Canons of EOI

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Exchange of Information (EOI) has been an integral part of the double taxation framework for decades and there has been notable progress on the same frontier on part of the Standard Setters in the past decade of so, right from the G20's endorsement for Automatic Information Exchange in April 2013. As of the time of going into the press there are some major frameworks all through the world engaged in the exchange of Information in taxation matters

- The Bilateral treaty network as modified by the MLI with article 26 modelled under the OECD/UN frameworks being the sought-after provision for EOI
- The Tax Information Exchange Agreements (TIEA's) Modelled after the Model Agreement On Exchange Of Information In Tax Matters (Model TIEA)
- The multilateral Convention on Mutual Administrative Assistance in Tax Matters
- Competent Authority Agreements
- Country by Country Reporting Requirements
- EU Directives
- The FATCA and Inter Governmental Agreements (IGA's)

Furthermore, there have been executed a number of Competent Authority Agreements. Pertinently both multilateral and bilateral agreements on both the Country by Country (CbC) and the Common Reporting Standards (CRS) have been instrumental in the adoption of the Automatic Exchange of Information (AEOI) standard by multiple jurisdictions.

Interestingly, as your author has in a previous session pointed out that there is a significant difference between information gathering and foreign revenue claims (https://aiftponline.org/journal/2020/july-2020/has-the-revenue-rule-established-in-govt-of-india-v-taylor-outlived-its-utility/), thus the question of application of the revenue rule in matters of information gathering doesn't hold ground(*Jimenez v. HMRC* http://www.bailii.org/ew/cases/EWCA/Civ/2019/51.html).

In addition, the OECD's initiative on Improving Access to Bank Information for Tax Purposes went hand-in-hand with the process of improving information with Tax Authorities. Others Notable movements in this sphere have been the development of the FATCA and DAC2(https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32011L0016) and the corresponding CRS for information exchange under FATCA and DAC2 of the European Union. Although it is to be noted that the UN and OECD Model Conventions are just that, Models, and not the actual treaties on which administration can be based, courts in multiple jurisdictions have used the same for interpretation of law regarding the same, and they provide a valuable framework.

Needless to say, the impetus on greater exchange of information is also part of a wider objective of tackling organised crime and terrorism.

According to the OECD "*On 19 April 2013, the G20 Finance Ministers endorsed automatic exchange as the expected new standard. On 19 June 2013, the G8 Leaders welcomed the OECD Secretary General report "A step change in tax transparency" which set out the concrete steps that needed to be undertaken to put a global model of automatic exchange in practice. On 6 September 2013, the G20 Leaders committed to automatic exchange of information as the new global standard and fully supported the OECD work, with G20 countries, aimed at presenting such a single standard in 2014.*" (https://www.oecd.org/tax/automaticexchange.htm)

However, despite the fact that almost a decade has gone by with the first instance of such initiatives, there remains much tangible to be seen as a result of such efforts. One of the standing impediments in such a result is the lack of availability of such data as can be construed meaningful to such initiatives. Furthermore, there are also legal complications as to different jurisdictions interpreting the use of data which might not have been legally obtained, and let's face the music, no sane person would willingly divulge any information to any tax authority. For example, in Switzerland in the ***Swiss Falciani Case (2C_1000/2015-2017)*** it was held by the courts that requests for information to be shared on the basis of a what could be construed as a crime as per Swiss Laws was to be denied. However, in the case of the stolen paradise papers the Australian High Courts opined that since legal professional privilege was not an actionable legal right, if privileged communications had been disclosed, taxpayers cannot take privilege as a ground to deny information to tax authorities (***Glencore International AG vs Commissioner of Taxation of the Commonwealth of Australia & Ors***). The Austrian Supreme Court had already on a number of occasions confirmed that stolen data even in violation of existing law can be used for the purpose of taxation.

Almost all information exchange protocols envisage in some form or the other the determination of what could be foreseeably relevant for the purpose of exchange of information, so much so as that in this entire domain this concept deserves its own mention.

The standard of what could be foreseeably relevant for the purpose of this article has been the subject of numerous judicial debates. The commentary on the model OECD Framework Article 26 at Para 5 states:

"*The standard of **"foreseeably relevance"** is intended to provide for exchange of information in tax matters to the widest possible extent and at the same time, to clarify that Contracting States are not at a liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.*" Jurisdictions in accordance with their own private international law and interpretations have attempted to define the domain of "foreseeably relevant"

Some interesting judicial pronouncements on what could be considered "foreseeably relevant"

Swiss Transfer Pricing Case (2C_411/2016): This is an interesting case since the Swiss Federal Supreme Court used the good faith and mutual trust in article 26 of the Vienna Convention on the Law of Treaties, so that the requested state can assume that the standard is met where the requesting state has fully supported their request, and the requested state can assume the presumption of compliance.

Hanse vs United States (17-cv-4573): The courts upheld that the IRS was not required to look beyond the compliance and conformity with the laws and administrative practice of the French Tax Administration, while acceding to the request of the French Authorities of information regarding a French national Hanse. ***AXY and others vs Comptroller of Income Tax (20 ITLR 723):*** This is possibly the gold standard ruling as far as the interpretation of the standard of foreseeably relevant is concerned. The Singapore Authorities had to consider the validity of an information request under the Singapore- South Korea Treaty, and had the occasion to confirm key principles to be applied while assessing the standard of foreseeably relevant. It opined that the comptroller is afforded a wide choice in dealing with requests from foreign tax jurisdictions. There is no obligation to embark on an independent investigation of the foreign tax authorities' allegations. However, if he deems fit he may enquire further from the relevant foreign tax authority. The validity of the request shou ld be considered within the time period of it being made, however, the subject person of the request should be afforded a judicial review of the same. ***Chatfield & Co vs Commissioner of Inland Revenue (20 ITLR 437):*** The High court of New Zealand held the judicial review of information requests were in fact superior to administrative matters and that such information requests were indeed subject to judicial review.

The author in his own way attempts to bring out the current context in this domain.

Article 26 of the Model Treaty Conventions :

Both the OECD (https://dx.doi.org/10.1787/9789264088016-6-en) and the UN Model convention (https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf) 's Article 26 which are more or less similar (Para 1.2 of the UN Model Commentary). However, the UN model code which generally favours developing and source nations over developed nations articulates in a major departure from the OECD convention in Para 1.3 wherein it states that "*Although Article 26 imposes reciprocal obligations on the Contracting States, it does not allow a developed country to refuse to provide information to a developing country on the ground that the developing country does not have an administrative capacity comparable to the developed country. Reciprocity has to be measured by reference to the overall effects of a treaty, not with respect to the effects of a single article."* India on its part has reserved the right to include documents or certified copies of the documents within the scope of this article. Mexico and Thailand reserved the rights to not include the restrictions on Article 1 and 2 of the Model Convention. As regards Hong Kong SAR and China in view of domestic law requirements, both will only exchange information post implementation of the relevant bilateral or multilateral instrument.

On the front as provided in the OECD Commentary to the Model Convention at para 9 there are three mannerisms of information exchange, automatic, on request, and spontaneously. However, at the same time the OECD Commentary on para 9.1 notes that there might be allowed other means of exchange.

A very important consideration in the application of Article 26 is the issue of foreseeably relevant. For the uninitiated the first paragraph of Article 26 is reproduced:

"*The competent authorities of the Contracting states shall exchange such information as is **foreseeably relevant** for carrying out the provisions under this convention*"

Also, article 26(3) of the Model Convention imposes limitations on the information being sought.

For concurrent practitioners there might seem to be a parallel to the feedback mechanism of the CBDT regarding roving and fishing enquiries during original proceedings u/s 143 of the Income Tax Act 1961.

Another important consideration is to banking secrecy laws. Several bilateral treaties omit article 26(5) of the Model Conventions pertaining to treaty limitations as to banking secrecy and client/attorney secrecy. For example, Canada, in most of its older treaties has such provisions lacking. Taiwan, for its recently concluded tax treaties, 32 in number, has 20 of them without secrecy clauses including banking secrecy and client attorney secrecy, whilst 12 of them incorporate the same. (*Source: IFA Cahiers*). Many of the older treaties which do not incorporate such a position by the relevant jurisdictions might nonetheless depending on the willingness of the jurisdiction concerned with regards to interpretation adhere to the international EOIR standard even if it might entail a violation of domestic law, when interpreted literally.

Pertinently it is to be recalled that this again is an administrative convention and, in most canons of taxation, and common law jurisdictions there are some or the other private international law considerations to be kept in mind. The reader would be well informed in such cases of the **German Treaty Override Case (** https://www.internationaltaxreview.com/article/b1f7ndtqn75w3b/germany-treaty-override-declared-constitutional **)** wherein the German Constitutional Court ruled that tax treaties or conventions would not be superior to local law. Also, interesting to note would be the English case of **Black vs R.**

The Tax Information Exchange Agreements (TIEA's) Modelled after the Model Agreement On Exchange Of Information In Tax Matters (Model TIEA):

While not creating a binding framework on the parties engaged, it sets out two models for bilateral and multilateral agreements between the contracting parties, with the aim of putting forward what could be construed as creation of an effective communication standard. Modelled around the Model TIEA (OECD Model Agreement on Exchange of Information in Tax Matters), this framework owes its origins to the momentous report on Harmful Tax Practices and Competition of the OECD in 1998. A number of jurisdictions have signed the TIEA with notable exceptions being Brazil, Chile, Colombia, Israel, Italy, Mauritius, Nigeria, Poland Peru, etc Interestingly while this is the second preferred mechanism it was the first to be born, predating the Article 26 of the Model Conventions. Article 1 of the Model TIEA uses almost similar nomenclature as Article 26 of the OECD/UN Model Convention

*"provide assistance through exchange of information that is **foreseeably relevant** to the administration and enforcement of the domestic laws of the contracting parties concerning taxes covered by this agreement."*

The primary reason that such agreements were signed was to create a framework of EOI between non-cooperative jurisdictions, wherein some jurisdictions do not deem it necessary to sign comprehensive bilateral tax treaties, but it remains desirous to actually have an information sharing relationship. It is to be borne in mind that TIEA's are only information sharing agreements and do not construe or form the basis for any impost relationships between jurisdictions.

It is estimated that there are about 1600 TIEA's in place currently, with most of them coming into existence in the period from 2009-2013 and the list is being added to as of currency. India on its part signed a new TIEA with Samoa in March 2020.

As a general measure, the taxes covered under the agreements encompass estate taxes, income and capital taxes, dividend taxes, inheritance or gift taxes.

It would be pertinent at this juncture to refer to the case of ***Volaw Trust & Corporate Services Ltd and another vs Office of the Comptroller of Taxes [2013] JCA 239, 17 ITLR 1]*** wherein the Court of Appeal in Jersey held that if the basis of taxation applied in a foreign country (Norway) then TIEA provisions for exchange of information would apply since they are just that, exchange of information. Any foreign authority (Jersey), although was at a liberty to ask for explanations it was under no compulsion to do so, and since it did not involve the contentious tax of making comments on a foreign jurisdiction's taxation system, there was no anomaly if the request was in consonance with Norweigan laws.

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MCAA):

This convention was approved by the OECD and the Council of Europe in 1988 and further amended by protocol in 2010. As of going into press this forms the most comprehensive framework as regards to EOI. The standard for foreseeable relevance discussed supra above applies here too, however, interesting departure is that under article 4 of the MCAA it applies for the administration or enforcement of domestic laws of the receiving country, thereby making it more or less compliant with the *Hanse* case supra. The information to be exchanged can relate to any individual or corporate entity, and can relate additionally to 1) Simultaneous tax assessments or tax assessments abroad in the requesting jurisdiction 2) Assistance in recovery of taxes due 3) Service of documents. It is pertinent to note that as at the time of going to press more 130+ jurisdictions are signatories under this convention.

The scope of the MCAA is very wide in ambit and discussed under article 2 of the MCAA, and at least in theory it covers a wide variety of taxes and other governmental contributions not limited to social security considerations, but with a specific exclusion as to cross border customs.

Notably too, Article 27(1) of the MCAA expressedly limit the scope of non-cooperation by agreeing jurisdictions. The article for the sake of brevity is being reproduced below *"The possibilities of assistance provided by this convention do not limit, not are they limited by, those contained in existing or future international agreements, or other arrangements, between the parties concerned or other instruments which related to co-operation in tax matters."* ***So the million dollar question in case of non-availability of information in taxation matters could***

be, "is the application made under the rightful convention?". One possible purpose of such an article could be to prevent more restrictive EOI provision in other – present of future, instruments to prevail. On the other hand, less restrictive instruments providing for closer or more specific cooperation between certain treaty states may be be used instead of the provisions of the MCAA.

Having said that again canonical private law interpretations could have different ramifications for information requested, depending on the type of law the jurisdiction follows either common law or codified or a combination.

Competent Authority Agreements (CAA):

Most of these agreements either multilateral or bilateral are of the nature of conventions between duly appointed competent authorities and are administrative mechanisms by their very nature, and undoubtedly subject to judicial scrutiny in many jurisdictions. The base for these CAA are generally found in the MAP of Article 25 of the OECD / UN Model Conventions, 13(1) of the TIEA or the articles 24(2) & 24(5) of the MCAA.

Bilateral CAA have their base under MAP of Article 25 of the OECD / UN Model Conventions, 13(1) of the TIEA, and are undoubtedly more restrictive in nature as opposed to MCAA. While there has been a rise in bilateral information exchange measures there is an acknowledged receipt of information to about 70 jurisdictions, there is a tendency to note a shift towards multilateral CAA as there is an increasing trend towards preference for the MCAA. According to an OECD report (https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf) there were about 70 countries engaged in bilateral sharing of information. India being an active participant under bilateral information sharing measures. Article 1 of the model TIEA as amended in 2015 provides that competent authorities may in addition to TIEA measures agree on additional measures to implement procedures for Automatic Exchange of Information and Specific Exchange of Information. Interestingly the United States which has declined to be a part of the MCAA and CbC reporting measures, has entered into bilateral tax treaty measures. What it has done is that it has used its domestic CbC reporting measures and incorporated the same into treaties.

Multilateral CAA have their base under Article 6 of the MCAA and have much more scope of operations than the bilateral CAA made under Article 25 of the OECD/UN Model Conventions. The formal basis of operation is that under Article 6 the competent authorities formalise the procedures and legal formalities to be adopted for in order to implement 1) The Common Reporting Standard (CRS) MCAA for fiscal information to be exchanged (https://read.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition_9789264267992-en#page12) 2) The CbCR MCAA for the automatic exchange of Country-by-Country reports, mainly done by MNC groups for jurisdictional information.

CRS : The CRS was introduced in July 2014 in response to the G20 commitment for the same on 6th September 2013. The model Competent Authority Agreement Standard endorsed by the G20 served as the groundwork for setting up the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Information (CRS MCAA) (https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-c

rs/multilateral-competent-authority-agreement.pdf). With a total of 110 signatories as at the last update on 10th December 2020 (https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/crs-mcaa-signatories.pdf) This agreement serves to implement the CRS which is defined in the instrument as " The standard for automatic exchange of financial account information in tax matters (which include the commentaries) developed by the OECD and the G20 Countries." The information is exchanged on an annual basis on the filtration of reportable persons in each jurisdiction. Information exchanged as per para 2.2 of the agreement which for the sake of brevity includes personal details of the account holders, including the tax identification numbers, competent persons, details of the reporting institution, account balances and any interest if paid.

Essentially despite being a multilateral convention by its constitution, information is exchanged in a bilateral manner. Details of the process in theory are enumerated in the competent authority agreement as outlined above. In Practice however, there are some considerations. For example, the quantity of information sought is far greater than the quantity of information being provided by any jurisdiction. Information on the same can be had from the OECD's Depository of "Activated Exchange Relationships for CRS Exchange" which has been updated as of December 2020 and under which "there are over 4400 bilateral exchange relationships activated with respect to more than 100 jurisdictions committed to the CRS, with next exchanges between these jurisdictions set to take place at the end of September 2021." (https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/). For instance, Japan which gets information from 98 jurisdictions provides information to only 69 Jurisdictions. Same goes for Spain which receives information from 100 jurisdictions but gives information to only 72 Jurisdictions (*Source: Falcao & Lara Yaffar, IFA Cahiers*). It is to be noted that barring the United States of America all major taxing jurisdictions are signatories to the MCAA CRS.

CbC : The CbC (Country by Country) framework , although under the MCAA was essentially a BEPS action 13 area which was implemented via the MCAA. The key identifiers used under the CbC included location of economic activity, the allocation of income and the taxes paid by the MNC. A natural corollary that follows from that is that it could actually help in the administration and assessment of Transfer pricing mechanisms and apportionment. The report on the same can be accessed at " OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241480-en).

Under the CbC a three-level approach was suggested (Section C of the Transfer pricing documentation)

I. The MNC has to prepare a "master" file which is available in all jurisdictions in which it has presence and in which the MNC provides all information regarding its global business operations and transfer pricing policies in general.

II. The MNC has to prepare a "local" file which is available in each jurisdiction concerned for the particular tax administration and would contain all relevant transfer pricing documentation

III. Large MNC's are required to prepare a country-by-country report containing certain information relating to global allocation of the MNC's income and taxes paid together with certain indicators of economic activity within the MNE group.

For the same purpose a model legislation has been created under the same report in section IV at page 41, essentially stating the obligations of the "ultimate parent entity" of an MNC to file a country-by-country report annually and its obligations to report economic activities in particular jurisdictions.

It is pertinent to note that in case as a result of information shared on the CbC report there is proposed some adjustment in the profits of an MNC in a particular jurisdiction owing to further enquiries on the information by the relevant tax administration, then it is proposed that the competent authorities of the jurisdictions would resolve issue of adjustments via MAP.

The above apart there are some significant conventions at the country level by the EU and the United States.

<u>EU :</u>

Directive 2011/06(DAC) concerns with exchange of information under the directive of administrative cooperation in the field of direct taxation both on request and automatically. It is important to note that the DAC has significant similarity with the MCAA which has already been adopted by EU members regarding EOI.

This directive has over the years undergone significant changes by way of amending protocols which are summarised below (*Source: Falcao & Lara Yaffar, IFA Cahiers*)

DAC 2	Under this directive member states automatically exchange financial account information, as well as dividends, interests, gross proceeds, and other investment income paid to that account during a year.
DAC 3	Exchange of information on advance pricing arrangements and advance cross border rulings
DAC 4	Automatic exchange of CbC information reports
DAC 6	Automatic exchange of cross border tax planning arrangements.
Anti Tax Avoidance Directive	Schemes related to the BPES project relating to the deductibility of interest on loans, CFC requirements, and hybrid transactions and entities.

Tax dispute resolution mechanisms in the EU Directive	Related to dispute resolution in tax in accordance with BEPS action plan 14

FATCA and IGA’s

The Obama Administration in the year 2010 enacted the Foreign Account Tax Compliance Act (initially passed as a part of the HIRE Act) in response to concerns that United States citizens were hiding their incomes overseas in offshore bank accounts or funds, directly or via trusts or similar arrangements. As was settled in the landmark Cook vs Tait (265 U.S. 47 (1924)) the United States citizenship was deemed to be a matter of privilege and not a matter of rights. In order to implement the Act the administration started imposing a 30% withholding tax on all outgoing United States source remittances to foreign financial institutions. According to the IRS “FFIs that enter into an agreement with the IRS to report on their account holders may be required to withhold 30% on certain payments to foreign payees if such payees do not comply with FATCA” (https://www.irs.gov/businesses/corporations/information-for-foreign-financial-institutions).

While the primary motive behind enactment of FATCA appears to be the tracing of assets and not income of United States citizens, it has been arguably the most successful implementation of and Exchange of Information mechanism all around the world, despite the fact that the United States does not participate in the MCAA CRS. One of the underlying reasons could be the fact of inconsistency of approach of basis of taxation under the MCAA and FATCA, while the United States taxes income based on citizenship the MCAA CRS used residency as the basis of taxation. It is also to be borne in mind that information flow under FATCA is unidirectional towards the United States.

Through its increased reporting, the Act seeks to improve on the tax compliance of specified persons on their financial Accounts. The reporting tresholds are set at individual client accounts with an aggregated annual value above $50000 and entities having an aggregated annual value above $250000. However, there are additional reporting requirements above aggregated annual value of above $1 million.

To circumvent this anomaly of unidirectional EOI the United States government has entered into Inter Governmental Agreements (IGA) under Model 1 to reciprocate some financial data with its EOI partners.

Inherently there are two models of Inter Governmental Agreement’s that are in place. The Model 1 requires Foreign Financial Institutions (FFI’s) to report information on account holders to tax authorities in their own jurisdiction and then this information is subsequently exchanged with the IRS under EOI mechanisms.

Under Model 2 IGA FFI’s are required to report financial information directly to the IRS. In case there is an accountholder who withholds information to an FFI, then in that case the IRS would be provided information by the local tax authorities. Within the Model 2 there are two types of IGA’s 1) type 2A where there are no TIEA in place and 2) type 2B where there is an existing treaty.

The constitutional validity of FATCA IGA was questioned in Canada the case of ***Deegan G L et al vs The Queen 2019 FC 960*** which upheld the validity of search and seizure operations under the US Canada IGA, and held it not to be arbitrary or contrary to the Canadian Charter of Rights and Freedoms. In another case ***Republicans from Abroad vs the Israeli Government (High Court of Justice of Israel Petition no 8886/15)*** the court held that the FATCA IGA provisions did violate privacy but that invasion was for appropriate purposes, proportional and reasonable. Interestingly the court held that refraining from implementation of FATCA provisions could be detrimental to the image and economy of Israel.

A vast majority of countries have implemented in one form or another, measures related to the EOI via either MCAA, FATCA, EU Directives or Treaty measures. The MCAA on the face of it appears to have the most comprehensive impact on the tax information sharing network. And while the FATCA IGA's have had their share of success it is to be noted that the basis of determination of foreseeably relevant is different in the two. While its residency in the case of the MCAA its citizenship in the case of FATCA. International pressure to comply with such measures seems to be very high on agenda on the comity of nations, and with the advent of measures such as blockchain and artificial intelligence the sharing of information will have to be spruced up in order to combat the evils of Evasion and Crime.