

The Power of Exchange of Information Agreements for Law Enforcement Authorities

OVERVIEW

Exchange of information (EOI) is the cross-border sharing of information for tax purposes between tax administrations to detect and prevent tax evasion, to ensure the correct application of a jurisdiction's domestic tax legislation and double taxation conventions and to foster domestic tax compliance. Unlike mutual legal assistance procedures, EOI is administrative in nature. However, EOI remains of critical importance for criminal law enforcement authorities as it allows for the exchange of any information that is, "foreseeably relevant" for the enforcement of domestic tax laws in the jurisdiction that receives the information. This means that EOI can be used to enforce both civil and criminal tax laws, which includes income tax (personal or company); indirect taxes (e.g. VAT or GST); or wealth tax (e.g. to identify financial assets or immovable property). EOI can therefore be a powerful tool in the fight against organised criminal tax schemes, including cross-border missing trader and carousel frauds which cost jurisdictions billions annually. Despite this, EOI instruments are for the most part used to support civil tax assessments and many jurisdictions report no or little use in criminal cases. To help ensure EOI instruments are used to their full potential, the OECD has developed this flyer to raise awareness among tax and law enforcement authorities of the power of EOI instruments in combatting cross-border illicit financial flows.

CONTEXT

Countries around the globe are facing a common threat posed by increasingly complex and innovative forms of financial crime. Tax evasion, fraud, corruption, money laundering, terrorist financing and other financial crimes threaten the strategic, political, and economic interests of all countries and undermine public trust in government and the financial system. In a world, where criminals can move quickly between national borders, it is imperative that law enforcement authorities work together to level the playing field by establishing efficient and effective mechanisms for cross-border co-operation.

International co-operation on cases involving tax and other financial crimes can take a number of forms including exchange of information and information sharing, service of documents, obtaining evidence, facilitating the taking of testimony from witnesses, transferring persons for questioning, executing freezing and seizing orders, and joint investigations. However, for such co-operation to take place, there must be an underlying legal agreement that sets out the terms and procedural requirements. When it comes to international co-operation on tax crimes, many law enforcement authorities default to use of bilateral or multilateral Mutual Legal Assistance (MLA) treaties – overlooking the availability and power of tax exchange of information (EOI) instruments. While it is of course up to each jurisdiction to determine what instrument to use for sending/requesting information in each case, it is well known that traditional MLA procedures can be cumbersome, time-consuming, and slow. This is particularly problematic when investigating criminals who are able to move vast sums of money across borders in real-time. This flyer seeks to provide authorities mandated to combat tax crimes and other financial crimes with an introduction on when and how EOI might be used as an alternative to, or in combination with, MLA procedures.

For more information:



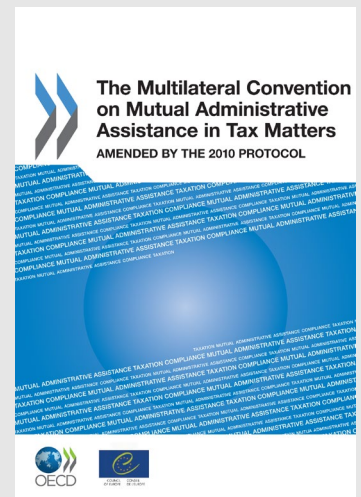
OECD.TaxandCrime@oecd.org



<https://www.oecd.org/tax/crime/>

WHAT ARE THE LEGAL BASES FOR EXCHANGE OF INFORMATION?

For EOI to take place, there must be an underlying legal agreement setting out the terms and procedural requirements. Here a special mention must be made of the Convention on Mutual Administrative Assistance in Tax Matters (“the MAAC”) – which is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance. To date, over 140 jurisdictions participate in the Convention including all G20 countries, all BRIICS, all OECD countries, major financial centres, and an increasing number of developing countries. In addition to the MAAC, jurisdictions can also conduct EOI pursuant to bilateral tax treaties and tax exchange of information agreements they have in place with other jurisdictions. While it is up to individual states to determine the terms/scope of their bilateral tax treaties, these will generally include provisions that facilitate some types of EOI.



WHO CAN EXCHANGE INFORMATION?

Taxpayer information is highly sensitive, and therefore any sharing must comply with the confidentiality requirements of both international and domestic legal provisions. Sharing can only take place between “competent authorities” of the requesting and supplying jurisdictions, which in general is a function held by the tax administration or the Ministry of Finance. However, subject to certain conditions explained below, this information can be shared with other domestic authorities responsible for the enforcement of tax crimes and other financial crimes.

HOW IS INFORMATION EXCHANGED?

EOI can take a number of forms, but those most relevant for authorities combatting tax crime are:

- Exchange of Information on Request (EOIR): This takes place where the competent authority of a jurisdiction asks for specific information on a particular case from another jurisdiction;
- Spontaneous exchange of information (SEOI): This enables the provision of information that is foreseeably relevant to a foreign competent authority and that has not been previously requested. SEOI takes place when a jurisdiction discovers information that is of interest for tax purposes to another jurisdiction (either the jurisdiction of the income source or the jurisdiction of residence);
- Automatic Exchange of information (AEOI): This refers to the regular (e.g. annual) automatic exchanges between tax authorities of pre-defined information (e.g. on the legal and beneficial owners of financial accounts, and the assets held, and income received, on such accounts).

WHAT INFORMATION CAN BE EXCHANGED?

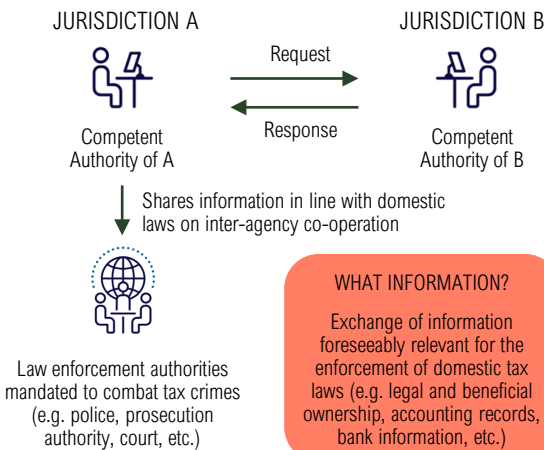
As outlined above, EOI provides for the exchange of any information that is “foreseeably relevant” to the enforcement of any tax crime. The standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent – whilst ensuring that parties to EOI agreements do not engage in “fishing expeditions” The scope of information that can be requested and/or shared is very broad, giving jurisdictions extensive powers to obtain information on individuals and their assets located abroad, which may be linked to tax evasion and other tax crimes. This includes:

- **Information on the identity and legal and beneficial ownership on all forms of domestic or foreign legal entities** (e.g. companies, partnerships, foundations) and arrangements (e.g. trusts, *Anstalten*, *fideicomisos*, *fiducies*).
- **Accounting information including accounting records, financial accounting statements, underlying supporting documentation** (e.g. invoices, vouchers, contracts, receipts), deeds, asset documents and correspondence, company management related documentation (e.g. minutes of board meetings, resolutions, distributions).
- **Banking information** including information on the account, information regarding the identity, legal structure and beneficial owner of the account holder, any information on transactions or parties to financial transactions and financial information.
- **Information on assets held by individuals, directly or indirectly**, such as immovable property or financial assets.

While the scope of EOI is broad, not all countries may be interested in engaging in all permissible forms of co-operation. Therefore, the MAAC and bilateral EOI agreements provide the flexibility to limit the scope or lodge reservations in certain areas which may be withdrawn at a later stage if the jurisdiction so desires.

USE OF EOI AGREEMENTS TO COMBAT TAX CRIMES IN PRACTICE

Exchange of information on request to combat tax crimes



In many jurisdictions, the tax administration is not the authority mandated to combat tax crimes and other financial crimes (e.g. in many jurisdictions, it is the police or prosecution authority who investigates, prosecutes, and/or recovers the proceeds of financial crimes). To that end, tax administrations around the globe have varying arrangements in place to enable them to share taxpayer information with domestic law enforcement authorities for the purposes of combatting tax and other financial crimes. This can range from tax administrations being able to provide information to domestic law enforcement authorities spontaneously or on request, or in some jurisdictions, law enforcement authorities being granted access to the tax administrations' database.

Similarly, EOI agreements contain secrecy provisions that mandate when and how tax administrations can share information received via EOI instruments with other domestic financial crime authorities to combat tax crimes and other (non-tax) related serious financial crimes.

ABILITY OF TAX ADMINISTRATION TO SHARE EOI DATA WITH DOMESTIC LAW ENFORCEMENT AUTHORITIES TO COMBAT TAX CRIME

In general, provided a tax administration can share information with its domestic law enforcement authorities for the purposes of combatting tax crimes under its domestic law, it may share information obtained from a foreign tax authority pursuant to an EOI agreement in the same manner. The provisions on confidentiality of information exchanged are found in Article 26(2) of the OECD Model Tax Convention, Article 8 of the Model TIEA, and Article 22 of the MAAC, and provide, more specifically, that the exchanged information should be protected in the same manner as information obtained by tax administrations under their domestic laws. The provisions further provide that information may be shared with persons or authorities concerned with the enforcement of tax laws, including law enforcement authorities, courts, administrative, or supervisory bodies that are concerned with the investigation, prosecution, and recovery of assets linked to tax crimes. Notwithstanding these provisions, information may also be disclosed in public court proceedings or in judicial decisions relating to such taxes.

ABILITY OF TAX ADMINISTRATION TO SHARE EOI DATA TO COMBAT OTHER (NON-TAX) RELATED SERIOUS CRIMES

As a notable exception to the rule that exchanged information must be only used for tax purposes, it can be used to fight other serious crimes, including money laundering terrorism financing, bribery, corruption. For example, the 2012 update to Article 26(2) of the OECD Model Tax Convention and Article 22(4) of the MAAC provide for use of EOI data for such "non-tax" purposes if it is allowed under the laws of both States and the competent authority of the supplying jurisdiction authorises such use. In practice, this means that where the domestic laws of both jurisdictions allow for information sharing between the tax administration and law enforcement authorities for non-tax purposes, information exchanged through EOI agreements may be shared in the same manner. Importantly, this is conditional on the competent authority of the supplying jurisdiction providing prior explicit authorisation for the wider use of the information in a particular case.

KEY TAKEAWAYS

- EOI instruments facilitate the exchange of broad-ranging types of taxpayer information that can be critical to combatting illicit financial flows.
- EOI instruments have proven to be an efficient and effective form of international co-operation that can be used in addition to mutual legal assistance in cases involving cross-border tax crimes.
- Tax authorities and other law enforcement authorities mandated to combat tax crimes and other serious financial crimes (e.g. money laundering and bribery) are strongly encouraged to explore the extent to which their jurisdiction can utilise relevant EOI instruments in cross-border cases.
- Generally speaking, tax authorities can share information obtained through EOI instruments with domestic law enforcement authorities for the enforcement of *tax crimes* to the same extent that they are able to share that type of information under their domestic laws. Use of EOI data for *non-tax crime* purposes (such as combatting other serious crimes), requires the explicit prior consent of the supplying jurisdiction.



NON-EXHAUSTIVE LIST OF RESOURCES

To aid law enforcement authorities in making full use of EOI instruments, the OECD has prepared the below (non-exhaustive) list of resources that provide comprehensive information on when and how EOI can be used in cases involving tax and other financial crimes.

Relevant information on international standards on tax transparency and exchange of information

- Global Forum Model Manual on Exchange of Information for Tax Purposes, <https://www.oecd.org/tax/transparency/documents/model-manual-on-exchange-of-information-for-tax-purposes.htm>
- Global Forum on Transparency and Exchange of Information for Tax Purposes, www.oecd.org/tax/transparency
- Key guidance, toolkits, and documentation of the Global Forum, www.oecd.org/tax/transparency/documents/key-publications-and-documents.htm
- OECD's e-learning in taxation, www.oecd.org/tax/global/self-paced-training.htm

Legal text and commentaries on the MAAC

- OECD and Council of Europe (2011), The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, OECD Publishing, <https://dx.doi.org/10.1787/9789264115606-en>
- The text of the Amended Convention in English, French, German (unofficial translation), Spanish (unofficial translation) and Portuguese (unofficial translation), <https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>
- The Revised Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters as Amended by 2010 Protocol, https://www.oecd.org/ctp/exchange-of-tax-information/Explanatory_Report_ENG_%2015_04_2010.pdf

General information on the MAAC

- Convention on Mutual Administrative Assistance in Tax Matters: <https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>
- Chart of participating jurisdictions (signatures and entry into force): https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf
- List of declarations, reservations and other communications: Multilateral Competent Authority Agreements for automatic exchange of information, <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyid=127>
- Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (the "CRS MCAA"), for the automatic exchange of financial account information pursuant to the Common Reporting Standard: <https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/>

Combatting tax crimes and other financial crimes through whole of government approaches

- Key guidance, toolkits, and documentation of the OECD Task Force on Tax Crimes and Other Crimes, <https://www.oecd.org/tax/crime/publications-and-reports-on-tax-crime.htm>
 - Improving Co-operation between Tax Authorities and Anti-Corruption Authorities in Combating Tax Crime and Corruption, <https://www.oecd.org/tax/crime/improving-co-operation-between-tax-authorities-and-anti-corruption-authorities-in-combating-tax-crime-and-corruption.htm>
 - Fighting Tax Crime – The Ten Global Principles, Second Edition, <https://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles-second-edition-006a6512-en.htm>
 - Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes <https://www.oecd.org/tax/crime/effective-inter-agency-co-operation-in-fighting-tax-crimes-and-other-financial-crimes.htm>
-