

TAX ADMINISTRATIONS, FINANCIAL INTELLIGENCE UNITS, LAW ENFORCEMENT AGENCIES: HOW TO WORK TOGETHER?

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Abstract

The level of cooperation between tax administrations and other domestic law enforcement agencies is critical in addressing illicit financial flows (IFFs). Recent international strategies addressing financial crimes and illicit flows have primarily focused on achieving greater synergies in information exchange. However, traditional concerns about taxpayer confidentiality and society's best interests have impeded cooperation in many jurisdictions, whereas others have found innovative solutions to resolve this conflict. Although there are several limitations on the scope of domestic inter-agency cooperation, opportunities do exist for countries to improve existing cooperation models by means of task forces, fusion centres and by applying international best practice. For African countries to meet the recommendations for inter-agency cooperation, as set out in the Report of the High-Level Panel on Illicit Financial Flows from Africa, this requires that appropriate legal gateways are in place, that strategies and objectives to combat IFFs are aligned and that appropriate co-ordination mechanisms are identified and implemented.

1 Introduction

A key challenge posed to African countries by the recommendations of the Report of the High-Level Panel on Illicit Financial Flows from Africa is that African states should 'strengthen the independent institutions and agencies of government responsible for preventing IFFs' and 'create methods and mechanisms for information sharing and co-ordination among the various institutions and agencies of government responsible for preventing IFFs'.¹ The main role players identified in the Report are tax and customs agencies; financial intelligence units; anti-fraud agencies; anti-corruption agencies; and financial crime agencies. Considering the complexities, mandates and objectives of different spheres of government, the question is how these different agencies should work together.

¹ UNECA *Illicit financial flows: Report of the High-Level Panel on Illicit Financial Flows from Africa* (2014) 81-82.

The relationship between different spheres of government is characterised by layers of inter-dependencies as it is not possible to have a complete separation of policy responsibilities and outcomes amongst different levels of government.² Producing deliverables and achieving government objectives requires co-ordination between government agencies. Charbit and Michalun define this as a complex relationship because at the same time it is vertical (across different levels of government), horizontal (among the same level of government) and networked, as the lines of communication and co-ordination for an agreed policy objective may traverse as it involves a multitude of actors and stakeholders in the public and private sectors.³

In addressing the above problem, Charbit and Michalun identify five dominant challenges to multi-level governance. These are described as information gaps; capacity gaps; fiscal gaps; as well as administrative and policy gaps. The *information gap* refers to 'information asymmetries between levels of government when designing, implementing and delivering public policy'.⁴ The *capacity gap* refers to a lack of human resources, knowledge and skills and supporting infrastructural resources. The *fiscal gap* represents 'the difference between sub-national revenues and the required expenditures for sub-national authorities to meet their responsibilities'.⁵ An *administrative gap* refers to a disjoint when administrative boundaries do not correspond to functional economic areas at sub-national levels, whilst a *policy gap* arises when strictly vertical approaches to cross-sectoral policy are taken by ministries.⁶ It can be argued that an administrative and policy gap arises when there is no nexus between the heads of administrations and policy setters (that is, a horizontal approach is taken without considering the vertical relationships).

The level of cooperation between tax administrations and other domestic law enforcement agencies is critical in countering financial crimes. Recent international strategies to address financial crimes and illicit flows primarily have focused on achieving greater synergies in information exchange. However, traditional concerns on taxpayer confidentiality and society's best interests have impeded cooperation in many jurisdictions, whereas others have found innovative solutions to resolve this conflict. The current state of affairs in domestic cooperation reveals that, whilst there are several limitations on the scope of cooperation, opportunities do exist in the form of existing cooperation

2 C Charbit & M Michalun 'Mind the gaps: Managing mutual dependence in relations among levels of government' OECD Working Papers on Public Governance 14 (2009) 8.

3 As above.

4 As above.

5 As above.

6 As above.

models, the use of task forces and fusion centres and in applying international best practice.

Tax administrations have a key role to play in addressing serious crime, and this role often is expressed in specific terms in country legislation.⁷ This obligation of sharing taxpayer information with other departments, however, should be measured against the potential impact on the integrity of the tax system. The Financial Action Task Force (FATF) points out that in most countries there are regulatory restrictions in place that govern the collection and use of information (whether from the public or from other government agencies).⁸ Such restrictions can limit an agency's ability to share information with other government agencies and countries. It is, therefore, necessary to find a balance between data protection rights and in government departments to share information and may lead to a situation where no sharing whatsoever will take place.

Moore points out that revenue administrations are highly networked and dependent on active cooperation from a variety of stakeholders that may include ministries of finance; commerce and trade; justice; as well as functionaries responsible for registering property; new businesses; motor vehicles; public utilities; and public procurement agencies.⁹ In addition to these stakeholders, there are the police; the judiciary; public prosecutors; security agencies; tax administrations of other countries' financial services industries; business associations; and professional associations of accountants and auditors.¹⁰

The ability of government institutions to share relevant information is often a key indicator of the effectiveness of a department to pro-actively identify risks pertinent to its mandate. The failure to relate its core functions and mandate to that of similar departments will not allow for a common line of sight desperately needed in countering financial crime.

In 2011 the first International Forum on Tax and Crimes was held in Oslo, Norway, with the aim of finding more effective ways of using a 'whole-of-government' approach in countering financial crimes. In response, the Organisation for Economic Co-operation and Development (OECD)¹¹ produced an in-depth analysis of inter-agency cooperation in fighting financial crimes in 32 countries wherein four different models of cooperation are mapped.¹² These are discussed in the next section.

7 Eg, in South Africa through sec 3 of the Financial Intelligence Centre Act (FICA) that singles out the tax authority next to law enforcement agencies.

8 FATF 'Best practices paper: Sharing among domestic competent authorities information related to the financing of proliferation' (2012) 6.

9 M Moore 'Obstacles to increasing tax revenues in low income countries' (2013) 8.

10 As above.

11 Through the Rome Report of 2012.

12 OECD 'Effective inter-agency co-operation in fighting tax crime and other financial crimes' (2013) 8.

2 Models for cooperation

Strategies for combating financial crimes are dependent on the ability to share information and that becomes a necessary pre-condition for inter-agency cooperation. Such cooperation is required over various stages, including prevention; detection; investigation; prosecution; and recovery of the proceeds of crime. From the perspective of combating financial crimes, a number of government agencies need to be involved in part or throughout an investigation, depending on the circumstances.

The OECD identifies the key agencies¹³ involved in the different stages of combating financial crimes, and identifies frameworks that support arrangements for inter-agency cooperation.¹⁴ It further identifies information flows of importance that enable different agencies to effectively combat financial crime, whilst describing the 'legal gateways' in countries that make or need to make information flows possible.

In assessing the ways in which countries have allocated responsibilities for countering tax crimes, four models were identified:

- In the first model, the tax administration has the responsibility of directing and conducting investigations (Model 1).¹⁵
- In the second scenario, tax administrations conduct investigations under the auspices of the public prosecutor (Model 2).¹⁶
- A third way identified is where a specialist tax agency is constituted outside the tax administration but under the auspices of the finance ministry to conduct investigations (Model 3).¹⁷
- The fourth model is one where the police or the public prosecutor has the responsibility for conducting investigations (Model 4).¹⁸

All countries assessed by the OECD have 'legal gateways' in place to allow tax administrations to share information collected for the purpose of a civil tax audit or law enforcement agencies that conduct tax crime

13 These agencies can include the tax and customs administration(s); anti-money-laundering authorities; the police; specialised law enforcement units; the public prosecutor's office; and financial regulators.

14 OECD (n 13 above) 8.

15 Applied in a number of Commonwealth countries (including the United Kingdom; Australia; Malaysia; South Africa; New Zealand; Uganda; and India), Japan; South Korea; Switzerland; and the United States.

16 Eg applied in Austria, Spain, Portugal and the US. The US is included in both models 1 and 2 as two types of criminal investigations are conducted: (i) administrative – conducted by the tax administration and handed over to the prosecutor's office; (ii) grand jury investigation initiated and conducted under the direction of a prosecutor.

17 Ghana, Greece, Iceland and Turkey.

18 Eg Belgium, Brazil, Burkina Faso, Denmark, Finland, France, Iceland, Norway, Slovenia and Spain. Spain is included under models 2 and 4 as it can conduct investigations under the direction of an examining judge or, because a case was initiated outside the tax administration, it may fall under the direction of the police.

investigations.¹⁹ However, there are shortcomings regarding the sharing of non-tax information by tax administrations with the police or public prosecutor.²⁰ Some countries explicitly prohibit tax administrations from sharing information relevant to non-tax crimes. Four countries assessed have prohibitions on the financial intelligence units (FIUs) from obtaining tax information from the tax authority.²¹ Wider information sharing is possible as far as customs information is concerned for tax and non-tax crimes. In the case of the latter, the customs mandate includes facilitation of trade and the collection of duties and security that puts it in a position where it will always collect both tax and non-tax information.

Cooperation between customs and tax can create financial and efficiency gains in the collection of duties and taxes, the exchange of information and a coordinated approach in pursuing common objectives such as improving compliance, fostering cross-border trade and supporting economic development.²² Effective cooperation can bring about better deterrence of tax and customs fraud through the holistic application of risk management methodologies. In this regard, import and export data and purchase and sales data can be matched to improve risk identification of under-declaration practices. When verifying the customs value for related party transactions involving multinational enterprises, customs administrations can benefit from information derived from the transfer-pricing studies that have been developed for profit tax purposes, and which are generally based on the application of the OECD transfer-pricing guidelines.²³

The World Customs Organization (WCO)²⁴ identifies the following underpinning enablers for effective and sustained cooperation and information exchange between tax and customs administrations:

- (a) Political will and executive commitment is required because once a policy decision is taken, it is the commitment and involvement of heads of both authorities that provides credibility and the necessary drive to ensure that officers in both administrations understand the importance of co-operation and information exchange and that they can actively pursue that agenda through a sustained process.
- (b) A legal framework is required for the effective exchange of information and the protection of data.

19 OECD (n 13 above) 14.

20 As above.

21 OECD (n 13 above) 14-15.

22 WCO 'Guidelines on customs-tax co-operation' (2016) 5.

23 As above. Both the OECD transfer pricing guidelines and the WTO customs valuation methodology are designed to ensure that related party prices are comparable to those between unrelated parties. The WCO notes that there are opposing risks, namely, the risk to customs generally is the undervaluation of imported goods to reduce customs duties, whereas the tax risk is the overvaluation of goods and services to reduce the taxable profit.

24 WCO (n 23 above) 7-8.

- (c) Governance processes and resources: An adequately-resourced governance process laying down detailed co-operation mechanisms and designated contact points should be put in place.
- (d) Cross-sectoral understanding: Both administrations should develop and enhance their capability to identify information of use that may be held by the other administration.
- (e) Data confidentiality and protection: Proper legal safeguards governing data privacy and protection are required and both administrations need to promote an organisational culture of data confidentiality.
- (f) The standardisation of communication protocols (inclusive of information technology systems) is required.
- (g) Data analytics: Large data requires robust data analytics capability and analytical techniques including predictive analytics which will assist in identifying patterns/trends, compliance and/or non-compliance history, gaps, risks and *modi operandi*.
- (h) Information and system security management.

Legal gateways are available in most countries (although a request-based limit may be imposed in some countries) whereby the police or prosecuting authority can provide relevant information to agencies that are investigating tax crimes.

In as far as information sharing between tax administrations and FIUs is concerned, several variations were identified. In some countries, tax authorities may have direct access to FIU information while, in others, the FIU may not share information with the tax authority for purposes of doing tax assessments. In the six countries assessed, FIUs are prohibited from sharing information with the customs authorities.²⁵ In most countries, legal gateways are in place for FIUs to provide information on possible tax offences to the responsible authority, although in many instances, the FIU is able to exercise a discretion as to what information is made available.

From an African perspective (of the countries assessed by the OECD), only Uganda allows tax crime investigators to have direct access to information obtained by the tax administration for purposes of administering and assessing taxes. Ghana operates on a *request based only* premise, and South Africa is able to share information spontaneously (it is under no obligation to do so and may exercise its discretion in opting whether to do so).²⁶

The four models for cooperation reveal that various options are available to countries for structuring inter-agency cooperation. Whichever agency is chosen to lead inter-agency efforts preferably should have both

25 OECD (n 13 above) 16.

26 OECD (n 13 above) 49 51.

strong governance procedures and institutional capacity in place to lead. It is also imperative that the underpinning enablers to cooperation, as identified by the WCO,²⁷ are in place.

3 Strategies for cooperation

The United States Joint Chiefs of Staff hold the view that ‘commitment to interorganisational cooperation can facilitate cooperation in areas of common interest, promote a common operational picture, and enable the sharing of critical information and resources’.²⁸ Where such commitment is present *and actioned*, inter-agency cooperation will enable:

- (a) *unity of effort* whereby national objectives are translated into unified action;²⁹
- (b) the pursuit of *commonly-shared objectives* by integrating joint and multinational operations at the strategic level and through co-ordination at the operational and tactical level;
- (c) achieving a *common understanding* that will allow for the identification of opportunities for co-operation and that can assist in mitigating unnecessary conflict or unintended consequences; and
- (d) a ‘whole-of- government approach’.³⁰

In 2009 the OECD described the rationale for ‘whole-of-government’ work as the recognition of the interdependence among levels of government.³¹ The term ‘whole-of-government approach’ is described as a resurgent form of co-ordination between government agencies, and the spectrum can range from improvements in horizontal co-ordination between different policy areas in the central administrative apparatus to improved inter-governmental vertical co-ordination between ministries and agencies.³² The intent behind this greater recognition of the existence of inter-dependencies generally is aimed at achieving better regulation and enhancing performance, effectiveness and efficiency.

The whole of government approach requires a particular way of working, which involves various managerial inputs. First, joining up policy making at the centre is required to achieve ‘a shared vision in support of implementation’. This means that all stakeholders should have

27 WCO (n 23 above) 5-6.

28 US Army Joint Publication 3-08 ‘Interorganizational Co-operation’ (2016) I-1.

29 Four attributes are associated with a framework that can improve unity of effort, namely, common vision or goals; common understanding of the operational environment; co-ordination of efforts to ensure continued coherency; and compatible measures of progress and ability to change course, if necessary (US Army JP 3-08: 2016: I-5/6).

30 US Army Joint Publication 3-08 (n 29 above) I-12.

31 US Army Joint Publication 3-08.

32 T Christensen & P Laegreid ‘The whole-of-government approach – Regulation, performance and public-sector reform’ (2006) 6.

the same understanding of the problem and the ‘same vision and buy-in to the same strategic priorities’ where they are part of the consultation process from the agenda-setting stage right through to policy development.³³ Colgan, Kennedy and Doherty make the point that whenever complex policy and policy implementation decisions are taken, there needs to be recognition of inter-dependencies between government agencies which is followed up by effective management between different government departments and the different levels of government to make the implementation work.³⁴ Fundamental to successful cooperation is the ability of heads of agencies to personally work together. In this regard, interpersonal communication skills that emphasize consultation, persuasion, compromise and consensus building are necessary contributors to achieving unified objectives and to build personal relationships that inspire trust and confidence.³⁵

Agencies have found various ways of working together in addressing financial crimes, such as joint investigation teams; joint training interventions (for example, Iceland and Latvia);³⁶ inter-agency centres of intelligence/fusion centres; secondments of personnel (for example, Italy, Ghana, Korea and Japan);³⁷ the use of shared data bases; joint committees to coordinate policies in areas of shared responsibility; and inter-agency meetings and training interventions.

3.1 Aligning objectives and developing a common understanding

By comparing the goals and objectives of two different agencies that are responsible for addressing IFFs, an indication of the feasibility of inter-agency cooperation can be obtained. To illustrate this point, the objectives of the South African Revenue Service (SARS) and the South African Financial Intelligence Centres (FICs) are compared to determine levels of alignment. The FICs’ mission and objectives are clear and are summarised in legislation: Section 3 of the Financial Intelligence Centre Act states that the principal objective of the Centre is to assist in the identification of the proceeds of unlawful activities, the combating of money-laundering activities and the financing of terrorist and related activities. The other objectives of the Centre are (a) to make information collected by it available to investigating authorities, the intelligence services and the South African Revenue Service to facilitate the administration and enforcement of the laws of the Republic; and (b) to exchange information

33 A Colgan et al *A Primer on implementing whole of government approaches* (2014) 4.

34 As above.

35 US Army Joint Publication 3-08 (n 29 above) I-12.

36 OECD (n 13 above) 232 265.

37 OECD (n 13 above) 251 218 258 254.

with similar bodies in other countries regarding money-laundering activities and similar offences.³⁸

One of the five-year priority initiatives of SARS is to 'achieve increased customs compliance.'³⁹ To achieve this outcome, it proposes, amongst others, to 'continue to adopt a whole of government view in managing the customs border environment; continue to strengthen risk management capabilities and to continue to strengthen international agreements and links with other jurisdictions'.⁴⁰ Its strategic plan further states that SARS will adopt a whole-of-government view in managing the customs border environment through collaboration with other government agencies. Collaboration with other government agencies is done in such a way as 'to improve government's overall value chain.'⁴¹ These sentiments capture the essential need for co-ordination and how the administration tends to go about in achieving this.

SARS also indicates that it will continue to strengthen international agreements and links with other jurisdictions and, given the level of interconnectivity in global trade, it acknowledges the importance of building and maintaining good relations with other tax and customs jurisdictions. SARS states that it

will collaborate with the Financial Action Task Force (FATF) to support its mandate in implementing global safeguards to protect the integrity of the financial system, in order to meet the objectives of tackling money laundering. This is particularly relevant to SARS as tax crime is considered as a base to money laundering and smuggling. Customs and excise duties offences are also included in this exercise.⁴²

Furthermore, SARS indicates that it will seek to strengthen and leverage South Africa's international treaty networks to cooperate and exchange information with other tax and customs jurisdictions.⁴³ Thus, the collaborating agencies and objectives are clearly defined.

In its latest strategic plan,⁴⁴ the inclusive language has dissipated to the extent that reference to FATF is limited to the participation of SARS in both domestic and global anti-terrorism bodies to assist SARS in the identification, mitigation and sharing of information regarding potential terrorist threats through the trade supply chain networks. Also, in dealing with the threat of the illicit economy and illicit financial flows,

38 Financial Intelligence Centre Act 38 of 2001.

39 SARS 'Strategic Plan 2014/15-2018/19' (2014) 25.

40 As above.

41 SARS (n 40 above) 25-27.

42 As above.

43 As above.

44 SARS 'Strategic Plan 2016/17-2020/21' (2016).

it is proposed that (i) engagement with other state enforcement agencies such as state security agency and police takes place to agree on memoranda of understanding (MOUs) for establishment of dedicated resources for fighting illicit trade; and (ii) enhancing the inter-agency co-operation in fighting tax and other financial crimes.⁴⁵

Notably absent from the language is specific reference to the term ‘money laundering’ and the FIC. It can be inferred from the language that an obstacle to co-ordination may have arisen as a result of changes in constituents. Another inference is possible in that the co-ordination levels are so well developed that they do not need mentioning. Be that as it may, it would have been preferable that specific reference to money-laundering activities be maintained because of the overlaps that exist between tax evasion and laundering.⁴⁶

The excerpts from the SARS strategic plans demonstrate sufficiently that its objectives overlap with other agencies and that it sees the need to coordinate actions at different levels to achieve its goals. As pointed out earlier, the FIC mandate and objectives are clear, and the Act leaves little room for different interpretations. Turning to the tax legislation analysed below, it is shown that high levels of discretion in determining what may or may not be shared may become problematic in advancing cooperation and co-ordination mechanisms.

Under section 70(3)(c) of the Tax Administration Act of 2011, provision is made for the disclosure of information to the Financial Intelligence Centre where such information is required for the purpose of carrying out the Centre’s duties and functions under the Financial Intelligence Centre Act 38 of 2001.⁴⁷ According to section 70(7), SARS may not disclose information if it is satisfied that the disclosure would seriously impair a civil or criminal tax investigation. Section 71 allows SARS to make an *ex parte* application to a judge in chambers for an order authorising SARS to disclose the information under certain circumstances.⁴⁸

45 SARS (n 45 above) 27 28.

46 Eg, both crimes entail some form of concealment or hiding of assets through shell companies or by means of deliberate steps to break the audit trail. Risk indicators also overlap, such as transactions that lack reasonable explanation; the use of offshore accounts, trusts or companies not supported by economic rationale for doing so; schemes involving suspect territories; over-complicated tax schemes; unrealistic wealth compared to client profile; short-life businesses involved in imports/exports; and the use of cash transactions.

47 Under sec 70(5). The information disclosed may only be disclosed to the extent that it is (a) necessary for the purpose of exercising a power or performing a regulatory function or duty under the legislation; and (b) relevant and proportionate to what the disclosure is intended to achieve as determined under the legislation.

48 Where it may reveal evidence that (a) an offence (other than a tax offence) was or may be committed in respect of which a court may impose a sentence of imprisonment exceeding five years; (b) that may be relevant to the investigation or prosecution of the offence; or (c) of an imminent and serious public safety or environmental risk.

A serious impediment to information sharing may be caused if section 70(7) is applied with a wide discretion or without some fixed criteria for determining what would cause or be a serious impairment of a civil or criminal tax investigation. Conversely, some criteria could be set for instances where information sharing should be compulsory because there are indicators within the scope of tax administrations which are relevant to anti-money-laundering initiatives.

The South African example shows that clear language should be used to describe the objectives of an agency and, also, in which areas it has inter-dependencies with another agency and how those inter-dependencies will be addressed. It is also evident that clarity in legislation and/or regulations is necessary where 'discretion' is left too wide for interpretation.

3.2. Joint investigation teams

A working example of an integrated task team is Project Wickenby which is run under the auspices of the Australian Tax Office (ATO).⁴⁹ The ATO is included in the Commonwealth's Organised Crime Strategic Framework as 'an agency with shared responsibility for addressing the impact on Australia of serious and organised crime'.⁵⁰ The ATO has direct access to information collected by the Australian FIU (AUSTRAC) which accords with the relevant provisions of the Financial Transactions Reports Act (FTR) and a memorandum of understanding between AUSTRAC and the ATO. There are no specific restrictions on the use of information by the tax authorities as the principle object of the FTR is to facilitate the administration and enforcement of tax laws. Under AML/CFT legislation, the tax authorities are entitled to access AUSTRAC information for any purpose that relates to facilitating the administration or enforcement of a tax law.⁵¹

The ATO's role is explained by 'the profit driven nature of organised crime' and the fact that the necessary skills are available to the ATO to help with the identification of unexplained wealth that is generated through the proceeds of crime.⁵² The basis of this framework is the understanding that law enforcement agencies have differing powers and responsibilities, and that cooperation will result in these responsibilities and powers being used to maximum effect. The purpose of the framework is to initiate and sustain

49 ATO (no longer available).

50 As above. The introduction, in 1985, of sec 3D of the Taxation Administration Act 1953 (allowing disclosure of ATO information to the National Crimes Authority (NCA), a precursor to the Australian Crime Commission (ACC) and the introduction, in 1989, of sec 3E of the TAA 1953 (which allowed the ATO to share information on serious offences with law enforcement bodies) formally inducted the ATO into the armoury of state and Commonwealth law enforcement.

51 E Mathias & G Esposito 'Using anti-money laundering measures to improve tax compliance' in M Geerten et al (eds) *Tax design issues worldwide* (2015) 284.

52 ATO (no longer available).

a collaborative and integrated Commonwealth approach to address organised criminal activity in order to reduce the social and economic impacts of organised crime on the Australian community by targeting the most significant threats.⁵³ Whilst taxation secrecy and disclosure provisions are designed to keep protected tax information confidential, limited circumstances allow the disclosure of protected information by the tax authorities to other agencies. Such circumstances include investigating a serious offence or when disclosure is in connection with a prescribed task force and one of the main purposes of the task force is protecting the fiscus.

3.3 Task force and the fusion centre concept

Information sharing by ATO officers for purposes of law enforcement is enabled under legislation. Information sharing through a task force allows the ATO to chase after assets of criminals by means of tax remedies. The task force's law enforcement impact is the result of having an integrated approach to confiscation of assets and by combining inter-agency resources. In July 2010, the National Criminal Intelligence Fusion Centre was launched, which is described as an important component of the Commonwealth Organised Crime Strategic Framework. The Fusion Centre concept is designed to bring together information, skills and knowledge, data and technology across government departments. The Fusion Centre integrates information and intelligence at a central or national level in order that 'real time' intelligence is generated on risk areas such as organised crime. It also draws together a variety of skills in a single environment that allows for better collaboration and for an improved view of factors associated with organised crime, such as risks, threats and vulnerabilities. From these factors, targets common to all participants can be identified.⁵⁴

The United States (US) in 2006 established the Organised Crime Drug Enforcement Task Force Fusion Centre (OCDETF-FC) under the auspices of the Department of Justice, Homeland Security and the Department of Treasury. The task force/fusion centre serves a central point for developing and utilising technologies that provide an analysis of law enforcement and intelligence data to support inter-agency cooperation.⁵⁵ Through the Fusion Centre, law enforcement data is shared and different agencies derive different benefits from the Centre. For example, the involvement of the Internal Revenue Service Criminal Investigation's (IRS-CI) at the OCDETF-FC is focused on money laundering activities, and it does not make tax information available.⁵⁶ The design of the OCDETF-FC is aimed at generating cross-agency

53 As above.

54 ACIC 'National criminal intelligence fusion capability' (2016).

55 OECD (n 13 above) 117.

56 As above.

integration and the analysis of drug and drug-related financial data to derive comprehensive intelligence pictures of targeted entities. The IRS-CI contributes resources and information for the purpose of generating analytical products, investigative leads, target profiles, strategic reports and field query reports.⁵⁷ This contribution is important as it is an acknowledgment that the pursuit of national objectives relies on collaboration. As such, it provides a basis for addressing risks such as IFFs through a whole-of-government approach in the form of fusion centres or task teams.

3.4 International developments in domestic cooperation

In 2013 criminal investigations leg of The Netherlands Tax and Customs Administration established a Centre for Intelligence and Operational Excellence which includes all national agencies involved in countering money laundering.⁵⁸ The main goals of the Centre are to

- enhance ongoing work on anti-money-laundering activities;
- improve seizure and confiscation procedures;
- centralise the management and preparation of money-laundering cases;
- optimise resources; and
- continuously identify ways of strengthening the process of combating money laundering through improved inter-agency and international co-operation.

In achieving these goals, the Centre acts as nodal point for case management and the evaluation of completed cases; for developing a network of cooperation; and establishing and maintaining partnerships and the sharing of information. The Centre is also responsible for the exploration of new strategies and techniques for addressing money laundering, including the use of digital technology and social media.⁵⁹

In 2011 the Grey Economy Information Unit (GEIU) was established in Finland as a means of addressing the grey economy.⁶⁰ The Unit's mandate to collect information is described as 'the right to receive, on request, necessary information held by other authorities, even where that information would not normally be available to the tax administration due to secrecy provisions.'⁶¹ A key role of the Unit is to produce compliance reports requested for purposes of levying taxes, the enforcement of tax

57 As above.

58 OECD (n 13 above) 20.

59 OECD (n 13 above) 115-116.

60 The grey economy is defined as 'any activities that result in the failure to meet legal obligations for payment of taxes, customs fees or to obtain unjust repayment'.

61 OECD (n 13 above) 203.

controls and the prevention or investigation of money laundering or terrorism.⁶²

France regards cooperation between the tax authority and customs as a critical aspect in the fight against tax evasion. This is recognised through a national agreement between the agencies. Cooperation is based on a legislative framework which allows for the receipt of information on request by the tax authority and also for spontaneous reporting by customs to the tax authority of information collected in the course of conducting customs activities.⁶³ Under Ghana's anti-money-laundering legislation, the Ghana Revenue Authority must spontaneously provide all information concerning suspicious transactions to the FIU. The framework for enhanced cooperation is contained through the governing body of the FIU which includes representatives of the various agencies combating financial and tax crimes.⁶⁴

India in 2011 constituted a High-Level Committee under the Chairmanship of the Secretary (Revenue) with representatives of the reserve bank, intelligence agency, enforcement directorate and other relevant agencies, following the recognition that a multi-disciplinary approach was required for the co-ordination of investigations into incidences where funds are generated illicitly in the country or where these are illicitly moved to foreign jurisdictions.⁶⁵

In October 2012 Mexico published the law (which came into effect in 2013) on the Federal Prevention and Identification of Operations from Illicit Resources that contains provisions to improve cooperation in information sharing and in the prevention, detection and combating money laundering between government agencies.⁶⁶ New Zealand's information exchange is largely case-specific and the means of transferring information is dependent on the type of data.⁶⁷ In 2011 Switzerland placed a duty on every federal civil servant (including tax officials) to report to the police or public prosecutor 'suspicions of all misdemeanours or felonies which they come across in the course of their professional activity'.⁶⁸

From the random country selection above, it is evident that many jurisdictions have recognised the need that an effective response to financial crime is best achieved through a 'whole-of-government' approach which is premised on the better gathering and sharing of information to allow for quicker responses through the pooling of resources.

62 As above.

63 OECD (n 13 above) 209.

64 OECD (n 13 above) 218.

65 OECD (n 13 above) 249.

66 OECD (n 13 above) 288.

67 OECD (n 13 above) 299.

68 OECD (n 13 above) 22.

3.5 FATF best practice – Principles for sharing information and joint operations

The FATF best practice on addressing proliferation finance provides useful guidance as far as principles for the sharing of information and joint operations are concerned. These best practices can be applied to a variety of target areas, including financial crimes, as it allows for joint analysis, coordinated and complementary operations, and more developed policy positions. The FATF points out that some of the benefits of joint initiatives are relationship and confidence-building measures that bring together representatives of various government agencies.⁶⁹ Some common issues that can be addressed through joint initiatives include

- the monitoring and analysis of risks, threats, new trends and vulnerabilities;
- policy development on combating financial crime and illicit financial flows;
- recommendations of appropriate responses for competent agencies to take action;
- identification of key intelligence gaps related to financial crimes and illicit flows and the development of possible solutions to close those gaps;
- consideration of potential interdiction opportunities to impede financial crimes and co-ordination of such actions;
- co-ordination and ‘de-conflicting’ the activities of competent agencies (including financial, intelligence and law enforcement agencies) in terms of combating the problem;
- co-ordination and de-conflicting of financial, intelligence and law enforcement agencies in terms of potential plans to identify individuals and entities who may be involved in or supporting financial crimes; and
- a review of mechanisms to ensure effective scrutiny of suspicious activity reporting.⁷⁰

Underlying these principles is the question whether the necessary information management systems are in place and whether risk management practices are followed. Similarly, the WCO⁷¹ points out that joint tax and customs activities may potentially include activities such as

- joint risk profiling/analysis for the identification of potential risk areas;
- joint investigations or audits; joint identification of measures and their application in the fight against customs duty, tax offences and transnational crime (for instance, money laundering);
- co-ordination of control and compliance activities within free trade zones;

⁶⁹ FATF (n 8 above) 9-10.

⁷⁰ As above.

⁷¹ WCO (n 23 above) 5.

- co-ordination on transfer pricing and customs valuation matters;
- integrated programmes on approved economic operators (AEO) and co-operative compliance;
- joint research and analysis on tax and customs topics; joint training initiatives to enhance the understanding of each other's roles and responsibilities and to educate officers on cross-sectoral risks and challenges;
- joint approach on legislative/policy matters and taxpayer education; and
- secondment programmes involving officers being interchanged between agencies to enhance cross-sectoral capacity.

Such initiatives should be backed by a proper risk management framework that provides for clear terms of reference for the setting up of risk committees and periodic meetings that will have the responsibility of assessing the performance of such programmes and to make operational decisions to address high-risk operators or tax entities identified.

4 Limitations to the scope of cooperation

The obligation of sharing taxpayer information with other departments in addressing serious crimes should be measured against the potential impact on the integrity of the tax system. A 2012 New Zealand study found that a tax administration's partaking in information sharing to address serious crime is acceptable as long as it is 'fit for purpose'.⁷² Aspects considered in the sharing of information include

- balancing the individual's right to privacy and the benefits to society;
- the nature of the serious crime in question and the scope of the information required;
- the authority of the information and the ability of the tax administration to provide it,
- the intended and potential use of the information,
- the risk and error of misuse.⁷³

When the above is considered in context of Recommendation 2, a twofold question may be posed, namely, to what extent information is available and to what extent it is shared. For example, the FATF shows that, while South Africa has 'most of the necessary legal tools and funding to combat money laundering, there is a very low number of ML investigations and prosecutions, despite an acknowledged level of organised crime and predicate offences'.⁷⁴ A key constraint identified is the insufficient recording of statistics to allow for a pro-active pursuit of money-laundering

72 OECD (n 13 above) 20.

73 As above.

74 FATF 'Mutual evaluation of South Africa' (2009) 67.

offences.⁷⁵ Recommendation 2 requires countries to have national AML/CFT policies in place that are informed by (a) the risks identified (requiring accurate information to be available) and (b) mechanisms in place to enable policy makers, FIUs and law enforcement authorities to cooperate. In addition, mechanisms should be in place on a domestic level for co-ordination in developing and implementing AML/CFT policies and activities, both on policy-making and operational levels.⁷⁶ Recommendation 2 also should be viewed in the context of the prevalence of corruption and a country's structural deficiencies.⁷⁷ The FATF methodology provides as follows:

An effective AML/CFT system normally requires certain structural elements to be in place, for example political stability; a high-level commitment to address AML/CFT issues; stable institutions with accountability, integrity, and transparency; the rule of law; and a capable, independent and efficient judicial system. The lack of such structural elements, or significant weaknesses and shortcomings in the general framework, may significantly hinder the implementation of an effective AML/CFT framework; and ... other contextual factors that might significantly influence the effectiveness of a country's AML/CFT measures include the maturity and sophistication of the regulatory and supervisory regime in the country; the level of corruption and the impact of measures to combat corruption ...⁷⁸

In taking a 'whole-of-government approach' to addressing financial crimes, Recommendation 29 clearly sets the requirements for effectiveness in respect of information sharing:

The FIU should (a) in addition to the information that entities report to the FIU, be able to obtain and use additional information from reporting entities, as needed to perform its analysis properly; and (b) have access to the widest possible range of financial, administrative and law enforcement information that it requires to properly undertake its functions.

The OECD⁷⁹ advances that if the ongoing objective of a whole-of-government approach is to identify ways in which agencies can work together in combating crime in order for better results to be attained over shorter time frames and with less costs, it may be opportune to consider extending the application of FATF Recommendations to include the public-sector institutions, especially in relation to the following:

⁷⁵ FATF (n 75 above) 67-69.

⁷⁶ FATF 'Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems' (2013) 6.

⁷⁷ The importance of structural reforms and good governance may be ignored at a country's own peril. Eg, by implementing OECD governance principles, Mauritius overtook South Africa in 2013 to become the most competitive economy in sub-Saharan Africa.

⁷⁸ FATF (n 77 above) 6.

⁷⁹ n 77 above.

- Secrecy laws should not inhibit the implementation of FATF Recommendations.⁸⁰
- Suspicion or reasonable grounds to suspect that funds are the proceeds of a criminal activity should be a mandatory reporting requirement.

The underlying rationale is that institutions of government daily come across information that may be relevant in addressing financial crimes. Without such information being channelled to a central repository for analysis and interpretation, a vast knowledge base is foregone. For example, suspicious activity that may come to the attention of any agency or department official which requires further scrutiny could be any of the following:

- transactions requested outside the normal service;
- transactions outside the company's relationship with the client;
- a person entered into a business relationship for a single transaction;
- extensive and unnecessary foreign travel; and
- loans to government employees.

Indicators within the scope of tax administrations:

- transactions that have no reasonable explanation;
- a person's use of offshore accounts, trusts or companies that does not support such economic requirements;
- tax schemes involving suspect territories;
- over-complicated tax schemes;
- unrealistic wealth compared to client profile;
- short-life businesses involved in imports/exports;
- cash transactions instead of appropriate financial instruments.⁸¹

The inclusion of tax crimes as predicate offences to money laundering has put the exchange of information high on the agenda of many countries. It is therefore important that agencies develop cross functional indicators in order to improve data quality that allow for meaningful exchange.

Most countries make provision for the protection of taxpayer information. For example, in South Africa, section 71 of the Tax Administration Act⁸² provides for the disclosure in criminal, public safety or environmental matters if so ordered by a judge, while section 70 makes provision for disclosure to other (specified) entities. Section 69 contains the

80 FATF Recommendation 9.

81 S Young & D Cafferty *Money laundering reporting officer's handbook* (2005) 107.

82 Act 28 of 2011.

prohibitions on information sharing.⁸³ Similarly, in terms of the Customs Control Act⁸⁴

no SARS official, customs officer or person referred to in section 12(3)(a), and no person who was such an official, officer or person, may disclose any information acquired by him or her in the exercise of powers or duties in terms of this Act or the Customs Duty Act concerning the private or confidential matters of any person,⁸⁵ except to the extent that such disclosure is made in the exercise of those powers or duties, including for the purpose of any proceedings referred to in Chapter 36.

Section 22(1) provides that any disclosure in terms of section 21(e) 'to ... (i) an organ of state referred to in section 20(j) must be confined to information necessary for enforcing the legislation administered by that organ of state regulating the movement of goods or persons into or out of the Republic'; and section 22(2) provides that 'an authorised recipient may use the information disclosed in terms of subsection (1) only for the purpose for which the information was disclosed'. 'Authorised recipient' under section 20 includes 'the police, public prosecutor, FIU and any organ of state administering legislation applicable to the crossing of goods or persons into or out of the Republic'.⁸⁶

The importance of cooperation between customs and other law enforcement agencies is acknowledged in section 12(2) that provides for a customs officer to perform an enforcement function⁸⁷ at any time and without a warrant or previous notice. Importantly, section 12(3) allows for a customs officer to 'be accompanied and assisted by any interpreters, technicians, workers, police officers or any other persons whose assistance

83 Sec 69 provides: '(1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official. (2) Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official (a) in the course of performance of duties under a tax Act, including (i) to the South African Police Service or the National Prosecuting Authority, if the information relates to, and constitutes material information for the proving of a tax offence; (ii) as a witness in civil or criminal proceedings under a tax Act; or (iii) the taxpayer information is necessary to enable a person to provide such information as may be required by SARS from that person; (b) under any other Act which expressly provides for the disclosure of the information despite the provisions in this chapter; (c) by order of a High Court; or (d) if the information is public information.'

84 Act 31 of 2014.

85 'Such official, customs officer or person may be obliged to disclose such information in terms of other legislation, eg the Financial Intelligence Centre Act, 2001.'

86 Act 31 of 2014, sec 20.

87 'Enforcement function', in relation to the customs authority or a customs officer, means a power or duty assigned to the customs authority in terms of this Act or assigned or delegated to a customs officer in terms of this Act to (a) implement and enforce this Act or a tax levying Act; or (b) to assist in the implementation or enforcement of other legislation referred to in ch 34 or 35.

may reasonably be required for the performance of that [enforcement] function'.⁸⁸

It is worth noting that the OECD Report also acknowledges that customs administrations are key in addressing financial crimes because of the records customs holds regarding individuals, companies, transactions and indirect taxes.⁸⁹ In addition, its control and security function should also entail a vast repository of information on crimes such as smuggling, money laundering and false declaration.

5 Conclusion

In meeting the challenge of strengthening their independent institutions and agencies of government responsible for preventing IFFs, countries are required to identify frameworks and mechanisms for information sharing and co-ordination. This chapter highlights some fundamental aspects that are necessary for inter-agency cooperation. It is shown that various models and gateways for cooperation are available in most countries and that strategies for cooperation should be founded on a shared commitment to inter-organisational cooperation. This commitment should be reflected in a common understanding of the goals and objectives as well as a unified effort through a whole-of-government approach. Countries, therefore, should recognise that the foundation for cooperation first and foremost lies in information sharing through appropriate legal gateways and, thereafter, in collaboration which is premised on a common line of sight.⁹⁰

Because the relationship between different spheres of government is characterised by layers of inter-dependencies, an optimal effort toward reducing illicit financial flows should be premised on common areas of interest and knowledge. Collaboration between different agencies, therefore, requires

- a common understanding of the problem;
- the identification and inclusion of all relevant stakeholders;
- policy co-ordination that supports the nexus between administrations and policy setters;
- horizontal and vertical alignment between the goals and objectives of different agencies;

88 Sec 12(4) provides that '[a] person assisting a customs officer in terms of subsection (3)(a) must, whilst and for the purpose of assisting, be regarded to be a customs officer under the supervision of the customs officer that person is assisting'.

89 OECD (n 13 above) 8.

90 I use the term 'common line sight' as cooperation goes further than having shared objectives – there should also be a shared view on how those objectives are to be achieved, in other words, an inter-departmental alignment of both goals and objectives in furtherance of a commonly-understood strategic imperative, is required.

- defining and implementing the strategies for cooperation; and
- implementing or revising existing legal gateways to streamline cooperation.

Fundamental to successful cooperation is the ability of heads of agencies and ministries to personally work together in a manner that seeks consensus, where such consensus leads to the implementation of strategies and actions that allow agencies to work together to address IFFs.

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