayers in the group.

**Example of a situation where the information requested is “foreseeably relevant”**

The tax authorities of State A conduct a tax investigation into the affairs of Mr. X. Based on this investigation the tax authorities have indications that Mr. X holds one or several undeclared bank accounts with Bank B in State B. However, State A has experienced that, in order to avoid detection, it is not unlikely that the bank accounts may be held in the name of relatives of the beneficial owner. State A therefore requests information on all accounts with Bank B of which Mr. X is the beneficial owner and all accounts held in the names of his spouse E and his children K and L.

Fishing expeditions are speculative requests for information that have no apparent nexus (link) to an open inquiry or investigation, and are not allowed.

<sup>24</sup> See Update To Article 26 of the OECD Model Tax Convention and its Commentary ([http://www.oecd.org/ctp/exchangeofinformation/120718\\_Article 26-ENG\\_no cover \(2\).pdf](http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf))

<sup>25</sup> The GFTEI's Terms of Reference reflect the principles of Transparency and EOI as reflected in Article 26 of the of the OECD Model Tax Convention on Income and Capital and its commentary as updated in 2004. The terms of reference make no explicit reference to group requests.

### Example of a fishing expedition

Company B is a company established in State B. State A requests the names of all shareholders in Company B resident in State A and information on all dividend payments made to such shareholders. The requesting State A points out that company B has significant business activity in State A and is therefore likely to have shareholders resident in State A. The request further states that it is well known that taxpayers often fail to disclose foreign source income or assets.

## 5.6 Limitations to the Obligation to Exchange information requested

The obligation to supply information is lifted in a limited number of situations. These exceptions are contained in paragraph 3 of Article 26 of the OECD/UN Model Convention, in Article 7 of the Model TIEA and in Article 21 Paragraph 2 of the Multilateral Convention. In the rare cases where the exceptions apply, the contracting parties are not obliged to provide information. It should be pointed out that when the limitations apply, the decision to provide or not to provide the information requested is left to the discretion of the requested competent authority. If it provides the information in cases where the limitations apply, there is no breach of tax secrecy.

### *No obligation to carry out measures at variance with domestic laws and practices*

The underlying rationale is that the requested party should be required to do no more – but also no less – than it would if its own taxation was at stake.

### *No obligation to provide information not obtainable under domestic law in the normal course of administration*

The requested party is free to decline to provide information if the information cannot be obtained under its domestic law or cannot be obtained in the normal course of administration. However, irrespective of domestic law or domestic administrative practice, the requested Party cannot use bank secrecy or a domestic tax interest requirement as a basis for declining to provide information. Furthermore, a request cannot be declined because the information is held by a nominee or a person acting in an agency or fiduciary capacity or because it relates to an ownership interest.

The requested Party is obliged only to obtain and provide such information that the requesting party could itself obtain under its own laws in similar circumstances. The Commentary to Article 26 of the OECD Model states that if a Contracting State applies, under paragraph 5, measures not normally foreseen in its domestic law or practice, for instance to access and exchange bank information, that State is equally entitled to request similar information from the other Contracting State. This would be fully in line with the principle of reciprocity which underlies subparagraphs a) and b) of paragraph 3.

### *Trade, business, professional and other secrets*

The Requested party is not obliged to provide information which would disclose any trade, business, industrial commercial or professional secret or information which is the subject of attorney client privilege. A trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g. may lead to severe financial hardship). Financial information, including books and records, does not by its nature constitute a trade, business or other secret. The role of the competent authority is to determine whether or not to pass on sensitive information and the local authorities that gather the information in the first instance should point out what might be sensitive.

**THE REQUESTED PARTY IS FREE TO DECLINE TO PROVIDE INFORMATION IF THE INFORMATION CANNOT BE OBTAINED UNDER ITS DOMESTIC LAW OR CANNOT BE OBTAINED IN THE NORMAL COURSE OF ADMINISTRATION**

**Example:**

In responding to a request from country B, the competent authority of country A engages in a comprehensive investigation of pharmaceutical company C, resident in country A. As a result, the competent authority of country A is exposed to highly valuable commercial information concerning the manufacture of the product itself. Such information would be subject to the limitations described above and the competent authority of Country A could refuse to supply the information to country B, or at least excise that part of the information from the response to country B.

The requested party may decline to provide information in cases where the information constitutes a confidential communication between a client and an attorney, solicitor or other admitted legal representative. However, the rules on what constitutes a confidential communication should not be interpreted or applied in such a broad way so as to hamper effective exchange of information. In particular, no privilege should attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure.

*Public Policy/Ordre Public*

The Requested party is not obliged to provide information the disclosure of which would be contrary to public policy/ordre public. This limitation may be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested State. It may also be invoked if a tax investigation in the requesting State were motivated by political, racial, or religious persecution. This limitation rarely applies in practice.

**THE REQUESTED PARTY IS NOT OBLIGED TO PROVIDE INFORMATION THE DISCLOSURE OF WHICH WOULD BE CONTRARY TO PUBLIC POLICY/ORDRE PUBLIC**

## **6. HOW TO EXCHANGE INFORMATION IN PRACTICE**

### **6.1 Exchange of information upon request: How to Make a Request and how to respond to a Request for Information**

*Before making a request*

Requests for information are generally initiated by tax auditors. Before sending a request, the tax auditor should use all means available in his own territory to obtain the information except where those would give rise to disproportionate difficulties. The tax auditor should attempt to obtain information from publicly available sources, for example by using public and commercial databases and online international phone books and other resources available via the internet.

**REQUESTS FOR INFORMATION ARE GENERALLY INITIATED BY TAX AUDITORS**

*Using the internet and Public and commercial websites to find information directly*

The information that tax auditors may need may be actually publicly available on the internet, for instance information to determine whether a company is registered in a given country. Using internet searches allows tax authorities to obtain information very quickly and reduces the number of requests to foreign competent authorities who will have more time to devote to the other requests they receive. On-line National Trade Registers are a good source of information. They often allow basic search functions and are often free of charge. They can also include extensive reports (annual accounts, ownership information, business statistics/ratios).



## Examples of relevant websites

**Amadeus** <https://amadeus.bvdep.com> a data base of financial information for public and private companies across Europe

Industry statistics, including company markup, cost of goods sold, profit and other data can be found at <http://www.bizstats.com/>

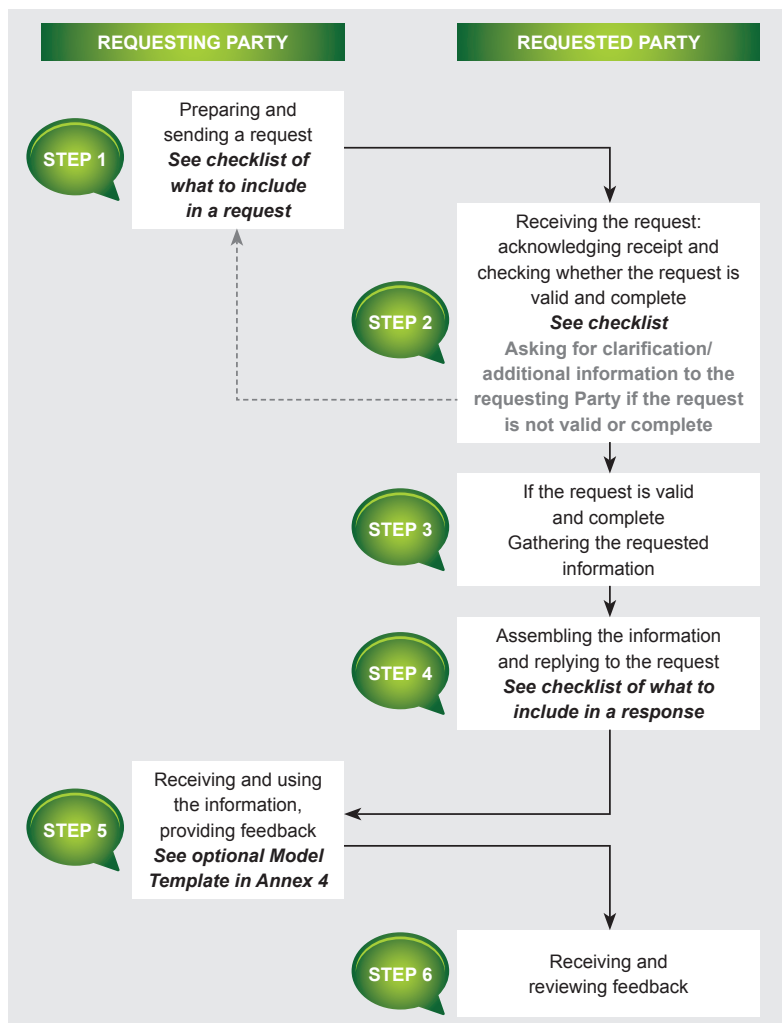
**Companies House** [www.companies-house.gov.uk](http://www.companies-house.gov.uk) is the official UK bodies to which UK companies have to send their accounts. Company documents can be ordered online. This site also gives free access to Companies Name and Address Index and the disqualified directors' database. There are charges for services such as the provision of documents e.g. annual accounts.

**Infogreffe.fr** provides information on companies and merchants and commercial agents registered in the French trade register

**www.Pacer.gov** The PACER service provides on-line access to U.S. Appellate, District, and Bankruptcy court records and documents nationwide.

International White and Yellow pages: [www.wayp.com](http://www.wayp.com)

The diagram below shows in which territory the various steps in information exchange upon request take place i.e. whether in the territory of the requesting Party or the requested Party:





### *Content of the request*

- Drafting the request in a complete and comprehensive manner is very important.
- The request should be as detailed as possible and contain all the relevant facts, so that the competent authority receiving the request is well aware of the needs of the requesting contracting party and can deal with the request in the most efficient manner.
- An incomplete request will increase delays since the foreign competent authority may have to ask for more details to answer the request properly.

While every case may differ on the particular facts and circumstances, the following checklist of what to include in a request<sup>26</sup> seeks to provide some guidance on what could be included in a request. Note that responding to a request should not be delayed by endeavouring to obtain every item on the checklist.



### PREPARING AND SENDING A REQUEST

#### *Checklist of what to include in a request*

- Reference to the legal basis upon which the request is based (e.g. DTC, TIEA or Multilateral Convention).
- A statement confirming that your tax administration has pursued all means available in its own territory to obtain the information except those that would give rise to disproportionate difficulties.
- A statement that the request is in conformity with the laws and administrative practices of your country, that your tax administration could obtain the information if it was within your country and that the request is in conformity with the legal instrument on which it is based (this is mandatory if request under a TIEA, but optional otherwise).
- The identification of the person(s) or entity under examination or investigation:
  - full name (first name, family name),
  - date of birth (for individuals),
  - marital status (if relevant),
  - Tax Identification Number (TIN) / VAT number,
  - full address (including e-mail or internet addresses, if known).

**NB:** In cases where the requesting competent authority does not provide the name or address of the taxpayer, it must include other information sufficient to identify the taxpayer.

- The identity of any foreign taxpayer(s) or entity(ies) relevant to the examination or investigation and, to the extent known, their relationship to the person(s) under examination or investigation:
  - name,
  - marital status (if relevant),
  - TIN (if known), addresses (including e-mail or internet addresses if known),

<sup>26</sup> The competent authorities may agree bilaterally in an MOU or otherwise on what to include in a request.

- registration number in the case of a legal entity (if known),
  - charts, diagrams or other documents illustrating the relationships between the persons involved.
- If the information requested involves a payment or transaction via an intermediary mention, if known, the name, addresses and TIN of the intermediary, including, also if known, the name and address of the bank branch as well as the bank account number when bank information is requested.
  - Relevant background information including the tax purpose for which the information is sought, the origin of the enquiry, the reasons for the request and the grounds for believing that the information requested is held in the territory of the requested party or is in the possession or control of a person within the jurisdiction of the requested party.
  - The stage of the procedure in the requesting party, the issues identified and whether the investigation is of a civil or administrative nature only or may also have criminal consequences. Where references are made to domestic law it is useful to provide some explanation as the foreign competent authority will not be familiar with your laws.
  - The information requested and why it is needed. Also specify the information that may be pertinent (e.g. invoices, contracts).
  - The taxes concerned.
  - The tax periods under examination (day, month, year they begin and end), and the tax periods for which information is requested (if they differ from the years examined give the reasons why for instance if there is a loss carryover, the information concerns a purchase price for determination of a capital gain).
  - The currency concerned whenever figures are mentioned.
  - The urgency of the reply: State the reasons for the urgency (statute of limitation, court case, etc) and, if applicable, indicate the date after which the information may no longer be useful.
  - Whether a translation should be provided if possible (in urgent cases mentioning that no translation is required could speed up the exchange).
  - If copies of documents or bank records are requested, the type of authentication that is necessary, if any.
  - If the information is likely to be used in a court proceeding and the applicable rules of evidence require the information to be in a certain form, the form should be indicated to the other competent authority.
  - Whether there are reasons for avoiding notification of the taxpayer under examination or investigation (e.g. if notification may endanger the investigation).
  - The name, phone, fax number and e-mail address of the tax official who may be contacted if needed, (that person should have delegation of competent authority).

**See Annex 4.2 for an Optional Model template for requests under TIEAs**

### ***Language of the request***

- The request by the competent authority should be drafted in a simple and clear manner (acronyms and abbreviations should be avoided).
- Unless EOI partners agree otherwise in an MOU, the request should be prepared in the native language of the requesting party and accompanied, where practicable, with a translation into the language of the requested party or a common third language. Alternatively, where this facilitates effective exchange of information, the request may be drafted only in the language of the requested party or a common third language.

### ***Procedure***

- The request prepared by the tax examiner should be forwarded to his competent authority through the normal official channels and will be translated in the official language of the requested country or an agreed language if needed for the requested competent authority to process the request.
- The competent authority will verify that the request meets all the necessary requirements and then transmit the request to his counterpart in the foreign country. The competent authority will get back to the tax auditor for any clarification.

### ***Form of the request (paper or electronic form)***

- The request by the competent authority should be made in writing but in urgent cases an oral request may be accepted, where permitted under the applicable laws and procedures, for the purposes of initiating an enquiry on the condition that it is followed up by written confirmation.
- The request in writing may be in paper or electronic form. The request should be signed by the competent authority or other person designated as competent authority.

## **REQUESTED PARTY**

### **STEP 2**

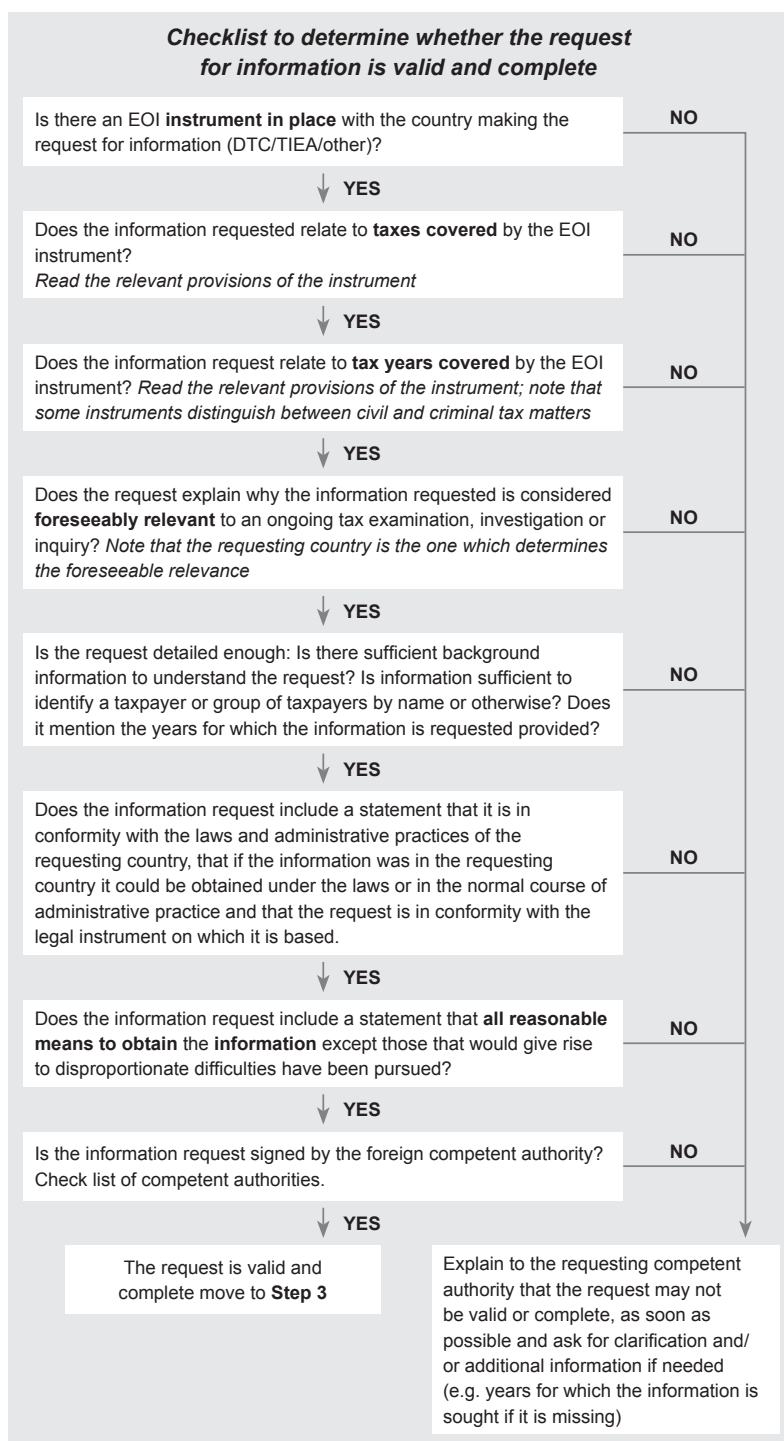
### **RECEIVING AND CHECKING WHETHER THE REQUEST IS VALID AND COMPLETE**

The requested competent authority should:

- register the request in the system with a reference number (see section below on processes);
- acknowledge receipt of the request as soon as possible and determine whether the request will be need to be translated;
- check whether the request is valid and complete;
- assign the request to an EOI case worker.

### ***Review of the validity and completeness of the request***

In the process of reviewing whether the request is valid and complete, the competent authority will also consider whether there are grounds for declining the request. Such grounds may also emerge later in the process (e.g. an attempt to obtain the information may be resisted based on the assertion that the information is protected by the attorney client privilege) and will then have to be considered at that stage.



### GATHERING INFORMATION

Gathering information for another country should be given a high priority because exchange of information is mandatory and a prompt and comprehensive reply is likely to contribute to similar treatment where the roles are reversed. If the information is not available, the requesting country should be informed as soon as possible via the competent authority.

In most countries, the governing principle is that the information is to be gathered as if it were sought for domestic tax purposes. Information requested may be of two types:

- information which is already at the disposal of the tax administration (e.g. tax return, income declared, expenses claimed); or
- information obtainable by the competent authority but requiring additional actions and therefore time to obtain it. For example, it may be necessary to interview a taxpayer, to undertake a tax investigation, or to obtain information from a third party (e.g. an employer or a bank). Additional information which is foreseeably relevant to the requesting country should also be included in the response, even if it is not specifically requested.

Efforts should also be made to pass on the information in a format which meets the requesting party's evidentiary or other legal requirement where this is requested (and to the extent allowable under domestic law), e.g. provide authenticated copies of original records.

#### *Costs Involved in Gathering Information*

It may happen that the gathering of information requested is costly. This can be in cases where copies of large volumes of documents are requested or long documents need to be translated. There is no standard provision on the issue of costs in EOI arrangements. The Model TIEA provides that the incidence of costs incurred in providing assistance shall be agreed by the Contracting Parties but other formulations are also common. The Multilateral Convention enables the competent authorities to consult each other and agree, on a bilateral basis, on the rules they wish to apply generally, and the procedure to be followed for finding a solution in the most important and costly cases. Article 26 of the OECD/UN Model Convention does not contain any provision on costs. If the issue arises in a particular case, it is important that the requested competent authority approach his counterpart as soon as possible to find a solution.

As a general rule, unless agreed otherwise, ordinary costs are borne by the requested Party, while extraordinary costs are borne by the requesting Party:

- **Ordinary costs** include the normal administrative and overhead expenses incurred by the requested Party in reviewing and responding to information requests, for example: costs for obtaining, copying and sending documents.
- **Extraordinary costs** are meant to cover third party costs, for example with respect to: interviews, depositions, witnesses and testimony where the requesting Party has requested the information in a particular manner, engaging experts, interpreters or translators where such services are at the request of the requesting Party.

#### **Example of provisions on costs that could be included in a Memorandum of Understanding (MOU) between competent authorities:**

Ordinary costs shall be borne by the requested Party. Extraordinary costs shall be borne by the requesting Party.

- i) Ordinary costs include the normal administrative and overhead expenses incurred by the requested Party in reviewing and responding to information requests. Ordinary costs include for example:
  - Costs for obtaining, copying and sending documents, legal fees for litigation in the courts of the requested Party.
  - Where the third-party ordinary costs are unusually high, such costs will be reimbursed subject to the prior agreement of the competent authority of the requesting Party. It is understood that third party record keepers will generally not charge for the production of documents where such documents are to be obtained in order to respond to a request.

- ii) Extraordinary costs include reasonable third party costs incurred, for example with respect to:
  - Interviews, depositions, witnesses and testimony where the requesting Party has requested the information in a particular manner, engaging experts, interpreters or translators where such services are at the request of the requesting Party.



#### ASSEMBLING AND SENDING THE RESPONSE

- The competent authority will prepare the response to the information request.
- In certain countries the reply may be prepared by a local tax office and the competent authority will then only review the reply. If prescribed under domestic law, and provided no exceptions apply, the competent authority will then notify the taxpayer. If no notification is required the information will be passed on to the foreign competent authority with a mention as to the limits on the use of the information.
- If the information touches upon trade and business secrets, the competent authority may wish to get in touch with its counterpart in order to establish how the information is to be used and what protective measures the requesting Party has according to its internal provisions to protect such secrets.

#### ***Checklist of what to include in the response***

The following checklist of what to include in a response seeks to provide some guidance on what could be included in a response. Every case may differ based on the particular facts and circumstances. Note that exchanges should not be delayed by endeavouring to obtain every item on the checklist and that abbreviations should not be used.

- The reference to the legal basis pursuant to which the information is provided (Article on exchange of a DTC, TIEA, Regional agreement etc);
- A reference to the request in response to which the information is provided (reference number);
- The information requested, including copies of documents (e.g. records, contracts, invoices) as well as any information not specifically requested but likely to be useful based on the information provided in connection with the request;
- Whether this is an interim/ partial or full response. If partial, indicate when you plan to send the remaining information;
- If applicable, an explanation why certain information could not be provided or could not be provided in the form requested;
- For money amounts the currency, whether a tax has been withheld and if so the rate and amount of tax;
- The type of action taken to gather the information;
- The tax periods for which the information is provided;
- Whether the taxpayer or a third person has been notified about the exchange;
- Whether there are any objections to notifying the taxpayer of the receipt of the information;
- Whether feedback is requested on the usefulness of the information;
- A reminder that the use of the information provided is subject to the applicable confidentiality rules (this can be done by stamping a reference to the applicable confidentiality rule on the information provided or including a watermark if the information is sent electronically);
- Contact point: The name, phone, fax number and e-mail address of the tax official who may be contacted if needed, (that person should have a delegation of competent authority);

- Signature of the response by the competent authority or person having a delegation of competent authority.

**If no partial or full response can be sent within 90 days of the request, an update on the status of the request should be sent to the requesting authority.**

### ***Language of the response***

Unless EOI partners agree otherwise in an MOU, the response should be prepared in the native language of the requested party and accompanied, where practicable, with a translation into the language of the requested party or a common third language. When responding to a request for information, special problems may arise in the translation of the attached documents such as agreements, business correspondence, invoices etc. If no translation is provided, the competent authority may provide a summary of the documents in the language of the requesting Party or another agreed language /or at least identify the relevant elements of the attached documents so that the requesting party does not take unnecessary time translating information which may be irrelevant to the request.

### ***Timelines***

Unless agreed otherwise between the competent authorities (for instance in a MOU), the competent authorities may apply the following best practices:

- Where the information requested is already held by the tax authority, send the information within **two months** of receipt of the request;
- Where the information requested is **not** already held by the tax authority, send the information within **six months** of receipt of the request<sup>27</sup>.

## **REQUESTING PARTY**

The requesting competent authority should:

- acknowledge receipt of the response;
- have the response translated if needed; and
- make the information available to the tax auditor who requested it, ensuring that the confidentiality of the information is preserved, and ask them for feedback.



### **PROVIDING FEEDBACK**

Regular, timely and comprehensive feedback between competent authorities is important to encourage cooperation. The benefits of feedback which have been reported are:

- Improved response times to information requests;
- Improvements in the quality of information exchanged;
- Increased willingness to devote resources to satisfy information requests that involve great time and effort;
- Increased willingness to provide information in a requested particular format;
- Increase in spontaneous EOI cases;
- Increase in simultaneous tax examinations;
- Higher priority given to EOI cases by tax audit teams;

<sup>27</sup> Paragraph 10.4 of the Commentary to Article 26 of the OECD Model Tax Convention provides for Default Optional Standard Time Limits: 2 months if the information requested is available to the tax administration and 6 months otherwise but competent authorities may agree to different periods. It is also stated that the exchange of information is still in accordance with Article 26 if the information is provided after the time limits.

- Increased willingness by competent authorities to enter into agreements and other forms of mutual understandings to improve EOI processes.

***Type of feedback that could be provided:***

- Details of additional tax revenue assessed or collected (if not considered as confidential information in the country that requested the information);
- Tax evasion methods detected and other related details that could be of use to the country that provided the requested information;
- Overall assessment of how useful the information was to the tax authority;
- Acknowledgement and appreciation of the fact that the request for information was given high priority.

***Encouraging feedback***

When seeking feedback from a tax auditor regarding information received as a result of a specific request, the competent authority could attach a paper or electronic feedback form to the requested information when sending the information to the tax auditor. Secure electronic methods of seeking and receiving feedback should be encouraged where possible (e.g. e-mail). Similarly, a feedback form should be attached to the spontaneous information that was received by the competent authority when sending this information to the relevant tax audit department for consideration (an example of a Model Feedback Form is provided in Annex 4).

**REQUESTED PARTY**



**RECEIVING AND ANALYSING FEEDBACK**

The tax official(s) who provided the information and their manager(s) should be provided with any feedback that has been received from abroad regarding information that was received either as a response to a request or provided spontaneously.

**6.2 The relevance of spontaneous exchange**

Tax auditors may encounter information that leads them to suspect that the audited taxpayer is engaged in tax avoidance or evasion activities in a foreign country. They may provide such information to foreign tax authorities in order for them to use it to identify non tax compliance. Provision of spontaneous information may also allow all countries involved to update their knowledge of the new aggressive tax planning schemes, tax evasion schemes and double non-taxation.

Spontaneous exchanges often result in significant tax adjustments and tax authorities should therefore ensure they systematically review incoming spontaneous exchanges of information to identify whether there is a tax risk.

***Receiving Spontaneous Exchange***

- Acknowledge receipt of the information;
- Check whether the information received reveals non-compliance. Spontaneous exchanges may also be useful to identify potential tax loopholes and may lead countries to consider legislative amendments;
- Evaluate the information and, if warranted, refer it to the appropriate investigative authorities for action;
- Request feedback from the investigative authorities on the usefulness of the information and forward it to the competent authority that spontaneously provided the information. Feedback may include details



of, for example, additional tax revenue raised, tax evasion methods detected and an overall assessment of how useful the information was to the tax administration. Regular, timely and comprehensive feedback between competent authorities is important as it will motivate further new spontaneous information exchanges.

#### *Initiating spontaneous exchange*

#### **What type of information can be provided spontaneously?**

Several circumstances may arise that could prompt a spontaneous exchange of information from a tax auditor via his competent authority. Spontaneous exchange of information should be considered where:

- There are grounds for suspecting that there may be a significant tax loss by the treaty partner;
- Payments are made to residents of another country and there is suspicion that they have not been reported;
- A person liable to tax obtains a reduction in or an exemption from tax in one State which would give rise to an increase in tax or to liability to tax in the other State;
- Information gathered during a tax audit shows that residents of another country are involved in a particular tax heaven arrangement;
- There are grounds for supposing that the same tax avoidance scheme which has been identified during a tax audit may be used in other countries.

#### ***How to make a spontaneous exchange in practice***

When a tax auditor identifies information suitable for a spontaneous exchange, he should first discuss it with his manager (or the regional EOI contact if there is one) to determine whether the information is worth transmitting to the EOI partner. If this is the case the tax auditor will send a memo to his competent authority through the normal official channels. In order to facilitate spontaneous exchange it is advisable to have a standard electronic or paper form to which a feedback form would be attached.

Some tax administrations have installed information systems that allow a tax auditor to electronically initiate a spontaneous exchange addressed to the competent authority for onward transmission to a foreign country when relevant non-compliance has been detected. A Standardised Form or a checklist may be provided to guide the tax auditor in the process of completing the data needed for a spontaneous exchange.

#### **Checklist of what to include in a spontaneous exchange**

- The reference to the EOI agreement on the basis of which the information is provided.
- The identity of the person(s) to whom the information relates: name, date of birth (for individuals), marital status (if relevant), Tax Identification Number (TIN) and address (including e-mail or internet addresses, if known).
- The identify of person from whom the information was obtained and, if relevant, their relationship to the person(s) to whom the information relates: name, marital status (if relevant), TIN (if known), addresses (including e-mail or internet addresses if known), registration number in case of a legal entity (if known), flow charts, diagrams or other documents illustrating the relationships between the persons involved.
- If the information involves a payment or transaction via an intermediary mention the name, addresses of the intermediary, including, where bank information is involved, the name and address of the bank branch as well as the bank account number.

- The information which was gathered and an explanation why the information is thought to be of interest to the other competent authority (for money amounts indicate the currency).
- Mention how the information was obtained and identify the source of the information provided, e.g. tax return, third party information.
- Mention whether the taxpayer or a third person has been notified about the exchange (if required under domestic law).
- Mention whether there are any objections to notifying the taxpayer of the receipt of the information.
- Mention whether feedback is requested on the usefulness of the information (if so a feedback form should be attached)
- A reminder that the use of the information provided is subject to the tax confidentiality provisions of the EOI instrument.
- The name, phone, fax number and e-mail address of the tax official who may be contacted if needed, if that person is a delegate of the competent authority.

### ***Sending the information***

The competent authority should make a final check, add his signature and send the information to his counterpart via registered mail or in a secure electronic form.

### ***How to promote and encourage the use of spontaneous exchange of information***

The effectiveness and efficiency of spontaneous exchange depends on the motivation and the initiative of the officials in the supplying country. Local tax officials need to be reminded regularly that they should pass on to their competent authority information which would potentially be of use to an EOI partner. In this context, tax administrations should consider developing strategies that aim to encourage and promote the use of spontaneous exchange of information. Such strategies might include:

- The mandatory publishing of spontaneous exchange statistics in annual reports;
- Carrying out comprehensive, regular and properly targeted awareness training to local tax officials;
- Consider negotiating Memoranda of Understanding and other similar instruments that seek to encourage, promote and facilitate effective spontaneous exchange of information;
- Encouraging feedback as this is an important factor in motivating spontaneous exchange (see an optional Model Feedback Form in Annex 5).

## **7. ENSURING THE CONFIDENTIALITY OF INFORMATION EXCHANGED FOR TAX PURPOSES<sup>28</sup>**

Effective mutual assistance between competent authorities requires that each competent authority be assured that the other will treat with proper confidence the information which it obtains. For this reason, all treaties and exchange of information instruments should contain provisions regarding tax confidentiality and the obligation to keep information exchanged as secret or confidential. The confidentiality rules cover competent authority letters, including the letter requesting information. It is understood that the requested State can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested State to be able to obtain or provide the requested information to the requesting State, without frustrating the efforts of the requesting State.

**EFFECTIVE  
MUTUAL ASSISTANCE  
BETWEEN COMPETENT  
AUTHORITIES REQUIRES  
THAT EACH COMPETENT  
AUTHORITY BE ASSURED  
THAT THE OTHER WILL  
TREAT WITH PROPER  
CONFIDENCE THE  
INFORMATION  
WHICH IT OBTAINS**

<sup>28</sup> For more information see the joint Global Forum /OECD 2012 Report: *Keeping it safe*.

## 7.1 Legal framework to protect the tax confidentiality of information exchanged

The provisions on tax confidentiality of information exchanged are found in Article 26 paragraph 2 of the OECD/UN Model, Article 8 of the Model TIEA and Article 22 of the Multilateral Convention. These provisions require that information be kept confidential and set limits on the persons to whom the information can be disclosed and on the purposes for which the information may be used. Article 26 of the OECD/UN Model and Article 22 of the Multilateral Convention contain the additional requirement that information should be treated “as secret in the same manner as information obtained under domestic law.” Under the Multilateral convention, if personal data are provided, the Party receiving them shall treat them in compliance not only with its own domestic law, but also with the safeguards that may be required to ensure data protection under the domestic law of the supplying Party. In addition the 2012 Update to Article 26 of the OECD Model Tax Convention clarifies that the confidentiality rules cover competent authority letters, including the letter requesting the information and that in the case of a breach of confidentiality, the other State may suspend assistance until proper assurances are provided.

Domestic legislation must include provisions on tax confidentiality and provide administrative and criminal penalties for persons or authorities who improperly disclose confidential information. Penalties must be clear and severe enough to discourage breaches. Information exchange partners may suspend the exchange of information if appropriate safeguards are not in place or if there has been a breach in confidentiality and they are not satisfied that the situation has been appropriately resolved.

## 7.2 Administrative Policies and Practices must be in place to protect the tax confidentiality of information exchanged

### *Before Transmission of information*

Prior to sending information the competent authority should have procedures/processes in place to ensure that the information sent will be kept confidential in the recipient country. This includes confirming that the person who has requested the information was authorised to make the request and to receive the information. Steps should be taken to confirm that the competent authority's name and address are correct before sending any information. All confidential information should be clearly labelled as confidential.

In order to ensure the tax confidentiality of information exchanged, the competent authorities may consider including a warning in the competent authority letter and all enclosures (background information, copies of contracts etc). This warning can be “embedded” by using a treaty stamp on every page for paper mail or a watermark in case of electronic exchange. Such treaty stamp or watermark often states:

**THIS INFORMATION IS FURNISHED UNDER THE PROVISIONS OF A TAX TREATY AND ITS USE AND DISCLOSURE ARE GOVERNED BY THE PROVISIONS OF SUCH TAX TREATY**

These types of warnings may also be placed on the documents that the receiving competent authority forwards to other officers within the tax administration (e.g. tax auditors).

Confidentiality before and during transmission is the responsibility of the sending authority. After receipt, it is the responsibility of the receiving authority. Only persons authorised to receive information under the treaty should be able to access the mailboxes of the competent authorities.

**DOMESTIC LEGISLATION  
MUST INCLUDE  
PROVISIONS ON TAX  
CONFIDENTIALITY  
AND PROVIDE  
ADMINISTRATIVE AND  
CRIMINAL PENALTIES  
FOR PERSONS OR  
AUTHORITIES WHO  
IMPROPERLY DISCLOSE  
CONFIDENTIAL  
INFORMATION**

**CONFIDENTIALITY  
BEFORE AND DURING  
TRANSMISSION IS THE  
RESPONSIBILITY OF THE  
SENDING AUTHORITY**

#### *During transmission*

Physical mail should only be sent via an international registration system where a mail tracking function is in place. Information sent electronically must remain confidential during transmission from the sender's computer system to the recipient's computer system. The request and any attachments sent electronically should be encrypted or sent via a secure platform.

#### **Example of an adequate level of encryption for a secure electronic transmission**

"128 bit encryption" with a suitably secure password is an adequate level of encryption. 128 bit encryption is a feature offered through most modern software incorporating encryption functionality, including WinZip version 9. A secure password should have a minimum of 15 characters incorporating a combination of alphabetic (both upper and lower case) and numeric characters. The password should be sent in a separate e-mail.

#### *After Reception of information*

The mail received from foreign competent authorities should be delivered directly to the EOI Unit and stored securely. Information obtained whether on paper or electronically from other competent authorities must be securely stored in secure cabinets or in the EOI database and should be accessible only to authorised staff.

#### *Access to information received*

The system for recording requests will depend on the circumstances of each country. The information may be kept in paper files or in an electronic format or both. When the volume of exchange increases, the information may be stored on a separate database or the main tax administration system, and all incoming requests for information and all information received may be entered into an internal IT management system to which only authorised tax officials have access by individual login and password. In such a case, access should be strictly controlled based on a need to know principle and could be by express permission only. These internal systems should leave an electronic fingerprint that allows identification of the tax officials who are accessing the files.

When information is kept electronically, hard copies of incoming information should only be made by competent authorities if necessary. Tax officials should also be made aware of the sensitivity of such information. One way to do so is to add a warning, treaty stamp or watermark on the hard copies. Hard copies should be kept securely by the tax official to whom the case is allocated. Hard copies should be disposed of in a secure manner when no longer necessary.

### **7.3 Disclosure rules**

Article 26 of the OECD/UN, the Model TIEA and the Multilateral Convention specify to whom the information received can be disclosed and for what purposes the information may be used. Disclosure of information is generally limited to persons or authorities (including courts and administrative bodies) concerned with the assessment, collection, enforcement, prosecution and determination of appeals in relation to the taxes with respect to which information may be exchanged under the DTC, TIEA or Multilateral Convention. As EOI instruments may differ, it is important in practice to consider the terms of the particular EOI instrument being applied.

#### *Disclosure of information in public court proceedings or in judicial decisions*

The competent authority may disclose the information received in public court proceedings or in judicial decisions. Once the information becomes public it can be used for other purposes even as possible evidence.

#### *Disclosure of information to the taxpayer his proxy or to a witness*

Information may be communicated to the taxpayer, his proxy or to a witness. Information can be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses. It is understood that the requested competent authority can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested State to be able to obtain or provide the requested information to the requesting State, without frustrating the efforts of the requesting State.

#### *Disclosure to oversight authorities*

Article 26 of the OECD/UN Model and Article 22 of the Multilateral Convention also permit disclosure to oversight authorities (the authorities that supervise the tax administration and enforcement authorities as part of the general administration of the government).

#### *Disclosure of information to a third jurisdiction*

Information exchanged under a DTC or TIEA may not be disclosed to a third jurisdiction unless there is an express provision in the instrument allowing it. Article 22 paragraph 4 of the Multilateral Convention allows the passing on of information received to a third Party to the Convention subject to the prior authorisation of the competent authority that supplied the information.

#### **7.4 Use of information received for other than tax purposes for instance to counteract serious crimes (corruption, money laundering etc)**

Information received may not be used for non-tax purposes unless otherwise specified in the EOI Agreement. Article 26 of the OECD Model expressly provides for the possibility of sharing information by tax authorities with other law enforcement agencies and judicial authorities<sup>29</sup>. The last sentence of paragraph 2 therefore allows the contracting states to share information received for tax purposes provided two conditions are met: the information may be used for other purposes under the laws of both states; and the competent authority of the supplying state authorizes such use. Prior to the 2012 Update of Article 26 of the OECD Model Convention, this language was optional and included in the Commentary to Article 26. More and more DTCs include this language and it is important in practice to consider the precise terms of the particular DTC being applied.

Article 22.4 of the Multilateral Convention permits the information to be used for other purposes where such other use is authorised under the laws of the requested Party and the competent authority allows such a use, for example to combat corruption or money laundering.

#### **7.5 Legal requirement to notify the taxpayer concerned about the request for information**

Some countries have rules that require them to notify the taxpayer concerned with a request for information. Notification procedures should not, however, be applied in a manner that, in the particular circumstances of the request, would

**INFORMATION RECEIVED  
MAY NOT BE USED FOR  
NON-TAX PURPOSES  
UNLESS OTHERWISE  
SPECIFIED IN THE  
EOI AGREEMENT**

<sup>29</sup> The International Standard is based on the 2004 version of Article 26 which does not include this provision.

frustrate the efforts of the requesting State. “For instance, notification rules should permit exceptions from the notification requirement in certain cases e.g. in cases where the information request is of a very urgent nature or in case of tax fraud. Countries with notification requirements should inform their EOI partners at the time of the negotiation of an EOI Agreement.

**Notification requirements are included in the Declarations of the Parties to the Multilateral Convention see [http://www.oecd.org/document/14/0,3746,en\\_2649\\_33767\\_2489998\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/14/0,3746,en_2649_33767_2489998_1_1_1_1,00.html)**

### **7.6 Tax confidentiality provisions take precedence over freedom of information legislation**

Most countries have domestic information disclosure laws such as freedom of information or other legislation that allows access to governmental documents and records. The confidentiality provisions in exchange of information instruments are intended to take precedence over any domestic rules that permit disclosure to persons not referred to in the confidentiality provisions of exchange of information instruments. Many countries have specific exemptions in their freedom of information laws so that information obtained under tax treaties is not subject to disclosure. Part IV of the 2012 joint Global Forum/OECD Report *Keeping it Safe* includes a Checklist for tax administrations to determine whether tax confidentiality issues are adequately addressed.

**PART IV OF THE 2012 JOINT GLOBAL FORUM/OECD REPORT *KEEPING IT SAFE* INCLUDES A CHECKLIST FOR TAX ADMINISTRATIONS TO DETERMINE WHETHER TAX CONFIDENTIALITY ISSUES ARE ADEQUATELY ADDRESSED**

	<b>CHECKPOINTS</b>	<b>YES</b>	<b>NO</b>
1	Treaty or other exchange of information mechanism is in place and provides for the confidentiality of tax information.		
2	Domestic legislation is in place to adequately protect the confidentiality of tax information.		
3	Domestic legislation includes sufficient sanctions for breaches of confidentiality.		
4	A comprehensive policy on confidentiality of tax information is in place and endorsed at the top level of the administration.		
5	A specified person is responsible for implementing the comprehensive policy.		
6	The comprehensive policy includes:		
	(a) background checks/security screening of employees,		
	(b) employment contracts,		
	(c) training,		
	(d) access to premises,		
	(e) access to electronic and physical records,		
	(f) departure policies,		
	(g) information disposal policies, and		
	(h) managing unauthorized disclosures		
7	All aspects of the policy have been implemented in practice		

	CHECKPOINTS	YES	NO
8	Have any breaches in confidentiality occurred?		
	If yes, (a) was the breach been investigated?		
	(b) was a report with recommendations prepared?		
	(c) did the recommendations in the report result in a high degree of confidence that the changes, once implemented, would ensure that a similar breach would not occur?		
	(d) were the recommendations effectively implemented?		
	(e) were the sanctions provided for in domestic law applied to the person or persons responsible in a manner that will deter future breaches?		

## 8. ORGANISATIONAL ASPECTS AND PROCESSES

There is a minimum set of factors that tax administrations must address in order to effectively implement exchange of information:

- The authority to gather information and powers to compel the information;
- Internal procedures on gathering information;
- Internal procedures on how to request information from other countries and gather information for other countries (both for field officials and the EOI Unit);
- Access to identified electronic sources of information both internal (tax records) and external (public databases);
- An internal and external communications system (phone, mail, fax, e-mail);
- Facilities – office space and equipment;
- A budget for personnel, supplies, facilities, travel, translation, enforcement expenses (gathering data and court costs), training etc.

It is important that the Tax Commissioners/Director General of Taxes and the management board be made aware of the importance or exchange of information for tax purposes and shown the benefits of mutual assistance to counteract international tax evasion. As the volume of exchange increases, this may help the EOI Unit to obtain sufficient human and financial resources to operate in an efficient manner.

**IT IS IMPORTANT THAT THE TAX COMMISSIONERS/DIRECTOR GENERAL OF TAXES AND THE MANAGEMENT BOARD BE MADE AWARE OF THE IMPORTANCE OR EXCHANGE OF INFORMATION FOR TAX PURPOSES AND SHOWN THE BENEFITS OF MUTUAL ASSISTANCE TO COUNTERACT INTERNATIONAL TAX EVASION**

### 8.1 Getting started

When a country is new to exchange, the role of carrying out EOI may be allocated to just one person. As the volumes of exchange increase (the numbers of incoming and outgoing requests), an EOI Unit will need to be set up under the responsibility of the designated Competent Authority. Various organisational options can be considered.

### 8.2 Organisation of EOI Units

The EOI Unit is generally located at headquarters within the International Department of the Tax Administration, or in the National Tax Audit Department, the Large Taxpayer Directorate, or the Department dealing with risk assessment and intelligence. In some countries, the International Tax Department may perform all the competent authority functions (negotiation and interpretation of tax treaties, mutual agreement procedures, advance pricing agreements and EOI functions).

The organization of the work on EOI depends on a number of factors:

- The type of tax, the type of request
- The existence of a centralised tax database
- The access rights of the EOI Unit to the tax administration database, other government data bases and public and commercial data bases
- The ability of the EOI Unit to gather third party information.



The following models are used by countries:

*Model 1: The EOI Unit directly handles requests concerning readily available information as well as third party information*

The EOI Unit asks regional offices to gather information only if an investigation is necessary to obtain the information. The operation of this model requires skilled EOI staff with tax audit experience.

*Model 2: The EOI Unit directly handles only requests concerning readily available information*

This approach also requires the EOI unit to be given access to the tax administration databases. This Model facilitates responding quickly to simple requests concerning residence status, tax return information etc. This model generally requires complex cases and those cases requiring third party information to be sent to regional offices.

*Model 3: The EOI Unit does not directly handle any requests*

In this Model the EOI Unit carries out all the EOI functions except the gathering of information. The EOI Unit registers new requests checks their validity and completeness and sends them electronically or by secure mail to the relevant province or state where the information requested is gathered. The information is sent back to the EOI Unit to forward the information to the EOI partner.

*Model 4: The EOI Unit processes incoming requests but does not handle outgoing requests*

All requests have to be sent to the EOI Unit which can monitor closely all incoming requests while speeding up the process for outgoing requests which are processed directly by regional directorates and National Audit Departments.

*Model 5: The EOI Unit is organised by country or geographic region*

The EOI Unit may be organised on a country basis or geographical region basis. This type of organization may take advantage of the language skills of staff in the EOI Unit and help to build up expertise on the relevant EOI instruments and knowledge on the EOI procedures of EOI partners. This may improve the efficiency of exchange and facilitate working relations over time with counterparts.

*The role of regional contacts for EOI*

When the volume of exchange reaches a certain level, some countries have found it helpful to have regional contacts on EOI who can provide assistance to tax auditors and other tax officials. The regional contacts can assist auditors if they have questions when drafting requests or responses to requests, when they consider providing spontaneous exchange and more generally on any issues relating to exchange of information. These regional contacts can also be useful to monitor requests sent to tax auditors to collect third party information and to provide training on EOI. EOI contacts can also be an integral part of the EOI process, for instance in federal countries.

### **8.2.1 Human resources in the EOI Unit**

The EOI Unit should have sufficient human resources in order to have an effective EOI programme. The size of the EOI Unit will generally depend on the volume of exchange handled by the EOI Unit.

The EOI Unit generally includes tax officials with varied expertise (legal, accounting, language):

- General knowledge of domestic tax laws, particularly those involving the gathering of information;
- General knowledge of tax law to be able to identify whether a request has a legitimate tax purpose;



- Knowledge on obligations under EOI agreements and in particular tax confidentiality obligations;
- Knowledge of administrative procedures, and in particular for processing requests;
- Accounting skills and experience as a tax auditor in order to understand complex requests and in particular requests concerning transfer pricing issues;
- Language skills.

### 8.2.2 Financial resources

The EOI Unit should also have sufficient financial resources to cover the various costs involved in EOI and in particular:

- The creation and maintenance of an EOI data base when needed;
- The gathering of information;
- Access to potentially relevant commercial websites;
- Translation services, if the translation function cannot be performed within the EOI Unit;
- Training;
- Travel for face to face meetings with counterparts and attending regional or international events.

### 8.2.3 IT Resources

The EOI Unit should have the technical ability to register and monitor EOI cases. The EOI monitoring system should be set up to register and monitor incoming requests, outgoing requests and spontaneous exchanges. The system can be kept quite simple especially if the volume of exchange is limited and it can then be developed over time into an EOI data base as the volume of EOI increases. The EOI Unit should also have the necessary tools and training to encrypt and decrypt information if information is exchanged electronically.

The EOI Unit could be given access to the taxpayers' data base if it is centralised, to online public registries, relevant commercial websites, electronic international phone books, etc.

**THE EOI UNIT COULD BE GIVEN ACCESS TO THE TAXPAYERS' DATA BASE IF IT IS CENTRALISED, TO ONLINE PUBLIC REGISTRIES, RELEVANT COMMERCIAL WEBSITES, ELECTRONIC INTERNATIONAL PHONE BOOKS, ETC**

## 8.3 Processes

Processes dedicated to EOI should be put in place and set up in such a way that there should be no disruption in case of change of staff or leave. Countries generally have step by step manuals for their EOI case workers on how to process information.

### *Processes for Incoming requests*

#### 1. *Registration of incoming request*

If the number of requests is limited, countries usually register incoming requests on an excel spread sheet and only have a paper based EOI file. Once the volume of exchange increases, most EOI Units register incoming requests in an EOI database. The head of the EOI Unit registers the request and assign the new request to an EOI case worker<sup>30</sup>. If the request is in paper form the request and attachments will often be scanned to create an electronic file.

#### 2. *Acknowledgement of receipt of the request*

The delegated Competent Authority or EOI manager usually acknowledges receipt of the request as soon as possible and provides his counterpart with the EOI reference number allocated to the request to

<sup>30</sup> In some cases the EOI caseworker will register the file.

further facilitate communications on the case. When a request is sent electronically, an acknowledgement of receipt can be automatically generated by the requested Competent Authority.

3. *Translation of the request and attachments if needed*

The translation of requests and documentation is handled by the EOI Unit when tax officials have adequate language skills. When the translation is not done by the EOI Unit staff, the translators should be subject to strict confidentiality rules.

The language of communication between Competent Authorities, especially requests for information, should be discussed in order to facilitate the process.

4. *Review of the request for validity and completeness*

The validation of the request is done by the EOI manager before it is assigned to an EOI case worker. Many competent authorities have a checklist to perform this function (see checklist above). If the request is not validated or is incomplete, the Competent Authority will ask the requesting Competent Authority for clarification or to provide additional information.

5. *Security classification*

Incoming requests are covered by tax confidentiality. Some countries have the possibility to assign special security classifications to incoming requests for highly sensitive information.

6. *Allocation of the case/Gathering information requested*

When the EOI Unit does not systematically ask regional/local tax offices to gather the information requested, the EOI manager will first determine whether the EOI Unit is able to answer directly the request without having to refer it to a regional/local office. If the request can be answered by the EOI Unit, the EOI manager will allocate the request to an EOI case worker.

When a request can be partially answered directly, the EOI case worker will generally provide a partial reply with the information gathered and indicate that the rest of the information will be provided at a later date.

When the request is assigned to a regional/local office, the requested office should be required to provide the information within a certain time frame which may depend on the complexity of the request.

7. *Quality controls*

EOI Units should have in place quality controls before they respond to a request in order to determine whether the information gathered:

- is complete, reliable, clear and fully responds to the request for information;
- meets the legal requirements of the requesting country and/or the information provided in the form requested.

When the information is gathered at the local level, there are generally two levels of quality controls: before passing on the information to the EOI Unit and by the EOI Unit before sending the information to the EOI partner.

8. *Acknowledging receipt of the information and providing feedback*

The acknowledgment of receipt of the information by the requesting partner is done by e-mail or regular mail. This can often be done by e-mail if the requesting country has provided a file reference and taxpayer information is not included in the e-mail.

If feedback is provided, the EOI Unit should analyse feedback to determine successes and failures and identify learning points. When the information was provided by a regional/local tax office, the EOI Unit will forward the feedback to the tax auditor who gathered the information.

Due to confidentiality rules, some countries are only able to provide general feedback on the usefulness, completeness and timeliness of the information but not detailed information on the tax adjustment, amount of tax reassessed etc.

**DUE TO CONFIDENTIALITY RULES, SOME COUNTRIES ARE ONLY ABLE TO PROVIDE GENERAL FEEDBACK ON THE USEFULNESS, COMPLETENESS AND TIMELINESS OF THE INFORMATION BUT NOT DETAILED INFORMATION ON THE TAX ADJUSTMENT, AMOUNT OF TAX REASSESSED ETC**

#### *Processes for outgoing requests*

1. *Identification of a need for information and preparation of the request*
  - The tax auditor will prepare a request for information (it may be helpful to have a Model Template or checklist to ensure the validity and completeness of the request: see the optional Model template for request under TIEAs in Annex 4).
  - The request will be addressed by tax auditors through the official channels via the tax administration intranet or in a paper form to the EOI Unit.
2. *The EOI Unit prepares the formal request and sends it to its EOI counterpart*
  - The EOI Unit will check the validity and comprehensiveness of the request, give it a reference number and enter it in to the EOI system under outgoing requests.
  - The EOI Unit will translate the request if needed (contact first the treaty partner to check whether a translation is needed) and send the request (in original language plus translation if needed) to the relevant foreign competent authority.
3. *The EOI Unit should acknowledge the receipt of the response*
  - The EOI Unit in the requested country should acknowledge receipt of the response, register the date of the response, and have the response translated (if needed).
  - The response is reviewed by the EOI case worker who has been assigned to the case to ensure all information requested was provided and if relevant, in the requested form. The response may contain partial or complete information, or an explanation of why information cannot be obtained. If no response is provided, a reminder should be sent to requested EOI partner.
  - The information forwarded to the tax auditor should include warnings that the information is confidential and has been obtained under a tax treaty; some of these warnings may advise that the information may not be disclosed under freedom of information laws or without consulting the Competent Authority in advance.

#### **8.4 Record Keeping**

The system for recording requests will depend on the circumstances of each country. At the start, requests may be recorded in a note book or on an excel spreadsheet. As the volume of exchange increases, the EOI Unit may be able to acquire a simple EOI system to record and monitor information concerning incoming and outgoing requests as well as spontaneous exchange sent and received. Any additional request should be linked to the original one.

**THE SYSTEM FOR RECORDING REQUESTS WILL DEPEND ON THE CIRCUMSTANCES OF EACH COUNTRY**

#### *Record keeping of incoming requests*

At a minimum for each incoming request, the following information should be recorded:

- Date of receipt of the request and reference number assigned to the request plus reference number given in requesting country if provided;

- Date of acknowledgement of the receipt of the request;
- Date of any notification to the requesting party that the request is considered to be invalid or incomplete;
- Date of any notification to the requesting party that information cannot be provided within the set timeframe;
- Date interim replies are provided;
- Date the information is provided; and
- Date the case is closed.

The more detailed information that can be captured in an EOI database for incoming requests is included in the table below<sup>31</sup>.

NEW INCOMING REQUEST		
GENERAL INFORMATION		
1	Requesting EOI Partner	Example: Blueland
2	Legal basis	DTC/TIEA/other ex: DTC between Blueland and Freedonia
3	EOI Reference Number	May be created automatically by system ex IN 2012-59
4	Date Request received	DDMMYYYY
5	EOI Unit Case Officer to whom the case has been assigned	
CONTENT OF REQUEST		
6	Foreign Reference Number	Supplied in the request by EOI partner
7	Date Request made by Requesting EOI Partner	Indicated in the request DDMMYYYY
8	Identification of taxpayer under audit/ investigation by name	Ex Mr John Smith, Company ABC
9	Address, postal code, country / e-mail address	
10	Residence country Tax Identification Number/VAT number	
11	Other identification if any	Bank account number, passport number etc
12	Tax(es) concerned	Income tax? VAT? Other?
13	Tax year(s) start and end for which information is requested	DDMMYYYY (may not correspond to calendar year)
14	Type of information requested	Tax return info, tax status, accounting records, bank info, ownership info, residence info, transfer pricing info, other
15	Any type of form	Certified copies etc
16	<b>URGENCY OF THE RESPONSE</b>	Reasons for urgency: court case, statute of limitation
STATUS OF THE CASE		
17	Status of the Case	Open/Closed/Re-opened

<sup>31</sup> A software application to monitor EOI will soon be made available on a password protected page of the EOI Portal [www.eoi-tax.org](http://www.eoi-tax.org)

18	Date Request assigned to EOI Unit Case Officer	DDMMYYYY
19	Date receipt of the Request acknowledged	DDMMYYYY
20	Date Request assigned to local tax office (if relevant)	DDMMYYYY
21	Local tax officer (to whom the case has been assigned), contact name and details	
22	Actions taken	Ex information requested to a bank, employer, company etc
23	Last Action Date	
24	Next Actions	
25	Deadline for Next Action Due	DDMMYYYY This should generate an automatic alert
26	Due Date of Reply to EOI Partner	DDMMYYYY
27	Date Interim Reply Sent	DDMMYYYY
28	Date Final Reply Sent – Case closed	DDMMYYYY
29	Contact Name and details in requesting country	

#### *Record keeping of outgoing requests*

At a minimum for each outgoing request, the following information should be recorded:

- Date the request is sent and reference number assigned;
- Date of acknowledgement by requested competent authority of the receipt of the request;
- Date of interim/partial replies received if any;
- Date the information was provided;
- Date of closing of the case.

**The more detailed information that can be captured in an EOI database for outgoing requests is included in the table below.**

<b>“NEW OUTGOING REQUEST”</b>		
<b>GENERAL INFORMATION</b>		
1	Requested EOI Partner	Freedonia
2	Legal basis of request	DTC/TIEA/ other ex TIEA
3	EOI Reference Number	May be created automatically by system ex OUT 2012-57
4	Date Request sent	DDMMYYYY
5	Name and details of EOI case officer in charge of the case	
<b>CONTENT OF REQUEST</b>		
7	Date Request received from tax auditor	DDMMYYYY
8	Identification of taxpayer under audit/ investigation: name	Ex Mr John Smith, Company ABC
9	Address, postal code, country / e-mail address	
10	Residence country Tax Identification Number/VAT number	

11	Other identification if any	Bank account number, passport number
12	Tax(es) to which the request relates	Income tax /VAT other
13	Tax year(s) start and end for which information is requested	DDMMYYYY - DDMMYYYY (may not correspond to calendar year)
14	Type of information requested	Tax return information, tax status, accounting records, bank information, ownership information, residence information, transfer pricing information, other
15	If known Name of taxpayer believed to be in possession of the information	
16	If known Postal Address / e-mail address of taxpayer believed to be in possession of the information requested	
<b>STATUS OF THE CASE</b>		
17	Status of the Case	Open/Closed/Re-opened
18	Date acknowledgement of receipt of the request by EOI partner	DDMMYYYY
19	Date interim reply received from EOI partner if any	DDMMYYYY
20	Date reminders sent if any	DDMMYYYY
21	Date Final Reply received – Case closed	DDMMYYYY
22	Date acknowledgement of receipt of reply	DDMMYYYY
23	Date of receipt of feedback if any	DDMMYYYY
24	Name of Contact in requested State	
25	Contact Details	Phone number, e-mail address, etc

### 8.5 Statistics on EOI and Evaluation Reports

The EOI database should allow statistics to be compiled periodically on the status of incoming and outgoing requests and incoming and outgoing spontaneous exchange, and facilitate the preparation of summary reports for managers or auditing departments. These summary reports can include statistics concerning:

- The number of requests received/sent and spontaneous exchange received/sent in total and by country;
- The number and percentage of requests acknowledged within the specified time frames;
- The number of requests closed during a given year and age of the request;
- The number of requests still open and age of the requests;
- The type of information requested (bank information, transfer pricing information etc);
- The percentage of requests declined.

### Example of Report by Response Times (incoming requests)

Date of request	EOI Section Reference Number	Requesting party	Type of request	Status (open/closed)	Response time		
					Acknowledgement letter (No. of days taken to issue)	Interim Reply (1 <sup>st</sup> /2 <sup>nd</sup> /3 <sup>rd</sup> ) (No. of days taken to issue)	Final reply (No. of days taken to issue)

#### *Performance Management*

The competent authority should have performance measures to monitor the exchange of information programme. The basic core system for managing performance may consist of the basic record keeping and reporting system, and routine use of a feedback form.

#### *Routine use of feedback form*

It should be a standard part of the EOI process to provide basic feedback using a standard 'feedback' form where this is requested by the tax authority responding to the information request (see Annex 4.1 for a Model Template for Feedback).

#### *Setting a baseline*

The use of performance measurement is important in setting a baseline for evaluating the progress made by initiatives to improve the efficiency and effectiveness of exchange of information.

The baseline will allow the first year's results to be set as a benchmark for future progress and for tracking the effect of any improvement activities. These could include new procedures to gather information, to speed up translations or the introduction of IT support. It could also track the effect of any changes to reflect EOI tasks in the overall system of tasks and targets assigned to tax auditors. Tax auditors typically have a heavy workload to which exchange of information activities may need to be added and therefore reflected in their job descriptions and performance management systems.

**THE USE OF  
PERFORMANCE  
MEASUREMENT IS  
IMPORTANT IN SETTING  
A BASELINE FOR  
EVALUATING THE  
PROGRESS MADE BY  
INITIATIVES TO IMPROVE  
THE EFFICIENCY  
AND EFFECTIVENESS  
OF EXCHANGE OF  
INFORMATION**

## 9. THE KEY ROLE OF TAX AUDITORS IN EOI

Tax auditors play a key role exchange of information, in particular:

- Providing the information requested by an EOI partner if a taxpayer needs to be contacted or a tax investigation is needed to gather the information requested;
- Requesting information from EOI partners in connexion with their tax audit work;
- Providing information spontaneously via the competent authority;
- Receiving and acting on information received from an EOI partner;
- Providing feedback;
- Receiving and using feedback.

Tax auditors should know that all information requests must be sent via the competent authority, that sensitive non-taxpayer specific information should also be sent via the



competent authority and that when in doubt they should consult the EOI Unit or the regional EOI contact point. It is therefore important to raise the awareness of tax auditors about the importance of exchange of information, to include EOI as part of their yearly objectives and to take it into account in their evaluation so that EOI is given a high priority.

### **9.1 Guidance should be provided to tax auditors on when and how to make requests**

The Guidance should cover:

- When to consider making a request for information, i.e. early enough during the tax audit since it may take time to get the information;
- How to make a request;
- How to respond to a request;
- Tax confidentiality rules.

The guidance may take the form of checklists with attachments or other user-friendly material, highlighting key points for field officials to consider when making a request for information. The following checklist could be made available to field officials as part of standard training materials or guidance.

#### **Checklist for tax auditors of what to include in a request**

- The reference to the EOI agreement on the basis of which the information is provided;
- The date the information is required (due to pressures of the statute of limitations or court case) or any other facts indicating the urgent need for the information and/or the importance of the case;
- Identity of person under examination. Include all identifying information available and if name is not available, include sufficient information to identify the person, e.g. account number;
- Specify if there a concern with the taxpayer being notified of the request;
- The specific years for which the information is requested;
- The tax or taxes to which the request relates;
- The tax purpose for which the information is sought (a summary of the facts of the case, the tax issues involved and the findings to date);
- A statement of the efforts made to secure the desired information prior to the request and why the efforts were not successful;
- The type of case (whether a civil or criminal investigation);
- Any other relevant background information affecting the examination;
- Details of the information sought (include whether the information is required in a specific form, e.g. authenticated copies);
- An explanation of why the information is necessary (i.e. reason/purpose for the request);
- Grounds for believing that the information is held in the requested jurisdiction or is within the possession or control of a person within its jurisdiction;
- Copies of all supporting data, flowcharts/diagrams indicating foreign activity or a relationship/connection abroad;
- And if available: Name and address of any person believed to be in possession of the information requested.

#### ***What if a request is received directly by a tax auditor from a foreign local tax official?***

Local tax officials are not entitled to exchange information directly with their foreign counterparts unless they have received a delegation of competent authority. It may happen that a tax official receives a request which has bypassed his or both competent authorities. In such a case, the tax official should immediately pass it on to his country's competent authority.

**LOCAL TAX OFFICIALS  
ARE NOT ENTITLED TO  
EXCHANGE INFORMATION  
DIRECTLY WITH THEIR  
FOREIGN COUNTERPARTS  
UNLESS THEY HAVE  
RECEIVED A DELEGATION  
OF COMPETENT  
AUTHORITY**

The competent authority will decide whether the request is worth processing. If it is the case, it will contact his counterpart to ask to produce a new request according to the normal procedure but the tax official should not wait to start gathering the information.

## **9.2 Training and Awareness on EOI**

The tax administration should ensure that tax officials and in particular tax auditors receive appropriate training on EOI. The tax administration should:

- Identify relevant areas of the tax administration that require EOI training: new audit staff, international tax auditors;
- Determine the nature, extent and frequency of EOI training required by each of the identified areas (new staff, international tax auditors tax auditors in international tax departments);
- Determine who will conduct the training;
- Produce a training syllabus, material and case studies that cover the key topics;
- Consider the most effective methods of carrying out the programme (on-line training, training by the EOI Unit, on the job training);
- Evaluate the usefulness and effectiveness of the exchange of information training provided and use this feedback to refine future courses.

**THE TAX  
ADMINISTRATION  
SHOULD ENSURE THAT  
TAX OFFICIALS AND  
IN PARTICULAR TAX  
AUDITORS RECEIVE  
APPROPRIATE  
TRAINING ON EOI**

# ANNEX 1

## Article 26 on Exchange of Information of the OECD Model Tax Convention

The text in bold was added in the 2012 Update and was previously included as an optional provision in paragraph 12.3 of the Commentary<sup>1</sup>

1. The competent authorities of the Contracting States shall exchange such information as is *foreseeably relevant* for carrying out the provisions of this Convention or *to the administration or enforcement* of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.
2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. **Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use<sup>2</sup>.**
3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
  - a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
  - b) to supply information this is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
  - c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).
4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.
5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

<sup>1</sup> See the Update To Article 26 of the OECD Model Tax Convention and its Commentary ([http://www.oecd.org/ctp/exchangeofinformation/120718\\_Article 26-ENG\\_no cover \(2\).pdf](http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf))

<sup>2</sup> The International Standard is based on the 2004 version of Article 26 which does not include this provision.

# ANNEX 2

Table summarising the possible forms of mutual assistance under Article 26 of the OECD Model Convention, the Model Agreement on Exchange of information (TIEA) and the Convention on Mutual Administrative Assistance in Tax Matters

Type of mutual assistance expressly mentioned or permitted under Article 26 or commentary, Model TIEA and Multilateral Convention	Models		Live Instrument
	Article 26 OECD and UN Model Tax Conventions <sup>1</sup>	Model Agreement on Exchange of information	Convention on Mutual Administrative Assistance in Tax Matters Multilateral Convention <sup>2</sup>
Exchange on request	YES	YES	YES
Automatic exchange	YES	NO	YES <sup>3</sup>
Spontaneous exchange	YES	NO	YES
Simultaneous tax examinations	YES	NO	YES
Tax examinations abroad	YES	YES	YES
Joint audits	Permitted	NO	Permitted
Industry wide exchange	Permitted	NO	Permitted
Assistance in tax collection	NO (provided in Article 27)	NO	YES

<sup>1</sup> The Model Convention does not restrict the possibilities of exchanging information to exchange on request spontaneous and automatic exchange and the Contracting States may use other techniques to obtain information which may be relevant to both Contracting States such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information.

<sup>2</sup> Article 4 does not restrict the possibilities of exchanging information to the five methods mentioned in the Convention. In general, the manner in which exchange of information will be provided can be decided upon by the Parties, acting through their competent authorities.

<sup>3</sup> Article 8 provides for automatic exchanges of information, but this form of assistance requires a preliminary agreement between the competent authorities of the Parties willing to provide each other information automatically.

# ANNEX 3

## Case Studies based on Actual Cases of Exchange

### Case study 1: Exchange of information on a High Net Worth Individual

The taxpayer is a citizen of Country A, who emigrated to Country B with very little wealth but by the early 1990's the media was prominently depicting him as an extremely wealthy man.

The tax authorities of Country B undertook an initial review in 2000 which revealed an asset base of an equivalent of millions of USD supposedly arising from an annual income of USD 10 000. The initial explanation provided by the taxpayer was that his mother, a resident of country A, had provided initial funding.

In order to ascertain these facts, the competent authority of Country B made a request for information to Country A under their Double Tax Convention. As the Double Tax Convention between Countries A and B provides for assistance in tax collection, Country B was also able to make a request for assistance in tax collection to Country B.

The competent authority of country A responded that the taxpayer's mother could not have been the initial funding. As a result, assessments to the value of millions of USD were raised on the taxpayer and assets secured to ensure payment of the tax debt.

A private jet of the taxpayer was tracked down and located in Country C. Again making use of the Double Tax Convention between Countries B and C, the asset was secured and eventually sold off in part payment of the tax due.

Country B made every use of the powers available through its treaty with Country A to put restraining orders in place preventing the disposal of major offshore assets held by the taxpayer and associated enterprises.

### Case study 2: Exchange on request Services Re-invoicing Scheme

Company X, a resident of Country A, claims a deduction for services invoiced by Company Y, resident in Country B. The tax official auditing Company X learns that the services were performed by Company Z, also a resident of Country A. The tax official begins an audit of Company Z. The income tax return of Company Z only shows income from services invoiced to Company Y. The amount invoiced by Company Z to Company Y for the services performed for Company X is significantly smaller than the amount invoiced by Company Y to Company X for the services. The tax auditor suspects that Company Y is merely re-invoicing these services and that the difference between the amount declared by Company Z and the amount invoiced by Company Y to Company X (minus its re-invoicing fee) is paid into a bank account held by Company Z with a bank resident in Country B. Typically, the Country A tax administration would request from the competent authority of Country B:

- Information about Company Y including the business activity;
- Invoices of Company Z to Company Y and any payments made to Company Z;
- All accounts payable of Company Y with respect to Company Z for the years under examination;
- Accounting and financial records of Company Y (in particular any bank records showing transfers by Company Y to Company Z).

### Case study 3: Exchange on request Suspected Unreported Income – Assets Identification

The tax administration of Country A is conducting an investigation of one of its own fiscal residents, Mrs A, a self-employed accountant, following receipt of information received from Mrs Z, her former business associate, who states Mrs A owns substantial assets that were purchased by her whilst enjoying a holiday in Country B. The years under examination are 2002 and 2003. These assets are based in Country B and include a house and boat. Mrs Z advises the tax auditors that these assets were funded through undeclared income in Country A. The auditors interview Mrs Z until they are satisfied they have obtained all the information they possibly can get from her. The auditors have also exhausted all of their available domestic information sources. They have now established the city where the house is located, the city where the boat was purchased, and approximate dates of when both assets were purchased. The auditors now know that the house is vacant throughout the year and is only occupied by Mrs A when she visits on holiday. The auditors were also advised that Mrs A opened a bank account with Bank J in 2002, at the City K branch, in Country B, and that she may have obtained a loan from that bank to partly fund the purchase of the house and boat. The competent authority of Country A therefore requests the following information from the competent authority of Country B:

- Details of real property and boat registration searches for Mrs A – the request includes all details provided to the auditors, including the city where the house and boat were purchased, and the approximate dates they were purchased;
- Details of the bank account held in Country B by Mrs A – the request includes all of the details known to the auditors, including when the account was opened and the name and address of the bank; and
- Details of any loans that may have been taken out with Bank J to partly fund the purchase of these assets – the request will explain why this information is required.

#### **Case study 4: Exchange on request in a transfer pricing audit**

Countries A and B have signed an exchange of information instrument that came into force in 2007. In 2012, the tax administration in Country A is conducting an audit of Company Y, a resident of Country A, Company Y is a subsidiary company of Company Z, in Country B. The fiscal years under examination are 2009 and 2010. Company Z manufactures electronics products and sells them to Company Y, which then distributes these products throughout Country A. The auditors suspect that the terms of the sale from Company Z to Company Y may not be in accordance with the country's transfer pricing rules and therefore the profits in A are understated for tax purposes.

The auditors found the staff at Company Y to be extremely uncooperative, as shown by their lack of willingness to provide full answers during tax examination interviews and inability to produce adequate business records, including contracts that describe the commercial relationship between the two companies.

After exhausting all domestic avenues to obtain the required information, the competent authority in Country A requested information from the competent authority in Country B, including:

- A copy of the contract between Company Z and Company Y showing the nature, scope and structure of the business relationship between the two entities;
- Details of sales by Company Z to third party customers;
- Details of the functions and activities carried out Company Z and a copy of Company Z's financial statements,
- Documentation showing how the pricing between the companies was determined; and
- Relevant information derived from the 2009 and 2010 Company Z tax returns to show total gross income derived by selling the products to Company Y.
- A copy of any transfer pricing reports provided by Company Z to the tax administration in Country B.

#### **Case study 5: Spontaneous exchange of information**

The tax authorities of Country B came across information concerning the sale of a significant number of shares in a dozen companies by a taxpayer of Country A triggering capital gains. The information was sent to Country A on the basis of the EOI Article of their DTC to ensure that the taxpayer had properly reported these capital gains.

The tax authorities of Country A determined that the taxpayer had not filed any income tax returns in the past 9 years, the taxpayer was asked to file tax returns. It was found that for the 9 year tax period the taxpayer had failed to report business income, interest and dividends in addition to the capital gains. The total reassessment amounted to a euro equivalent of over one million.

#### **Case study 6: Exchange of information for VAT purposes: Cross-border sale of software**

Bank QA is a provider of financial services established in Country A. As in most countries, financial services are VAT exempt in Country A (i.e. the supplier invoices its supplies to its customers without VAT but cannot deduct the input VAT on its own purchases). Bank QA wants to purchase expensive software from a provider established in Country A. Since the bank has no right to a deduction of the input VAT invoiced by the supplier of the software, the input VAT would constitute a cost for Bank Q.

Bank QA therefore asks the software supplier to invoice the software to its branch Bank QB in Country B. According to the destination principle found in most VAT legislations, the software supplier invoices the service without VAT (i.e. at a zero rate) to Bank QB, pretending that the supply is an "export" of services to Country B. The supplier tells the tax administration that the software is provided over the internet and that it is to be considered as a service for VAT purposes because it is an intangible. The software is in fact used exclusively by Bank QA in Country A. Since the software is an intangible, there is no customs documentation to evidence this export.

The tax administration of Country A has some suspicion about this supposed export. On the basis of the EOI instrument between country A and B, the competent authority of Country A asks its counterpart whether Bank QB has actually bought the software and accounted for VAT on the acquisition of the software. If this is not the case, there will be evidence that there is no export and the tax administration of Country A will be able to claim the VAT either from Bank QA or from the software supplier.

# ANNEX 4

## Optional Model Templates

### 4.1 Exchange of information feedback form (specific request)

*Confidential information once completed*

**FEEDBACK QUESTIONNAIRE – SPECIFIC REQUEST/OUT**

Information Received from *[insert Country]*

Please complete this form electronically and e-mail it to:.....  
*[insert name, e-mail and physical address, and contact details of the Competent Authority/Exchange of Information team]*

Case Reference Number:..... Team:.....  
Taxpayer Name: ..... Tax Identification Number:.....  
Name of Tax Official: ..... Contact telephone/e-mail:.....

**GENERAL FEEDBACK**  
Overall, the information received was:  
 Very useful     Useful     Not useful enough     Not useful

If not deemed useful, please specify why:  
 Too late     Incomplete     Not relevant     Other:.....

**RESULTS OF AUDIT ACTIVITY: TAX IMPLICATIONS**  
*(please indicate amount in relevant section below)*

Income Tax: ..... VAT: .....  
Excise: ..... Other:.....

**RESULTS DIRECTLY RELATED TO THE INFORMATION RECEIVED**  
If an assessment or reassessment was raised, how much (if known) can be attributed to the information received?

Approximate adjustment

Tax: ..... Unreported income:.....  
Overstated expenses:..... Other: .....

**COMMENTS/SUGGESTIONS**

.....  
.....  
.....



## 4.2 Optional Model Template for Requests for Information under a Tax Information Exchange Agreement

The completed form constitutes a confidential communication between the relevant competent authorities.

1.	To: <sup>1</sup>		
2.	From: <sup>2</sup>		
3.	Contact point <sup>3</sup>	Name:	
		E-mail:	
		Telephone:	
		Fax:	
		Language skills:	
4.	Legal Basis:		
5.	Reference numbers and related matters	Reference number: <sup>4</sup>	
		Initial request:	Please check the box: <input type="checkbox"/> Yes <input type="checkbox"/> No If no, please provide reference number(s) and date(s) of any related request(s): .....
		Acknowledgement needed:	Please check the box: <input type="checkbox"/> Yes <input type="checkbox"/> No
		Number of attachments to the request:	
		Total number of pages for all attachments:	
6.	Urgency of reply	Date, if any, after which information would no longer be useful:	
		Urgent reply required due to:	Please check the box: <input type="checkbox"/> Statute of limitation; date: <input type="checkbox"/> Suspected fraud <input type="checkbox"/> Court case <input type="checkbox"/> Other reasons (please specify): .....
7.	Identity of person(s) under examination or investigation: <sup>5</sup>		
8.	Request to refrain from notifying the taxpayer(s) involved: <sup>6</sup>	Please check the box: <input type="checkbox"/> Yes <input type="checkbox"/> No Reasons: <input type="checkbox"/> If yes, the competent authority confirms that the requesting country would be able to refrain from notification in similar circumstances.	
9.	Time period or taxable event for which or in relation to which the information is sought: <sup>7</sup>		
10.	Tax(es) to which the request relates: <sup>8</sup>		

<sup>1</sup> Please add name and address of the competent authority of the requested jurisdiction.

<sup>2</sup> Please add name and address of the competent authority of the requesting jurisdiction.

<sup>3</sup> The contact point should have the authority to exchange information.

<sup>4</sup> Please provide a reference number that the requested competent authority should use in case of questions and that allows you to retrieve the request and the related file.

<sup>5</sup> Information about the identity of the person(s) under examination or investigation must be understood within the meaning of the commentary to Article 5(5) of the OECD Model Agreement on Exchange of Information on Tax Matters.

<sup>6</sup> Some countries have rules that require them in certain cases to notify the taxpayer concerned about the request for information. Those rules provide for exceptions from the notification requirement in certain cases, for instance, in cases where the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation in the requesting country. This section indicates that the competent authority of the requesting country wishes to avail itself of any such exceptions and explains the reasons why the request may fall within the scope of such an exception.

<sup>7</sup> The request should specify the taxable periods to which request relates. As an alternative the language refers to an "event" in cases where there is no taxable period, for instance, in case of the imposition of a withholding tax.

<sup>8</sup> Please add the name of the tax(es), e.g. Federal corporate income tax. Add also the type of tax(es) (personal, corporate etc) if the name of the tax(es) is not sufficiently indicative of the type of tax.

11.	Tax purpose for which the information is requested:	Please check the box: <input type="checkbox"/> determination, assessment and collection of taxes <sup>9</sup> , <input type="checkbox"/> recovery and enforcement of tax claims <sup>10</sup> , <input type="checkbox"/> investigation or prosecution of tax matters <sup>11</sup> , <input type="checkbox"/> other (please specify): .....	
12.	Relevant background: <sup>12</sup>		
13.	Information requested: <sup>13</sup>		
14.	Grounds for believing that the requested information is held in the requested jurisdiction or is within the possession or control of a person within its jurisdiction:		
15.	Name and address of any person believed to be in possession of the information requested (to the extent known):		
16.	Form, if any, in which information is requested: <sup>14</sup>	For copies of documents what type of authentication, if any, is requested:	
		Other form requirements, if any:	
17.	Translation of reply requested:	Please check the box: <input type="checkbox"/> Yes <input type="checkbox"/> No Language requested: .....	
18.	In making the request, the requesting competent authority states that: (a) all information received in relation to this request will be kept confidential and used only for the purposes permitted in the agreement which forms the basis for this request; (b) the request is in conformity with its law and administrative practice and is further in conformity with the agreement on the basis of which it is made; (c) the information would be obtainable under its laws and the normal course of its administrative practice in similar circumstances; (d) it has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.		

Date: ..... Authorised signature of requesting competent authority: .....

<sup>9</sup> It is understood that the investigation of civil/administrative tax matters falls under this heading. The term "collection of taxes" is used to describe the normal method of collecting taxes and can involve collection via third parties such as an employer deducting tax on wages or a bank deducting tax on interest paid.

<sup>10</sup> The terms "recovery and enforcement of tax claims" are used to refer to the processes used when there is a tax claim and can cover legal actions such as court orders, sequestration of funds, use of bailiffs and insolvency procedures.

<sup>11</sup> It is understood that the investigation or prosecution of criminal tax matters falls under this heading.

<sup>12</sup> Please provide the necessary background information which would typically include a brief summary of the ongoing examination or investigation and how the requested information relates to this examination or investigation. Where any other persons (e.g. individuals, companies, partnerships, trusts, etc), including foreign persons, are relevant to the examination or investigation and the request, please specify, to the extent known, their relationship to the taxpayer and provide information sufficient to identify these persons.

<sup>13</sup> Please be as specific as possible about the information you are requesting as it will form the basis for any domestic information gathering measures taken by the requested competent authority.

<sup>14</sup> Please specify in the relevant fields the format in which the information is requested. For instance, some countries have rules that require the information requested to be in a specific format in order to be properly introduced into evidence in a court proceeding. For example, there may be specific formats for the deposition of witnesses or the manner in which copies of original documents are authenticated.

# ANNEX 5

## EOI Glossary of Terms

### A

- **Automatic exchange of information**

Automatic exchange of information (also called routine exchange by some countries) involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc). This information is obtained on a routine basis in the source country generally through reporting of the payments by the payer (financial institution, employer, etc). Automatic exchange can also be used to transmit other useful types of information such as changes of residence, ownership of immovable property, the purchase or disposition of immovable property, etc. The information is exchanged in a standard format (see [www.oecd.org/tax/eoi/toolkit](http://www.oecd.org/tax/eoi/toolkit)). See also the OECD 2012 Report Automatic exchange of information: What it is, how it works, benefits, what remain to be done (<http://www.oecd.org/ctp/exchangeofinformation/automaticexchangeofinformationreport.htm>)

### B

- **Bank secrecy**

Bank secrecy is widely recognised as playing a legitimate role in protecting the confidentiality of the financial affairs of individuals and legal entities. The effective administration and enforcement of many laws and regulations, including those on taxation, require access to, and analysis of, records of financial transactions. The international standard provides that there should be no restrictions on exchange based on bank secrecy.

- **Business or trade secret**

A requested State may decline to disclose information relating to a trade or business secret. A trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g. may lead to severe financial hardship). The determination, assessment or collection of taxes as such could not be considered to result in serious damage. Financial information, including books and records, does not by its nature constitute a trade, business or other secret (see Article 26. 3 of the OECD/UN Model Tax Conventions and Commentaries, Article 7 of the Model TIEA and Article 21 of the Multilateral Convention).

### C

- **Competent authority**

*See also delegation of competent authority*

Competent authority is a term used in tax conventions, TIEAs and other international instruments to identify the authority representing the State Party responsible for the implementation of the instrument. Depending on the instrument, it is possible to designate more than one competent authority.

- **Confidentiality or Tax secrecy**

Effective mutual assistance between competent authorities requires that each competent authority be assured that the other will treat with proper confidence the information which it obtains in the course of their co-operation. For this reason all treaties and exchange of information instruments contain provisions regarding tax confidentiality and the obligation to keep information exchanged as secret or confidential refers to the provisions under domestic law that ensures that information relating to a taxpayer and his affairs remains confidential and is protected from unauthorised disclosure. See Article 26.2 of the OECD/UN Model Tax Convention, Article 8 of the Model TIEA, and Article 22 of the Multilateral Convention. See also the Global Forum/OECD Report *Keeping it Safe*

- **Convention on Mutual Administrative Assistance in Tax Matters**

The Convention on Mutual Administrative Assistance in Tax Matters is the most powerful instrument for international cooperation. It was developed jointly by the Council of Europe and the OECD and opened for signature by the member states of both organizations on 25 January 1988. The Convention aims at facilitating international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. The Convention provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims. The original Convention was amended in 2010 to align it to the international standard and to open it to all countries, responding to the call of the G20 to make it easier for all countries to secure the benefits of the new co-operative tax environment. The amended Convention entered into force on 1 June 2011 see [www.oecd.org/ctp/eoi/mutual](http://www.oecd.org/ctp/eoi/mutual) for more information.

- **Costs of information exchange**

Ordinary costs include the normal administrative and overhead expenses incurred by the requested Party in reviewing and responding to information requests, for example: costs for obtaining, copying and sending documents.

Extraordinary costs are meant to cover third party costs, for example with respect to: interviews, depositions, witnesses and testimony where the requesting Party has requested the information in a particular manner, engaging experts, interpreters or translators where such services are at the request of the requesting Party

- **Criminal tax matters**

Criminal tax matters are tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the requesting Party.

**D**

- **Delegation of powers of competent authority**

Given that designations of competent authorities in tax conventions, TIEAs and other international instruments can be at a fairly senior level within government, for practical and administrative purposes the powers and functions of the competent authority for EOI are typically delegated to officials who will carry out the day to day responsibilities of the function.

- **Domestic Tax Interest**

The international standard on exchange provides for information exchange on request, where the information is “foreseeably relevant” for the administration of the taxes of the requesting party, regardless of a domestic tax interest.

**E**

- **Exchange of information on request (specific exchange)**

Exchange of information on request occurs where one country’s competent authority asks for particular information from another competent authority. The information requested may relate to an examination, inquiry or investigation of a taxpayer’s tax liability for specified tax years. The international standard provides that the information requested must be foreseeably relevant to the administration and enforcement of domestic tax laws of the requesting party. The request should be made in writing but in urgent cases an oral request may be accepted, where permitted under the applicable laws and procedures. Requests should be as detailed as possible and contain all the relevant facts, so that the competent authority that receives the request is well aware of the needs of the requesting party and can deal with the request in an efficient manner. The OECD has developed guidance on what could be included in a request (see OECD guidance at <http://www.oecd.org/dataoecd/16/23/36647823.pdf>).

**F**

- **Foreseeably relevant information**

Information exchanged under Article 26 of the OECD/UN Model Tax Convention and TIEAs shall be foreseeably relevant to the administration and enforcement of domestic tax laws of the contracting states. Countries are not at liberty to engage in “fishing expeditions” (i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation) or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. In formulating their requests, the requesting state should demonstrate the foreseeable relevance of the requested information. The standard of “foreseeable relevance” was clarified in the 2012 Update of Article 26 of the OECD Model Tax Convention See Update to Article 26 of the OECD Model Tax Convention and its Commentary ([http://www.oecd.org/ctp/exchangeofinformation/120718\\_Article 26-ENG\\_no cover \(2\).pdf](http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf))

**G**

- **Global Forum on Transparency And Exchange of Information For Tax Purposes (GFTEOI)**

The GFTEOI, which currently has 118 members, is mandated to promote the universal, rapid and consistent implementation of the international standard on transparency and effective exchange of information through a process of in-depth monitoring and peer review. With this in mind the Global Forum has developed Terms of Reference which are used by its assessment teams as the standards and key elements against which jurisdictions’ legal and administrative frameworks and their actual implementation of the standards are assessed. The GFTEI’s Terms of Reference reflect the principles of transparency and effective exchange as reflected in the 2002 Model Agreement on Exchange of Information in Tax matters and its commentary and in Article 26 of the of the OECD Model Tax Convention on Income and Capital and its commentary as updated in 2004.

## I

- **Industry-wide exchange of information**

As international transactions have increased, so too has the need for tax treaty partners to seek assistance from each other by sharing knowledge and expertise on particular industries and special issues of mutual interest. An industry-wide exchange of information is the exchange of tax information specifically concerning a whole economic sector and not taxpayers in particular. The purpose of such an exchange is to secure comprehensive data on worldwide industry practices and operating patterns, enabling tax inspectors to conduct more knowledgeable and effective examinations of industry taxpayers. The OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes (<http://www.oecd.org/dataoecd/15/42/36648040.pdf>) provides essential technical and practical guidance for all officials engaged in any industry-wide exchanges of information.

- **Information exchanged**

Information means any fact, statement or record in any form whatever. Information exchanged can concern information available to the tax administration (tax return information), accounting information, bank information, and information regarding the ownership of companies, partnerships, trusts, foundations, “Anstalten” and other persons. The term “record” is not limited to information maintained in paper form but includes information maintained in electronic form.

- **Information gathering measures**

Information gathering measures are defined by the Model Agreement on Exchange of Information on Tax Matters as laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information. Each Contracting Party determines the form of such powers and the manner in which they are implemented under its internal law. Information gathering measures typically include requiring the presentation of records for examination, gaining direct access to records, making copies of such records and interviewing persons having knowledge, possession, control or custody of pertinent information.

- **International Standard on Transparency and Exchange of Information for tax purposes**

The internationally standard on transparency and exchange of information for tax purposes provides for full exchange of information on request in all tax matters without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged (see Global Forum). See also Global Forum on Transparency and Exchange of Information for Tax Purposes (GFTEOI).

## J

- **Joint audit**

A joint audit can be described as two or more countries joining together to form a single audit team to examine an issue(s) / transaction(s) of a company or individual with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organised in the participating countries, where the taxpayer jointly makes presentations and shares information with the countries, and the team includes Competent Authority representatives from each country who are involved to resolve potential differences/stalemates. If countries want to carry out a joint audit, it is necessary to determine the legal framework based on which they could co-operate. The basis for co-operation can be found in a network of bilateral and multilateral tax treaties in which mutual assistance is incorporated.

## L

- **Limitations to exchange of information**

The obligation to supply information is lifted in a limited number of situations. These exceptions are contained in paragraphs 3 through 5 of Article 26 of the OECD and UN Model Convention, in Article 7 of the Model TIEA and Article 21 of the Multilateral Convention. In the rare cases where the exceptions apply, the requested party is not obligated to provide information. The decision to provide or not to provide the information is then left to the discretion of the requested party. It follows that a competent authority may decide to provide the information even where there is no obligation to do so. If a competent authority does provide the information, it still acts within the framework of the agreement. For instance, where a request relates to information that may involve a trade secret, a competent authority may still provide such information if it feels that the laws and practices of the requesting State together with the confidentiality obligations imposed under Article 26.2 of the OECD/UN Model Conventions (or Article 8 of the Model TIEA). If the requested party decides to provide the information it should indicate that a trade or other secret is involved in order to allow the requesting party to take any additional or special measures as may be appropriate to ensure the strictest confidentiality.

## M

- **Model Agreement On Exchange Of Information for Tax Purposes Model TIEA**

The purpose of the Model Agreement on Exchange of Information on Tax Purposes is to promote international co-operation in tax matters through exchange of information. TIEAs differ from DTCs in that they are only concerned with exchange of information. The Model TIEA provides for exchange of information on request and tax examinations abroad principally for direct taxes but TIEAs may also cover other taxes such as VAT and provide for forms of exchange other than exchange on request.

## O

- **Ownership information**

Ownership information is information on the owners of companies and any bodies corporate. Owners include legal owners, and, in any case where a legal owner acts on behalf of any other person as a nominee or under a similar arrangement, that other person, as well as persons in an ownership chain.

## P

- **Public policy**

A requested State may decline to provide information if it is contrary to Public Policy/ordre public (see Article 26.3 of the OECD/UN Model Tax Conventions Article 7 of the Model TIEA and Article 21 of the Multilateral Convention. "Public policy" generally refers to the vital interests of a country, for instance where information requested relates to a state secret. A case of "public policy" may also arise, for example, where a tax investigation in another country was motivated by racial or political persecution.

## R

- **Reciprocity**

Reciprocity in relation to exchange of information means that a contracting party, when collecting information for the other contracting party, is obliged only to obtain and provide such information that the requesting party could itself obtain under its own laws in similar circumstances. This condition of reciprocity is present in the OECD Model Tax Convention (Art. 26) and in the Model Agreement on Exchange of Information on Tax Purposes (Art. 7). A requested party is not obliged to supply information that the requesting party itself could not obtain in the normal course of administration.

## S

- **Simultaneous tax examinations**

A simultaneous tax examination is an arrangement by two or more countries to examine simultaneously and independently, each on its territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest with a view to exchanging any relevant information which they so obtain. The existing differences in statutes of limitations of countries are a major practical consideration in the selection of cases. Such examinations are particularly useful in the area of transfer pricing and in identifying tax evasion schemes involving low tax jurisdictions. The OECD has designed a model agreement for the undertaking of simultaneous tax examinations.

- **Spontaneous exchange of information**

Information is exchanged spontaneously when one of the contracting parties, having obtained information in the course of administering its own tax laws which it believes will be of interest to one of its treaty partners for tax purposes passes on this information without the latter having asked for it. The effectiveness of this form of exchange of information largely depends on the ability of tax auditors to identify, in the course of an investigation, information that may be relevant for a foreign tax administration.

## T

- **Tax examination abroad**

Tax examination abroad procedure operates by enabling tax administrations, to the extent allowable by its domestic law, to permit authorised tax officials of another country to participate in the conduct of tax examinations carried out by the requested country. The participation of authorised foreign tax officials in a tax examination being carried out by the requested country may be passive or active. Some countries may only permit passive participation of foreign tax officials in a tax examination. In such instances, participation by foreign tax officials would be limited to observing relevant parts of the tax examination and only liaising directly with the tax officials of the requested country. Foreign tax officials would not be permitted to directly interview taxpayers or other individuals under this form of tax examination abroad. Other countries may permit active participation of authorised foreign tax officials. Under such circumstances, some countries may, for example,

allow foreign tax officials to conduct interviews and examine records pertaining to the taxpayers under examination. Tax examinations of this nature are useful in situations where the laws enable the taxpayer to keep records in another country and the taxpayer has agreed to have the tax official come to the foreign country rather than provide the books and records in the taxpayer's country.

- **Tax confidentiality / Tax secrecy**

*See Confidentiality*

- **Tax Information Exchange Agreements (TIEAS)**

*See Model Tax Information Agreement*

V

- **Visit of authorised representatives of the competent authorities**

Travel to a foreign jurisdiction for purposes of gathering information for a particular case may be useful in certain circumstances. However, this visit has to be authorised by the foreign jurisdiction (and be permitted by the laws of the sending country), otherwise it would represent a breach of sovereignty. Thus, the decisions on whether or not to authorise such visits, and if so, whether the presence of foreign tax officials should require the consent of the taxpayer (as well as any other terms and conditions for such visits) fall within the sole discretion of individual countries. The tax officials must be authorised representatives of the competent authorities. This presence abroad may occur in different instances. It may be at the request of the country seeking information if it is felt it will facilitate the understanding of the request and the gathering of information. It may be at the initiative of the requested competent authority to reduce the cost and burden of gathering information. In a number of countries, authorised representatives of the competent authorities of the other country may participate in a tax examination and this is often of great value to ascertain a clear picture of business and other relations a resident of a country may have with his foreign associates. See also Tax examinations abroad.



# ANNEX 6

## Relevant Websites

- Global Forum on Transparency and Exchange of Information  
[www.oecd.org/tax/transparency](http://www.oecd.org/tax/transparency)
- EOI Portal  
[www.eoi-portal](http://www.eoi-portal)
- Article 26 of the OECD Model Tax Convention in English and French  
Update To Article 26 of the OECD Model Tax Convention and its Commentary  
([http://www.oecd.org/ctp/exchangeofinformation/120718\\_Article 26-ENG\\_no cover \(2\).pdf](http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf))
- Article 26 of the UN Model Tax Convention  
[http://www.un.org/esa/ffd/tax/Article%2026\\_Exchange%20of%20Information%20\\_revised\\_.pdf](http://www.un.org/esa/ffd/tax/Article%2026_Exchange%20of%20Information%20_revised_.pdf)
- Model Tax Information Exchange Agreement (TIEA) (in English and French)  
<http://www.oecd.org/dataoecd/15/43/2082215.pdf>
- Multilateral Convention on Mutual Administrative Assistance in Tax Matters (in English and French Spanish and Portuguese)  
[www.oecd.org/ctp/eoi/mutual](http://www.oecd.org/ctp/eoi/mutual)
  - flyer on the Convention
  - process to be invited to sign the Convention
  - list of signatures and ratifications
- OECD Manual on exchange of information (in English French and Spanish)  
[www.oecd.org/ctp/eoi/manual](http://www.oecd.org/ctp/eoi/manual)
- The Manual follows a modular approach. It first discusses general and legal aspects of exchange of information (<http://www.oecd.org/dataoecd/16/23/36647823.pdf>) and then covers the following specific subject matters:
  - (1) Exchange of Information on Request (<http://www.oecd.org/dataoecd/15/45/36647905.pdf>)
  - (2) Spontaneous Information Exchange (<http://www.oecd.org/dataoecd/15/44/36647914.pdf>)
  - (3) Automatic (or Routine) Exchange of Information (<http://www.oecd.org/dataoecd/15/43/36648027.pdf>)
  - (4) Industry-wide Exchange of Information (<http://www.oecd.org/dataoecd/15/42/36648040.pdf>)
  - (5) Simultaneous Tax Examinations (<http://www.oecd.org/dataoecd/16/1/36648057.pdf>)
  - (6) Tax Examinations Abroad (<http://www.oecd.org/dataoecd/16/0/36648066.pdf>)
  - (7) Country Profiles Regarding Information Exchange (<http://www.oecd.org/dataoecd/15/63/36648093.pdf>)
  - (8) Information Exchange Instruments and Models (<http://www.oecd.org/dataoecd/15/61/36648135.pdf>)
  - (9) New 2010 Module on joint audits: the Forum on Tax Administration joint Audits Participants Guide (<http://www.oecd.org/dataoecd/16/39/47468438.pdf>)
- Publicly available information: Reference guide of relevant public websites for competent authorities  
<http://www.oecd.org/dataoecd/50/21/36010709.pdf>
- Regional Tax and Other Regional Organizations:
  - ATAF – [www.ataftax.net](http://www.ataftax.net)
  - ATAIC – [www.ataic8.com](http://www.ataic8.com)
  - CARICOM – [www.caricom.org](http://www.caricom.org)
  - CATA – [www.catatax.org](http://www.catatax.org)
  - CEMAC – [www.cemac.int](http://www.cemac.int)
  - CIAT – [www.ciat.org](http://www.ciat.org)
  - CREDAF – [www.credaf.org](http://www.credaf.org)
  - EAC – [www.eac.int](http://www.eac.int)
  - SAARC – [www.sarc.org](http://www.sarc.org)
  - SADC – [www.sadc.int](http://www.sadc.int)
  - UEMOA – [www.uemoa.int](http://www.uemoa.int)



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