

TAX JUSTICE BRIEFING

Tax Information Exchange Arrangements

1. Introduction: summary

1.1 In March 2009, many states that had been identified as tax havens or secrecy jurisdictions¹ suddenly began making more commitments to exchanging information for tax purposes. This paper seeks to summarise and explain the nature of existing arrangements and standards, and to assess whether they can effectively address the pervasive problems that secrecy jurisdictions pose to rich and developing countries.

1.2 Exchange of information between tax authorities of different states is based on international agreements, which may be bilateral or multilateral. Two main types of bilateral agreements are used². The first is *Double Taxation Agreements* (DTAs, also called income tax treaties). The second is *Tax Information Exchange Agreements* (TIEAs).

1.3 These prevalent bilateral models suffer drawbacks, however. First, they are bilateral, rather than multilateral instruments, and this means major sections of the world's population, especially those in developing countries, are effectively left out of the system. Second, these systems of exchanging information are typically "on request" – in short, you have to know what you are looking for before you request it –

and this is inferior to the alternative: automatic exchange of information. Third, even if there is an agreement to exchange information, the information may in any case not be available, or hard to collect – and this may be deliberate. The briefing paper also examines the systems of multilateral automatic information exchange that are already in place, and discusses prospects for moving forwards.

2. Double Taxation Agreements (DTAs)

2.1 These are comprehensive agreements between two states to prevent income or profits from international economic activity being taxed twice. A major reason why countries enter such agreements is to foster foreign investment.

2.2 Businesses and other actors can abuse these treaties through "treaty shopping" so that cross-border income is taxed lightly, or not at all. There are now over 2,000 such bilateral treaties between different states. The Organisation for Economic Cooperation and Development (OECD) plays an important role in shaping these treaties because it produces a [Model Convention](#) that is frequently updated and serves as a template for many bilateral treaties. However, this model remains contested in the developing world because, among other things, it favours rich nations by emphasising the rights of an investor's resident state (usually a rich nation) to levy the taxes. [A variant of this Model Convention](#) has been produced by the UN Committee of Tax Experts, however, which is more amenable to developing countries' interests because it prioritises the taxing rights of the state where the economic activity is actually undertaken³ – often a developing country.

¹ No common definition of the terms has been agreed. The Tax Justice Network uses the terms "tax haven" and "secrecy jurisdiction" interchangeably.
² There is a third type of bilateral agreements, the Treaty for Mutual Legal Assistance in Criminal Matters (MLATs). Some of those MLATs cover criminal tax matters, but other MLATs specifically exclude tax matters. However, a MLAT only allows criminal law enforcement authorities to make use of the treaties and information requests may be hampered by delays, not least because judicial authorization might still be needed (OECD 2001: Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, Paris, 65).

³ For more details about "Source" and "Residence" taxation, see [here](#) and [here](#) and Rixen, Thomas 2008:

2.3 The provision for exchange of information in the OECD Model Convention is Article 26. This Article has been considerably revised and extended in recent years; the [current version](#) was agreed in 2005. It now provides for exchange of information which is 'foreseeably relevant' for the 'administration or enforcement of ... taxes of every kind'. Another major improvement in 2005 was to override banking and trust secrecy: bank and trust secrecy may no longer serve as a reason for categorical refusal to exchange information (Art. 26 (5)). Earlier versions were much weaker, and were limited to the exchange of information necessary for the purposes of the treaty, which many states interpreted as meaning only to prevent double taxation, but not to prevent tax evasion and avoidance. Many existing DTAs still contain the older version of article 26.

2.4 The corresponding provision in the UN Model Convention was amended in 2008 and now adds further clarification. It specifies that information "shall be exchanged that would be **helpful** to a Contracting State in **preventing** avoidance or evasion of such taxes" and requires the parties to "**develop** appropriate methods and techniques" in order to fulfil information requests (Art. 26 (1), (6); emphasis added). The OECD could usefully introduce the same additional sentences for clarification purposes.

3. Tax Information Exchange Agreements

3.1 The second type of treaty is the [Tax Information Exchange Agreement \(TIEA\)](#). TIEAs are intended to complement DTAs or for use with countries for which a DTA is not deemed appropriate, mainly because they have no, or low, taxes on income or profits.

3.2 Today, most TIEAs are based on an OECD Model Agreement which was published in 2002 by the Global Forum on Taxation formed in 2001 as a result of the OECD's Harmful Tax Practices Project. This Forum includes many tax havens such as Bermuda, the Cayman Islands, Cyprus, the

Isle of Man, Malta, Mauritius, and the Netherlands Antilles⁴.

3.3 While TIEAs are much narrower in scope than DTAs, they are more detailed on the subject of information exchange. The OECD TIEAs specify, typically over 20-30 pages, rules and procedures for how such information exchange is to occur. They have several key flaws, described below. A second organisation has also produced a TIEA model, the [Inter-American Center of Tax Administrations \(CIAT\)](#). It shares some of the problems of the OECD TIEAs.)

4. First Problem: Bilateralism vs. Multilateralism

4.1 All these Models for DTAs and TIEAs, from the OECD, the UN and the CIAT, only provide a *template* for bilateral treaties – they have no force unless pairs of states conclude such agreements. The resulting bilateralism produces two related difficulties. **First**, this system has only led to a few links between many players; and **second**, developing countries have been all but left out of the system. In each case, a multilateral system would be far more comprehensive and effective.

4.2 Regarding the **first** difficulty, it is not a straightforward matter for the number of links between jurisdictions to be increased quickly. The early 2009 announcements by tax havens, substantially triggered by threats of sanctions or blacklisting, boiled down to commitments to:

(a) accept the OECD Art. 26 provisions in new DTAs, and renegotiate their existing treaties to include this new version (e.g. Switzerland, Luxembourg, Austria, Singapore committed to this), or:

(b) conclude a few new TIEAs, at least enough to satisfy the international community to stave off the threat of blacklisting (e.g. Jersey, Guernsey, and the Isle of Man committed to this).

4.3 For these commitments to become a reality two major steps are needed. First, countries that have not yet done so (such as Switzerland) must change their internal

The Political Economy of International Tax Governance, Basingstoke, 101-104.

⁴ Sheppard, Lee 2009: Don't Ask, Don't Tell, Part 4: Ineffectual Information Sharing, in: Tax Notes (23 March 2009), 1411-1418.

laws to allow them to **theoretically** exchange information for tax purposes⁵. Also, the current OECD DTA does not require the parties to develop mechanisms to **obtain** information (see Section 7 below). The changes to internal laws may be very significant and may depend on political approval which may, for example, require referendums. Second, the states must renegotiate their existing treaties, or negotiate new treaties, with all interested states. This can be time-consuming.

4.4 Furthermore, states may maintain or introduce other restrictions on the procedures for obtaining or supplying information. For example, some states consider that before any information is supplied, the person concerned must be notified of the request and be given an opportunity to object. This could give tax evaders opportunity to cover their tracks.

4.5 Assuming that domestic legal barriers are removed, the negotiation of these treaties would require many resources and much time, even for rich countries. There are between [50](#) and [72](#) secrecy jurisdictions in the world and far more than a hundred countries with which they could negotiate information exchange agreements. Yet by March 2009, [only 49 OECD TIEAs have been signed](#) between OECD countries and secrecy jurisdictions and [only 18 OECD TIEAs](#) have entered into force. Thus, in almost a decade, the thirty most powerful and technically sophisticated states in the world have only negotiated a handful of such agreements each. At least [four CIAT TIEAs](#) are in force.

4.6 Even this figure is inflated by a number of treaties which are unlikely to be used. For example, recently the UK Crown Dependencies (Isle of Man, Jersey, Guernsey) have each concluded TIEAs with Greenland and the Faroe Islands (both "Crown Dependencies" of Denmark), territories with a combined population of little over 100,000 people⁶. It seems likely that these treaties will hardly

be used, and are merely being concluded to bulk up the number of TIEAs signed in order to fend off OECD blacklisting.

4.7 **Second**, TIEAs do not work well for developing countries. It is very unlikely that even medium-sized developing countries like Chile, India or South Africa – let alone economic minnows like Tanzania or Malawi - would have sufficient leverage to strike a good deal with, for instance, Switzerland, on similar terms to those struck between Switzerland and the US or Germany. Worse, if these powerful countries pursue bilateral TIEAs with tax havens, developing countries will not benefit at all and their collective negotiating position *vis-à-vis* the tax havens will be weakened. (This model has not yet been requested). Furthermore, this model leaves it to the contracting parties to specify what criteria must be met in order to exchange information upon request. This may significantly lower the bar for information exchange by redefining what a 'fishing expedition' is.

Box 1: OECD's false multilateralism

The OECD's [Model TIEA](#), entitled "Agreement on Exchange of Information on Tax Matters", in fact presents two models: a multilateral version and a bilateral version, which largely share the same text. However, the multilateral instrument is not a "multilateral" agreement in the traditional sense. Instead, it provides the basis for an integrated bundle of bilateral treaties: "A party to the multilateral Agreement would only be bound by the Agreement vis-à-vis the specific parties with which it agrees to be bound." (p. 2). So each treaty partner would continue to negotiate individually with every other single treaty partner about whether or not to exchange information. Furthermore, this Model TIEA currently does not include automatic information exchange.

NB: This "multilateral instrument" bears no resemblance to the multilateral Council of Europe/OECD Convention of 1988, referred to below.

⁵ Implementation in domestic law could be facilitated by legislation such as that approved in 2008 in the Cayman Islands, authorising information exchange with any country with which agreement is reached.

⁶ CIA World Factbook.

<https://www.cia.gov/library/publications/the-world-factbook/>; 1.4.2009.

5. Second problem: No automatic information exchange

5.1 Both of the bilateral treaty provisions, the DTAs but especially the OECD TIEAs, require only the provision of information exchange 'upon request'. The DTA permits, but does not require, automatic exchange of information, and for this to be established a supplementary agreement is needed. The TIEA includes strict conditions about the form of such requests. These are designed to prevent so-called 'fishing expeditions' for information. So a request does not mean a brief email containing the name and identifying information of the individual or company concerned. Instead, a detailed case must be made, with the criteria set out in a lengthy legal document. In effect, this means that the authorities requesting the information must already have a strong case even before they request the information. So it is not possible to follow up a suspicion without already having significant evidence. This sets the bar very high indeed for tax authorities wanting to make a request.

5.2 The legal technicalities provide ample opportunities to hinder and block requests for information – and these are amply exploited by well-resourced law and accountancy firms that proliferate in secrecy jurisdictions. They can also use their good connections with local officials, since there are generally few incentives for secrecy jurisdictions to stick properly to their obligations under TIEAs. The evidence so far is that TIEAs have produced little more than a trickle of information. For instance, the TIEA between the US and Jersey – two of the biggest players in the offshore system - [was used only four times in 2008](#).

5.3 [The TIEA developed by CIAT](#) is more advanced in this respect. It provides in its Article 4 not only for information exchange upon request (Art. 4 (5)), but also for the possibility of automatic information exchange (Art. 4 (3)) and spontaneous information exchange (Art. 4. (4) – that is, information that is foreseeably relevant to the other party but has not specifically been requested). Furthermore, this model leaves it to the contracting parties to specify what criteria must be met in order to exchange information upon request.

This may significantly lower the bar for information exchange by redefining what a 'fishing expedition' is.

Box 2: Expert Opinion

Lee A. Sheppard, a leading expert writing in the specialist tax publication *Tax Notes*⁷: "The standard OECD information exchange agreement is nearly worthless. Information exchange under the standard agreement is sporadic, difficult, and unwieldy for tax administrators even under the best of circumstances. When a banking haven is the requested party, information exchange is nearly impossible. The information exchange article in the OECD model tax convention suffers from the same limitations."

6. Third problem: there may be no information to exchange, or problems collecting it

6.1 Finally, the procedure entirely depends on the availability of the relevant information, which in turn depends on the legal requirements and administrative measures laid down in the secrecy jurisdiction. Quite often, the information simply does not exist in the jurisdiction concerned, and this may be deliberate.

6.2 The legal text of both the OECD and the UN Model DTAs rules out any obligation "to carry out administrative measures at variance with the laws and administrative practice" of that state or "to supply information which is not obtainable under the laws or in the normal course of the administration" of that state (Art. 26 (3)). The OECD Model TIEA does go further and requires the state to be able to obtain 'information held by' banks and others, although it does not specify what information banks must hold. It also requires information to be obtainable regarding ownership of entities such as companies and trusts⁸.

⁷ Sheppard, Lee 2009: Don't Ask, Don't Tell, Part 4: Ineffectual Information Sharing, in: *Tax Notes* (23 March 2009), 1411-1418.

⁸ The CIAT Model TIEA is not entirely clear in this respect, it requires the requested state "to take all measures, allowed by its legislation, including compulsory measures, to provide the applicant state with the information requested" (Art. 4 (2) and (5)).

To clarify: Article 26 is only about exchange of information; it does not create an obligation to obtain information, only to use the existing powers that national tax authorities already have for their own tax purposes. By contrast, TIEAs do have a (limited) obligation to be able to access e.g. bank information.

6.3 This explains a seeming paradox that Switzerland announced both that it would accept "OECD standards" (Switzerland has about 70 double tax agreements that follow the OECD Model, and no TIEAs so far), but that its banking secrecy would not be affected. The logic goes like this: Switzerland agrees to exchange information on request – but since Switzerland does not have the power to obtain the information, it will not make a difference. A similar problem arises in countries that dispense with any registration requirements for trusts, such as Jersey or, indeed, Switzerland. In these cases it is an open question if and how TIEAs (e.g. with Jersey, Guernsey, Isle of Man) can be used to effectively obtain and exchange information on trusts.

7. The solution: multilateral automatic information exchange

7.1 There is a solution that can overcome these problems outlined above: automatic information exchange of information, on a multilateral basis. This would cover all states, not just those with the political muscle to negotiate bilateral agreements⁹.

7.2 Precedents for automatic multilateral information exchange exist. The best known is the [European Union's Savings Directive](#) (STD), which has since 2005 put in place a working system for multilateral, automatic information exchange. The Directive has many flaws (see below), but in an improved form it could be used to inspire or serve as a template for a global standard. With the EU STD, tax haven

⁹ In fact, such a convention was put forward when the very first proposals were made by the League of Nations in 1928, which produced draft treaties both to prevent double taxation and for administrative assistance in assessment and collection of taxes. The latter were largely ignored, except for the heavily watered-down provision for information exchange, which became Article 26 of the Model treaty.

governments and courts no longer have a choice over how to interpret the treaties; instead, the format of the information, its collection and its transmission are automated, with no room for discretion.

7.3 A [TJN briefing paper](#) sets out the EU STD and its current limitations. Essentially, it only covers interest from bank accounts paid to individuals (natural persons), so it can easily be avoided by using a company or trust to control the account. It also allows some participating jurisdictions - currently Austria, Belgium, Luxembourg and a number of non-EU jurisdictions like Jersey, to let taxpayers opt out of information exchange and instead submit to withholding taxes, thus preserving secrecy. Proposals were put forward in November 2008 to revise and improve the Directive to cover artificial legal persons and a wider range of assets, and these hold promise for improvement. In February 2009, the European Commission [proposed another two Directives](#) that primarily aim at improving administrative cooperation in tax matters among European tax administrations, [including automatic information exchange](#).

7.4 However, a **second precedent** exists in the form of a [comprehensive multilateral Convention drawn up](#) in 1988 by the Council of Europe and the OECD. Its title, "The Convention on Mutual (Administrative) Assistance in Tax Matters" indicates that the Convention is broader than merely exchange of information; it is a deeper and more comprehensive arrangement than the EU STD and consequently could make a better, stronger template, at least from a technical point of view.

7.5 It emerged following concern at the explosion of tax avoidance and evasion in the 1970s and 1980s, and unlike the EU STD it covers all information needed for both assessing and collecting all taxes from all taxpayers, both companies and individuals. This treaty allows¹⁰ information to be provided automatically, as well as on request, and spontaneously (that is, where specific information is provided to

¹⁰ Spencer, David 1991: Mutual Assistance Convention Has its Limitations, in: Journal of International Taxation (January / February 1991).

another tax authority even if the information has not been requested). It is also a comprehensive multilateral agreement, unlike the EU's STD which is a directive, not a multilateral treaty.

7.6 Unfortunately, even the OECD states have been slow to join: it is in force for only 14 states, and the UK joined only in 2008, while Germany has signed but not yet applied it. While this approach has the advantage of representing a stronger and deeper form of information exchange, the fact that it is very comprehensive may also make it harder for some jurisdictions to sign up.

7.7 Obviously, arrangements for multilateral automatic exchange of information should not be limited to the rich Council of Europe and OECD countries, but must be extended to poor and rich countries alike. The OECD has established [technical arrangements](#), and these have begun to be used between the OECD member states, although no reports have yet been made available on how effective the system is. Lack of current capacity in developing countries should not be used as a reason to lock developing countries out of participating in the system (see Box 3). Instead, these states should if necessary be empowered with technical assistance to enable them to participate as fully as possible.

Box 3: OECD's rejection of automatic exchange

On [various occasions](#), [the OECD has argued](#) against automatic information exchange with developing countries, saying it would be hard for them to manage large flows of information. An example the OECD used was stockpiles of hard-copy files sent by tax administrations in the past. This appears to be a bogus argument. The OECD itself developed electronic information transmission standards for automatic information exchange [as early as 1992](#). The latest version of OECD's electronic transmission format - available since 2005 - is called [STF \(Standard Transmission Format\)](#), now widely used, and is based on ordinary XML-web language. Even a simple Excel-sheet would suffice to transmit the necessary information. It is hard to see how this should overburden a tax administration, let alone prevent a developing country to quickly develop the appropriate skills. As we have seen after 9/11, developing countries all over the world were able to swiftly and ably implement an instant information exchange system with regard to border passport controls. Nowadays, customs police at airports all over the world can access foreign police records within seconds after scanning the passport.

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