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# Fears for TIEAs: Mutual exchange agreements want to rule the offshore world

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The OECD website lists 518 Tax Information Exchange Agreements (TIEAs) entered into between 2000 and 2012. They are hugely important in the offshore world, engaging onshore concerns about lost tax revenues and offshore expectations of privacy and sovereignty. This article considers how courts have approached TIEA requests in three offshore jurisdictions.

## Jersey

In Stephan v Comptroller of Taxes [2021] JRC075, the application before the Court was an application by the Comptroller (Jersey's 'Competent Authority') to set aside leave to proceed with judicial review proceedings brought by Mr Stephan.

Mr Stephan was the subject of a request issued by the Dutch Tax Authority. Mr Stephen sought to have the Comptroller's decision to issue production notices in response to the request judicially reviewed. He asserted four separate grounds:

1. The Comptroller failed to consider that acceding to the request would render nugatory existing proceedings in the Netherlands brought by Mr Stephan which would have made the TIEA request itself unlawful as a matter of Dutch law if he was successful.

2. The notices were drafted too widely and the information provided by the Comptroller did not sufficiently demonstrate a link between the information sought and the Dutch tax investigation.

3. The TIEA request (and notices) specified information falling outside the temporal scope of the Jersey/Netherlands TIEA, which was limited to matters arising after 1 March 2008.

4. The transmission of the information was a contravention of Mr Stephan's privacy rights under the European Convention on Human Rights.

The Court rejected the Comptroller's application to set aside leave.

1. The Comptroller argued that although she might be given sufficient material by the requesting Authority to substantiate the request, there was no obligation to provide it to the recipient or subject of the Notice – and because Mr Stephan could not identify any vitiating error without seeing the Comptroller's reasons,

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leave should be set aside.

2. The Court found that argument 'circular'. It acknowledged that detailed reasons may not have to be provided with a notice. However, in a challenge to the validity of a notice, the Comptroller needed to put sufficient material before the Court to explain her reasoning.
   In relation to grounds 1 and 4, the Comptroller argued that she was not required to take into account the effect of complying with a request on proceedings in another jurisdiction.

3. The Court commented, '*it is not the job of the [Comptroller] to carry out a mini trial in order to establish the position of the requesting authority under its own law.*' However, the Comptroller still had to satisfy herself that the power to issue the notice would be validly exercised.

   If the Comptroller was put on notice of some particular difficulty in the requesting State then there is arguably a different duty on the Comptroller:*'because it might be the case that it is unreasonable for a Competent Authority in Jersey to respond to a request which was unlawful under the laws of the country governing the competent authority making it.'*

4. In relation to the challenge to the temporal scope of the Notice, the Court found that the lack of information provided by the Comptroller prevented it from assessing Mr Stephan's challenge at this stage.

It is important to note that the Court was not required to make conclusive findings on Mr Stephan's objections. The low threshold was whether or not those objections were merely arguable. That said, the decision still provides instructive authority in respect of issues which arise time and again in connection with TIEAs: how much information the Competent Authority should provide to the subject, and the extent to which the Competent Authority needs to consider the law of the requesting jurisdiction.

## BVI

The BVI Courts have also considered what information must be disclosed by the Competent Authority (the ITA) to the recipient of a production order. Quiver Inc and Friar Tuck v ITA, concerned a challenge to production notices which did not:

a. Provide details of the content of the requests from the foreign authority;

b. Specify the foreign State;

c. Identify the taxpayer who was the subject of the request;

d. Specify the tax years under investigation;

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e. Specify the tax purposes for which the information was sought; or

f. Explain the reason the information requested was relevant to the enforcement of the relevant tax laws.

The ITA refused to provide this information, relying upon the confidentiality obligations under the relevant TIEA.

Justice Ellis held that the ITA had to provide some procedural fairness, even though local law did not give the recipient an opportunity to make representations ahead of the issue of a notice, nor was there a right of review.

The ITA's obligations of procedural fairness were balanced with its aim to maintain confidentiality. The ITA would not be required to produce the request itself, but it should consider what information the recipient would need to determine whether the ITA's statutory power to issue the notice was validly exercised.

In this case the details provided were insufficient and the ITA was obliged to provide the source of the request, the tax period, and a summary of the nature of the investigation.

Since Friar Tuck, anecdotally the practice of the ITA has been adapted to take into account the High Court's findings. Whilst it is not uncommon for notices to lack background information, the ITA will generally provide information broadly along the lines ordered in Friar Tuck, if requested.

## Guernsey

In Guernsey, the leading case remains the Court of Appeal decision in A, a Taxpayer v Director of Income Tax. This case concerned an appeal from a decision refusing leave for the taxpayer (not the recipient of the notice) to seek judicial review of the Guernsey Competent Authority's decision to issue a production notice.
At first instance, the judge refused leave on the basis that:

a. The Respondent’s decision to issue the notice was not justiciable because it would involve consideration of an international agreement; and

b. The Appellant had an alternative remedy available to him in the Requesting Country.

The Court of Appeal upheld the appeal and granted the tax payer permission to proceed with judicial review.

The Court drew a distinction between the international obligations creating the TIEA and the Guernsey laws which gave the Director his powers:

*'To acquiesce in the Respondent’s approach would be to accept that the Royal Court either has no jurisdiction to consider, or should not consider, the rights of those affected by insular legislation concerning a TIEA. We think that cannot be right.'*

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The Court also rejected the argument that the taxpayer had an 'alternative remedy' of contesting these issues in the foreign jurisdiction in underlying tax proceedings. Perhaps the taxpayer could challenge the TIEA request in the requesting country, but in the Guernsey proceedings they were instead challenging the Director's exercise of his powers under Guernsey law.

In assessing the lawfulness of the Director's actions, the Court emphasised the importance of the TIEA as a relevant factor, and in particular the limiting effect that will have on the Director's role in determining whether or not a request has been made in accordance with it. Significantly, the Court found:

*'Any enquiry in Guernsey into whether in fact the request is foreseeably relevant to the requesting country's tax administration or enforcement of tax collection is likely to be of limited compass ...* ***While it is true that the Director must be satisfied that the request is in accordance with the TIEA, he is unlikely in our judgment to be required to make an exhaustive investigation of foreign law so to be satisfied. He is entitled to proceed on the assumption that the requesting state is acting lawfully, at least until material is put before him that this might not be the case****, at which time he should make such enquiries as would be reasonable to satisfy himself that the request is a proper one to which effect should be given.'*

In relation to the information the Director should provide, the Court made clear that information should be provided to the taxpayer and recognised the general importance of information in enabling those effected by the issue of a notice to effectively exercise their rights. However, the Court expressed doubt as to whether or not the taxpayer was entitled to see the request itself.

## Conclusion

The OECD's TIEA system provides an opportunity to compare the approaches of Courts across jurisdictions to very similar issues under local laws implementing nearly identical international treaties.

It is comforting to see that, amongst the offshore world, there is broad consistency in the approaches, from which general principles can be drawn.

First, the Competent Authority needs to engage in some kind of process to determine whether the foreign TIEA request is valid, and there is likely to be a right of review where this reasoning process is scrutinised by local courts against local law.

Second, to exercise this right of review effectively it is necessary for the person affected to have some information about the foreign request; the Competent Authority cannot hide behind secrecy obligations in the TIEA.

However, the extent of these principles is limited. The Competent Authority will not be expected to investigate and make determinations on issues of foreign law, particularly where they are not raised. Neither will the local

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authority be obliged to provide the TIEA request itself. Whilst some information must be provided, confidentiality is important.

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