

Overview of tax information exchange in the British Virgin Islands

The system of tax information exchange in the BVI is largely modelled on international principles developed by the Organisation for Economic Co-operation and Development (the **OECD**). The competent authority responsible for dealing with tax information exchange in the BVI is the International Tax Authority (the **ITA**).

Types of tax information exchange regimes

There are two types of tax information exchange:

- 'automatic' exchange of information, AEOI for short, most popularly known as the US-focussed Foreign Account Tax Compliance Act (**FATCA**), the OECD's more global Common Reporting Standard (**CRS**) and the Country-by-Country reporting (**CbCR**) framework; and
- substantive 'on request' exchange of information (**EOI**) regimes contained in bilateral tax information exchange agreements (**TIEAs**), double taxation treaties/conventions (**DTCs**) and the OECD's multilateral Convention on the Mutual Administrative Assistance in Tax Matters (the **Multilateral Convention**).

The automatic exchange (AEOI) regime

As mentioned earlier, the best known examples of automatic exchange globally are FATCA, CRS and CbCR.

Under FATCA, BVI financial institutions must collect and report annually, and automatically, certain limited forms of tax and financial data on the accounts they hold for US persons (typically US citizens and permanent residents). In the BVI the information collected is reported to the ITA which then onward reports to the US Internal Revenue Service (**IRS**).

Whereas FATCA deals with reporting on US persons and is based on the citizenship test CRS mandates a similar form of reporting albeit on a global pool of taxpayers and based on the residency test. CRS reporting relates to those financial institutions and tax-payers based in the

participating CRS jurisdictions. As at the date of this article, 109 countries and territories do or will participate in CRS reporting in either 2017 or 2018. Reporting occurs in respect of the preceding tax year. In line with the UK and majority EU position, all UK Overseas Territories and Crown Dependencies, including the BVI, became early adopters of CRS. This means that the 2016 tax year was the first one to be reported on (by mid-2017). In contrast 'late adopter' jurisdictions such as Hong Kong and Switzerland have deferred CRS reporting for a year, meaning that the 2017 tax year will be the first one reported on in 2018.

The BVI in 2018 approved changes to the Mutual Legal Assistance (Tax Matters) Act 2003 (**MLAT**) requiring certain multinational enterprises (**MNE**) to file CbCR with the ITA as a part of the BVI's implementation of the OECD's Base Erosion and Profit Shifting (**BEPS**) framework. Taken together, FATCA, CRS and the CbCR changes demonstrate the BVI's continued commitment to international best practice on exchange of information with participating tax authorities, adding to reporting and notification obligations under the BVI's implementation of FATCA, CRS and beneficial ownership registers. MNE groups are caught by the CbCR requirements if they have annual consolidated group revenue in the preceding financial year of €750 million or more and a BVI entity in the group. BVI entities should now consider whether they are part of an MNE group and address their reporting, registration and notification obligations.

Determining whether a BVI company or other person is subject to an obligation to report under FATCA, CRS or CbCR can be a complex task and is beyond the scope of the present article. In addition, it should be noted that there are strict anti-avoidance provisions associated with AEOI regimes and it is generally expected that parties comply with the spirit of the legislation without seeking to circumvent requirements. We recommend that professional legal advice be obtained on these issues at the outset and prior to the set-up of new businesses or

structures based in FATCA/CRS/CbCR reporting jurisdictions such as the BVI.

On-request exchange of information (EOI)

Whereas the AEOI regime requires financial institutions to exchange fairly formulaic and anodyne data about the accounts of foreign taxpayers on their books, in contrast the 'on-request' regime deals with specific and potentially in-depth investigations into the affairs of named and designated tax payers with offshore or international holdings. Such investigations typically, though not exclusively, occur following data-leaks involving international financial centres or in situations where there is some ongoing criminal tax investigation taking place in the onshore jurisdiction

There are presently two arrangements for this sort of EOI:

- requests made between countries and jurisdictions that are party to bilateral TIEAs or DTCs; and
- requests made between countries and jurisdictions under the framework of the Multilateral Convention.

EOI under TIEAs and DTCs

As at the date of this article the BVI is party to twenty-eight TIEAs with various third countries and territoriesⁱ. It is also party to one DTC with Switzerland. Despite the fact that the BVI is not a sovereign nation the UK has delegated significant authority to the local government to negotiate and conclude treaties internationally. In practice, the BVI government has taken up this challenge fastidiously and has been an OECD 'white list' jurisdiction since August 2009. The BVI is currently on a 'grey' list since the coming into force of the Economic Substance (Companies and Limited Partnerships) Act 2018 and the reason for this is that the position with respect to collective investment vehicles (**CIV**) are being considered at the level of the OECD. The BVI does have a robust regime for supervising, monitoring and regulating CIVs and the BVI is hopeful to be off of the 'grey' list and back to the 'white' list shortly.

Domestically, all TIEAs and any new DTCs are brought into force through subsidiary legislation issued under the MLAT. The MLAT is the framework legislation in the BVI that governs the tax EOI generally.

Under this system, and subject to various safe-guards, a foreign country which is a party to a TIEA with the BVI may request documents and information relevant to the tax affairs of domestic tax-payers from the BVI competent authorities. Following receipt the BVI authorities, ie the ITA, would channel acceptable requests through to private persons subject to BVI jurisdiction in the form of notices issued under the MLAT. In practice individuals and companies based in the BVI are likely to be within the territorial scope of this regime as the ITA is likely to have a reasonable belief that such person(s) is in possession or control of the information to which the notices relate. The information requested is information that is held by a bank

or other financial institution or any person acting in an agency or fiduciary capacity, including a nominee or trustee or any other person or entity or information regarding the beneficial ownership of a company, partnership or other person or entity.

EOI under the Multilateral Convention

The Multilateral Convention was developed jointly by the OECD and the Council of Europe as a way of streamlining the need for countries to agree on EOI through costly and time-intensive bilateral treaty negotiations which culminate in either a TIEA or DTC. There are currently 130 jurisdictions participating in the Multilateral Convention, including 15 jurisdictions covered by territorial extension, of which the BVI is oneⁱⁱ.

The Multilateral Convention was extended to the BVI by the UK government and applies as of 1 March 2014 and was ratified into local law by the Mutual Legal Assistance (Tax Matters) (No. 3) Order 2014 (as subsidiary legislation to the MLAT). Similarly to TIEAs, the Multilateral Convention is implemented through subsidiary legislation issued under the MLAT. As such EOI under the Multilateral Convention operates domestically within the in BVI in a very similar way to the TIEA requests and notices procedure outlined above. The Multilateral Convention can be seen as a multi-party TIEA and to the extent a country or territory has signed onto it or in some cases the Multilateral Convention has been extended to a country or territory such country or territory does not need to put in place a separate bi-lateral TIEA. Once the countries or territories are signatory states, the local competent authorities, in the BVI's case, the ITA, can act on requests made by requesting states, under the Multilateral Convention.

Legislative and judicial safe-guards

Even though the BVI is a participating jurisdiction in the Multilateral Convention and numerous TIEAs the BVI competent authorities must nevertheless abide by rules of law applicable to it under constitutional arrangements and court-based jurisprudence (from cases in both the BVI and elsewhere in the UK's common law orbit). These rules principally relate to the private individual's rights under local law as well as under safe-guards contained in various tax EOI regimes.

In light of recent judicial pronouncements in the BVI and elsewhere, it is reasonably clear that directors, trustees and other similar fiduciaries of BVI companies may have a potential duty to guard against fishing requests and other possible abuses of process under tax EOI regimeⁱⁱⁱ.

Similarly under these principles, when issuing notices which demand that private persons disclose confidential information to the authorities, the ITA must ensure that rules of procedural fairness and due process are followed. In very high level terms such ITA notices should generally contain enough basic and contextual information to enable the recipient to determine the basis on which the originating (overseas) request may have been made. It is also acknowledged that the private person has a right to determine whether the notice and request have been

validly made and are in compliance with the applicable EOI framework - in other words, to be in a position to understand whether the request is a fishing exercise.

The basic and contextual details referred to above may, for example, include the name of the requesting state, the nature of the underlying investigation, the identity of the tax payer involved, the tax period under review and details of the applicable foreign law.

Penalties

Failure to comply with an EOI obligation in the BVI may constitute a criminal offence punishable (on indictment) to a fine not exceeding US\$100,000 or to imprisonment for a term not exceeding five years, or both.

Reflections

Anyone receiving a notice to produce information under one of the EOI regimes in the BVI will need to delicately balance various competing interests. On the one hand, they should carefully consider whether they are subject to a duty of confidentiality in respect of the information subject to disclosure and, if so, whether the request is a mere fishing exercise.

On the other hand, there is a legal duty to comply with valid notices and, additionally, the BVI regime contains strict anti-tipping off obligations on the recipients of notices (these obligations are similar to those seen in anti-money

laundering regimes and mean that recipients are prohibited from discussing the matter with any third party except for legal counsel). If there is a real need for the notice to be shown to a third party in situations where such third parties may have the information or documents to which the notice relates or is able to assist with obtaining the information or documents then an application should be made to the ITA requesting the prior written approval for the notice to be shown or disclosed to the third party.

One thing is for certain, prudence here dictates that anyone in receipt of a request or notice under an EOI regime should immediately contact their professional legal advisors.

At Harneys we have a dedicated team of regulatory lawyers and specialists working on various matters relating to the exchange of tax information who can advise clients on their obligations whether it be in relation to matters pertaining to "on request" exchange of information or "automatic" exchange of information. Please do feel free to contact us. Our team of regulatory lawyers can be found [here](#).



For more information and key contacts please visit [harneys.com](https://www.harneys.com)

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- ⁱ Aruba, Australia, Canada, People's Republic of China, Curacao, Czech Republic, Denmark, Faroe Islands, Finland, France, Germany, Greenland, Guernsey, Iceland, India, Ireland, Isle of Man, Japan, Netherlands, New Zealand, Norway, Poland, Portugal, Saint Maarten, South Korea, Sweden, United Kingdom and the United States of America. Find out more about TIEAs [here](#).
 - ⁱⁱ The identity and status of implementation of countries participating in the Multilateral Convention is available [here](#).
 - ⁱⁱⁱ *Quiver Inc. v International Tax Authority and Friar Tuck v. International Tax Authority* Claims No. BVIHC201510339 and 340, for a summary of this case which Harneys litigated please see [here](#).

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