

INTER-AGENCY COOPERATION AND GOOD TAX GOVERNANCE IN AFRICA: AN OVERVIEW

Jeffrey Owens and Rick McDonell

1 Introduction

This book examines the linkages between money laundering, bribery, corruption and tax evasion in Africa, and how to counter these illicit financial flows (IFFs) requires a whole government approach and a reassessment of existing international instruments. To fully understand the issues discussed by the various authors, it is essential to understand recent developments in the international environment.

The period from the 1980s to the mid-1990s was marked by the progressive liberalisation and deregulation of international trade, investment and financial flows. Increasingly dense networks of cross-border economic relationships resulted, as financial centres were forced to compete with each other to attract international financial flows. With the decline of non-tax barriers to the mobility of capital, the significance of low or preferential tax regimes as a factor in making investment decisions increased.¹ In 1996 the heads of the G-7 states sought to bring these developments to a head. In their final Communiqué issued following the Lyon Summit, they acknowledged:²

Globalisation is creating new challenges in the field of tax policy. Tax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between states, carrying the risk of distorting trade and investment [and] leading to the erosion of national tax bases. We strongly urge the [Organisation for Economic Co-operation and Development (OECD)] to vigorously pursue its work in this field, aimed at establishing a multilateral approach under which countries could operate individually and collectively to limit the extent of these practices.

1 See A Easson & EM Zolt 'Tax incentives' World Bank Institute 3-4, (2007) <http://siteresources.worldbank.org/INTTPA/Resources/EassonZoltPaper.pdf> (accessed 20 October 2017).

2 See G7 Communiqué, Lyon 21 July 1996 (See AP Archive).

2 OECD harmful tax competition initiative

The Organisation for Economic Co-operation and Development (OECD) responded to the call by the G-7 for a return to the *status quo ante* through its 'harmful tax competition' project, which called for the development of 'measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases'.³ In 1998, the OECD published its first report entitled 'Harmful Tax Competition: An Emerging Global Issue'.⁴ The report identified two primary contributors to the harmful tax competition developing between states – the so-called 'tax haven' jurisdictions⁵ and preferential tax regimes.⁶ The latter predominantly were phenomena of OECD member states, and were to be dealt with internally by a process of domestic and peer review, while secrecy jurisdictions were subject to a more confrontational and interventionist approach. The report announced the creation of the Forum on Harmful Tax Practices, which was tasked with identifying non-OECD member jurisdictions that met the criteria for designation as a secrecy jurisdiction. A follow-up report published in 2000 identified 35 such jurisdictions, which were to be identified in a future 'List of uncooperative tax havens' unless they made a commitment to eliminating harmful tax practices by 2005.⁷ Any jurisdiction that failed

3 OECD Council at Ministerial Level, Communiqué (21-22 May 2006) para 15(xv).

4 OECD *Harmful tax competition: An emerging global issue* (OECD Publication Service: Paris 1998) (OECD 1998 Report).

5 'Tax havens' are characterised in the OECD 1998 Report by four main factors: (i) imposing no, or only nominal tax; (ii) a lack of effective exchange of information with other countries; (iii) a lack of transparency; and (iv) investment with no substantial activities. The application of the term 'tax haven' remains controversial and contested. It is often conflated with the term 'offshore financial centre' – itself an equally amorphous term that, from the perspective of land-locked 'onshore' jurisdictions such as Switzerland and Lichtenstein, usefully glosses over the fact that everywhere is 'offshore' of everywhere else. Accordingly, this article adopts the Tax Justice Network's preferred terminology of 'secrecy jurisdiction', where the more pertinent distinction is one between 'here' and 'elsewhere'.

6 'Preferential tax regimes' are characterised in the OECD 1998 Report by four main factors: (i) the regime imposes low or no taxes on the relevant income (from geographically mobile financial and other service activities); (ii) the regime is ring-fenced; (iii) the regime lacks transparency, eg the details of the regime or its application are not apparent, or there is inadequate regulatory supervision or financial disclosure; and (iv) there is no effective exchange of information with respect to the regime. Note that ring-fencing occurs when a tax regime is partially or fully isolated from the domestic markets of the country providing the regime. It may take a number of forms, including excluding resident taxpayers from taking advantage of its benefits; and/or excluding enterprises that benefit from the regime from operating in the domestic market.

7 OECD 'Towards global taxation: Progress in identifying and eliminating harmful tax practices' Report to the 2000 Ministerial Council and Recommendations by the Committee on Fiscal Affairs.

to comply would be liable to the application of co-ordinated defensive measures by OECD member states.⁸

However, Switzerland and Luxembourg had vocally abstained from endorsing both the 1998 and 2000 reports,⁹ arguing that they represented a partial and imbalanced approach that resulted in the unacceptable protection of countries with high levels of taxation, while the incoming United States (US) Treasury Secretary had expressed concern to the G-7 Finance Ministers.

The intervention by the US reflected ideological unease with the OECD's increasing encroachment upon fiscal sovereignty. Traditionally, taxation was seen as an inherent or essential component of sovereign status, and any infringement of a state's right to self-determination concerning its system of taxation would be regarded as an infringement on sovereignty itself.¹⁰ Instead, the US sought to align the work being done by the OECD on harmful tax practices with the work being done by the Financial Action Task Force (FATF) and others on anti-money-laundering and counter-terrorism financing (AML/CFT). This shifted the focus of the project towards transparency and information exchange as mechanisms to be used in the detection and prevention of illicit financial flows.

3 Emphasis on misuse of corporate vehicles

In February 2000, the FATF had undertaken a review of the rules and practices that impaired the effectiveness of money laundering prevention and detection systems, and concluded:

Shell corporations and nominees are widely used mechanisms to launder the proceeds from crime, particularly bribery (eg to build up slush funds). The ability for competent authorities to obtain and share information regarding the identification of companies and their beneficial owner(s) is therefore essential for all the relevant authorities responsible for preventing and punishing money laundering.¹¹

8 Interestingly, the Report only envisaged the application of defensive measures against non-cooperative secrecy jurisdictions; no corresponding provision was made for similar measures to be invoked against non-cooperative OECD member states with preferential tax regimes. See R Woodward 'The OECD's harmful tax competition initiative and offshore financial centres in the Caribbean Basin' in R Ramsaran (ed) *The fiscal experience in the Caribbean: Emerging issues and problems* (University of the West Indies: St Augustine, Trinidad 2004) 623-625.

9 See JC Sharman *Havens in a storm: The struggle for global tax regulation* (Cornell University Press: Ithaca 2006) 61; DM Ring 'Democracy, sovereignty and tax competition: The role of tax sovereignty in shaping tax co-operation' (2009) 9 *Florida Tax Review* 12-13.

10 A Christians 'Sovereignty, taxation and social contract' (2009) 18 *Minnesota Journal of International Law* 99.

11 Cited in FATF 'The misuse of corporate vehicles, including trust and company service providers' 13 October 2006.

In April 2000, the Financial Stability Forum (FSF) had also highlighted a number of prudential and market integrity concerns arising from their review of what they termed ‘problematic’ secrecy jurisdictions. They specifically expressed concern at the ease with which corporate vehicles – such as companies, trusts, foundations, partnerships, and other types of legal persons and arrangements¹² – could be created and dissolved in these jurisdictions, and the lack of availability of timely information on their beneficial ownership.¹³ The FSF subsequently issued a formal request to the OECD to examine the vulnerability of corporate vehicles to misuse for illicit purposes, and stressed the importance of ensuring that the authorities in each jurisdiction had the ability to obtain and share information on the beneficial ownership and control of corporate vehicles established in their jurisdictions.

In May 2001, the OECD issued its Report on the Misuse of Corporate Vehicles for Illicit Purposes to the G-7 Finance Ministers and the Financial Stability Forum (FSF).¹⁴ The report found that almost all economic crimes involve the misuse of corporate vehicles: Money launderers exploit cash-based ‘front’ businesses and other legal entities to disguise the source of their illicit gains; corrupt officials conduct transactions through bank accounts opened under the names of corporations and foundations; and individuals hide or shield their wealth from tax authorities and other creditors through trusts and partnerships.¹⁵ In order to successfully combat and prevent the misuse of corporate vehicles for these purposes, the report concluded that it was essential that all jurisdictions establish effective mechanisms enabling their authorities to obtain, on a timely basis, information on the beneficial ownership and control of corporate vehicles established in their own jurisdictions, and that such information must be capable of being shared with other authorities both domestically and internationally.¹⁶

12 The term ‘legal arrangements’ refers to express trusts or other similar legal arrangements (eg *fiducie*, *treuhand* and *fideicomiso*, while ‘legal persons’ refers to any entities other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property (eg companies, bodies corporate, foundations, *anstalt*, partnerships, or associations and other relevantly similar entities). See FATF ‘Glossary of the FATF Recommendations’ October 2012.

13 Financial Stability Forum ‘Report of the Working Group on Offshore Centres’ 5 April 2000, http://www.fsb.org/wp-content/uploads/r_0004b.pdf?page_moved=1 (accessed 19 October 2017).

14 Cited in OECD *Behind the corporate veil: Using corporate entities for illicit purposes* (OECD Publication Service: Paris 2001) 3, <https://www.oecd.org/corporate/ca/43703185.pdf> (accessed 19 October 2017).

15 As above.

16 OECD (n 13 above) 7-8.

The OECD report was followed by a succession of others exploring similar policy concerns, ensuring that the issue of corporate vehicle misuse and financial transparency remained firmly on the public agenda.¹⁷

4 Improving the legal framework for information exchange: Article 26 of the OECD Model Tax Convention

In 2005, significant amendments were made to article 26 of the OECD Model Tax Convention on Income and Capital to enable the broader exchange of information and prevent bank secrecy. Previously, article 26(1) provided for the exchange of ‘information as is *necessary* for carrying out the provisions of [the Convention] or of the domestic laws concerning taxes of every kind and description imposed on behalf of the contracting states’.¹⁸ The revisions to paragraph 1 of article 26 substituted the right to request and the obligation to provide tax information when it becomes ‘foreseeably relevant’, rather than only when ‘necessary’. A new paragraph 5 was also added to article 26, which made it clear that jurisdictions could not decline to provide information solely because it was held by banks, financial institutions, nominees, agents or fiduciaries, or solely because it was information relating to ownership. The most significant consequence of the change was that domestic bank secrecy rules, by themselves, no longer could be used as a basis for declining to provide information.

5 Global responses to the financial crisis

The global financial crises of 2008-2009 brought secrecy jurisdictions back to the centre of the conversation around illicit financial flows and the need for greater transparency. Countries around the world were confronted with damaging combinations of large bailout costs and diminishing corporate tax receipts, and politicians and bureaucrats were acutely aware of the need to find additional revenue streams. Spurred on by contemporaneous media reports and prosecutions arising out of the Swiss UBS bank scandal¹⁹ and the Liechtenstein tax data leak,²⁰ issues of tax evasion and

17 In 2002 the International Trade and Investment Organisation (ITIO) and the Society of Trust and Estate Practitioners (STEP) commissioned the report ‘Towards a Level Playing Field: Regulating Corporate Vehicles in Cross-Border Transactions’. In 2006 the FATF issued its paper on ‘The misuse of corporate vehicles’, and in 2010 the Caribbean FATF published ‘Money laundering using trust and company service providers’.

18 Our emphasis.

19 During US senate hearings, a Geneva-based whistle-blower from UBS bank, which at the time was partly owned by the Swiss government, disclosed that UBS was sending bank officials to US cities to promote the use of its services by high-net-worth Americans. These officials told the Americans that they could successfully hide their monies offshore where the monies would remain undetected and untaxed by US tax

tax avoidance²¹ suddenly found themselves high on the public agenda as attention turned towards the massive amounts of unreported private financial wealth concealed in the world's secrecy jurisdictions.²²

5.1 How big is the problem of hidden wealth?²³

The most frequently-cited estimate on the global extent of all illicit financial flows comes from the International Monetary Fund (IMF) in the mid-1990s, which provided a 'consensus range' of between 2 and 5 per cent of global gross domestic product (GDP) – or between USD1.47 and USD3.69 trillion (based on a global GDP of USD73.9 trillion in 2015).²⁴

These figures were endorsed in a recent meta-analysis conducted by the United Nations Office on Drugs and Crime (UNODC), which estimated the total illicit financial flows at 3.6 per cent of global GDP or around USD2.7 trillion (adjusted) annually, of which 2.7 per cent or USD2 trillion was available for laundering through the international

authorities. The US government successfully forced the disclosure of roughly 4 450 account identities of US taxpayers, leading to a host of penalties and prosecutions as well as a USD780 million fine payable by UBS to the US government. See AJ Cockfield 'Big data and tax haven secrecy' (2016) 18 *Florida Tax Review* 483 508-509.

- 20 The 2008 Lichtenstein tax affair originated when a bank employee surreptitiously copied bank records listing over 1 400 customers with anonymous bank accounts. A compact disc with this bank account information was purchased by the German government for €4.2 million, and eventually was transferred to governments and tax authorities throughout the world, leading to audits and prosecutions of non-compliant taxpayers. See Cockfield (n 18 above) 507; M Esterl, GR Simpson & D Crawford 'Stolen data spur tax probes' *The Wall Street Journal* 19 February 2008.
- 21 According to the European Commission, 'tax evasion' generally comprises illegal arrangements where tax liability is hidden or ignored, that is, the taxpayer pays less tax than he or she is supposed to pay under the law by hiding income or information from the tax authorities. 'Tax avoidance' is defined as acting within the law, sometimes at the edge of legality, to minimise or eliminate tax that would otherwise be legally owed. It often involves exploiting the strict letter of the law, loopholes and mismatches to obtain a tax advantage that was not originally intended by the legislation.
- 22 JS Henry 'The price of offshore revisited' *Tax Justice Network* July 2012, http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf (accessed 19 October 2017).
- 23 Quantitative estimates suffer from a number of methodological shortcomings, which are exacerbated by inconsistencies in defining predicate offences (eg legality or otherwise of 'facilitation payments' – given to induce foreign public officials to perform an act or exercise a function); terminological uncertainty; and legal grey areas (eg not all jurisdictions agree on the dividing lines between 'tax evasion', 'tax avoidance' and 'tax fraud'). Accordingly, the figures cited are imperfect estimates and based on a combination of inferences from macro-economic data and direct information collected by law enforcement agencies, financial intelligence units, and taxation and customs authorities.
- 24 See World Bank National accounts data 2015, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (accessed 19 October 2017).

financial system – around the midpoint of the earlier International Monetary Fund (IMF) consensus range.²⁵

Of course, not all illicit financial flows are hidden within, or routed through, secrecy jurisdictions. Of the amounts identified above, the Tax Justice Network estimates the total amount of private wealth held in secrecy jurisdictions at somewhere between USD24 to USD36 trillion.²⁶ Other models, based on differing data sets and utilising narrower assumptions, place the total much lower, at around USD7.6 trillion (roughly 8 per cent of global GDP). Even following the most conservative estimates, this results in a global ‘tax gap’ – the difference between tax actually collected and that which is theoretically due and payable – of USD190 billion per year.²⁷

While illicit financial flows and the hidden wealth phenomena are global issues, their impacts are felt disproportionately in the developing world. It is estimated that developing countries lose USD1 trillion each year as a result of corrupt or illegal cross-border deals, many of which involve anonymous companies.²⁸ An Oxfam analysis shows that in Africa alone, approximately 30 per cent of all financial wealth – a total of USD500 billion – is held in secrecy jurisdictions. This is estimated to cost African countries USD14 billion a year in lost tax revenues; enough money to pay for healthcare that could save the lives of 4 million children, and to employ enough teachers for every African child to receive an education.²⁹

At the April 2009 London Summit, G-20 member states again committed to taking action against non-cooperative secrecy jurisdictions. Announcing their capacity and willingness to ‘deploy sanctions to protect our public finances and financial systems’, the G-20 successfully pressured each of the jurisdictions identified by the OECD as being non-compliant with existing international standards on tax transparency to enter into a range of bilateral tax information exchange agreements (TIEAs).³⁰ The Summit was hailed as a watershed moment for global financial transparency, with the G-20 leaders declaring at the conclusion of the

25 UNODC ‘Estimated illicit financial flows’; figures in US dollars (USD) extrapolated from GDP figures and adjusted according to World Bank data as at 2015; see n 23 above.

26 Initial estimates outlined in JS Henry ‘The price of offshore revisited’ updated in 2015; see JS Henry ‘Taxing tax havens’ *Foreign Affairs*, 12 April 2016.

27 G Zucman *The hidden wealth of nations: The scourge of tax havens* (University of Chicago Press: Chicago 2015).

28 One ‘The trillion-dollar scandal’ <http://www.one.org/international/policy/trillion-dollar-scandal/> (accessed 19 October 2017).

29 Oxfam ‘An economy for the 1%’ https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf (accessed 19 October 2017).

30 TIEAs were promoted by the OECD as a means for countries to administer and enforce their tax and criminal laws by facilitating the exchange of foreign tax information that can then be used in an examination of a taxpayer.

Summit that ‘the era of banking secrecy is over’.³¹ While arguably premature in light of subsequent critiques of the effectiveness of TIEAs,³² the G-20’s call for jurisdictions to adopt high standards of transparency and information exchange in tax matters led to the restructuring of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes³³ and, ultimately, to amendments being made to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which laid the foundations for the global shift towards Automatic Exchange of Information (AEOI).

6 Political response to the offshore leaks disclosures

Another significant turning point in the global push for financial transparency came in April 2013, when the International Consortium of Investigative Journalists (ICIJ) released the first of what would prove to be several leaks involving vast quantities of financial data taken from within secrecy jurisdictions.³⁴ The cache of documents comprising the initial ‘offshore secrets’ leaks contained more than 2.5 million records, which revealed the previously secret dealings of over 120 000 offshore companies and private trusts, implicating more than 70 000 people from 170 countries and territories.³⁵ The leaked data provided a unique insight into the methods by which individuals were using networks of shell and shelf companies in tax havens to criminally evade taxes, launder illegal earnings, and finance cross-border terrorism,³⁶ and provided objective evidence for the severity of the crimes and abusive practices that could be successfully perpetrated by taking advantage of both a globalised financial system and incomplete and fragmented national tax and financial transparency frameworks.

A lack of knowledge about who ultimately controls, owns and profits from companies and legal arrangements, including trusts, not only assists those who seek to evade tax, but also those who seek to launder the proceeds of crime, often across borders. Shell companies can be misused to facilitate illicit financial flows stemming from corruption, tax evasion

31 See Anti-Corruption Summit London 2016: Communiqué 12 May 2016, <https://www.gov.uk/government/publications/anti-corruption-summit-communique> (accessed 19 October 2017).

32 See eg DS Kerzner & D W Chodikoff ‘The OECD’s war on offshore tax evasion 1996–2014’ in DS Kerzner & D W Chodikoff (eds) *International tax evasion in the global information age* (Palgrave Macmillan: 2016); A Miller & L Oats *Principles of international taxation* (Bloomsbury Professional: Hampsbury 2012).

33 Previously known as the ‘Forum on Harmful Tax Practices’.

34 Measured at 260 gigabytes, the total size of the leaked files obtained by the ICIJ was more than 160 times larger than the leak of US State Department documents by WikiLeaks in 2010. See G Ryle et al ‘Secret files expose offshore’s global impact’ ICIJ, <http://www.icij.org/offshore/secret-files-expose-offshores-global-impact> (accessed 19 October 2017).

35 As above.

36 See Cockfield (n 18 above) at 485.

and money laundering. The misuse of shell companies can be a severe impediment to sustainable economic growth and sound governance. We will make a concerted and collective effort to tackle this issue and improve the transparency of companies and legal arrangements. Improving transparency will also improve the investment climate, ease the security of doing business and tackle corruption and bribery. It will support law enforcement's efforts to pursue criminal networks, enforce sanctions, and identify and recover stolen assets.³⁷

The G-8 subsequently committed to taking concrete action, based on a number of principles considered fundamental to the transparency of ownership and control of companies and legal arrangements. These principles later were largely reiterated by the G-20 in adopting the High-Level Principles of Beneficial Ownership' at the Brisbane Summit in November 2014.

6.1 G-8/G-20 principles of beneficial ownership

- Beneficial ownership is defined in a way that captures the natural person(s) who ultimately owns or controls the legal person or legal arrangement.
- Legal persons obtain and hold their beneficial ownership and basic information onshore, and that this information is adequate, accurate, and current.
- Trustees of express trusts (and other similar legal arrangements) maintain adequate, accurate and current beneficial ownership information, including information of settlors, the protector (if any) trustees and beneficiaries.
- Relevant authorities have timely access to adequate, accurate and current beneficial ownership information.
- Authorities understand the risks to which their AML/CFT regime is exposed and implement effective and proportionate measures to target those risks.
- The misuse of financial instruments and of certain shareholding structures that may obstruct transparency, such as bearer shares and nominee shareholders and directors, is prevented.
- Financial institutions and designated non-financial businesses and professions (DNFBPs) are subject to effective AML/CFT obligations to identify and verify the beneficial ownership of their customers.
- Effective, proportionate and dissuasive sanctions are available for regulated businesses that do not comply with their obligations.

37 Lough Erne G8 Leaders' Communiqué, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf (accessed 19 October 2017).

- National authorities cooperate effectively domestically and internationally to combat the abuse of companies and legal arrangements for illicit activity.

In practice, these principles broadly reiterate requirements regarding the transparency of ownership and control of companies and legal arrangements that already had been in place for many years under the FATF standards.³⁸ Nonetheless, the commitment to action demonstrated collective buy-in to these issues at the highest political level, and paved the way for further strengthening of regulatory frameworks.

The European Commission sought to capitalise on this momentum, passing the Fourth Anti-Money Laundering Directive (4th AMLD) in December 2014. The new Directive brought the EU framework into line with the revised 2012 FATF Recommendations by extending the scope of the existing regime and strengthening obligations in a number of areas, including the risk-based approach, ongoing monitoring requirements, beneficial ownership identification and record keeping requirements, politically-exposed persons (PEPs), the scope of predicate offences, and third party equivalence. Controversially, the 4th AMLD also included express requirements for EU member states to keep central registries of accurate and current information on the ultimate beneficial owners of legal entities. This requirement went beyond the wording of the final G-8 and G-20 Communiqués, which noted only that central registries were a possible means of achieving compliance, rather than a necessary one. It is unclear at this point how many jurisdictions will follow the lead of the EU in mandating central registries for beneficial ownership information, or how many will choose to make them publicly accessible. The UK and Ukraine already have implemented public registries, while France, The Netherlands, South Africa, Nigeria, Afghanistan, Kenya, Ghana and Denmark have stated their intention to do so. Ireland, Australia, New Zealand, Indonesia, Jordan, Norway and Georgia reportedly are

38 The FATF Standards comprise the FATF Recommendations, their Interpretive Notes and applicable definitions in the Glossary. The FATF Recommendations set out a comprehensive and consistent framework of measures that countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. The first iteration of the FATF Recommendations was published in 1990 ('Forty Recommendations'), and subsequently amended in 2001 to incorporate standards dealing with the issue of terrorism financing ('Eight Special Recommendations'). In 2003/04, the FATF made revisions to the existing Recommendations, and added a Ninth Special Recommendation ('40+9 Recommendations'). A comprehensive review was again conducted in 2012, and the Recommendations were expanded to deal with the financing of proliferation of weapons of mass destruction, and to be clearer on transparency and tougher on corruption.

39 Country Statements from the UK Anti-Corruption Summit 2016 <https://www.gov.uk/government/publications/anti-corruption-summit-country-statements> (accessed 19 October 2017) (France, The Netherlands, South Africa, Nigeria, Afghanistan, Kenya and Ghana); see also Global Witness 'Anti-corruption summit: Afghan commitments a step forward in the fight against corruption' 13 May 2016,

considering doing the same.³⁹ The 4th AMLD entered into force on 26 June 2017.

Meanwhile, in July 2016, the European Commission subsequently published further proposed amendments to reinforce the Directive (unofficially termed the 5th AMLD), which *inter alia* will extend the scope of the central registries to include trusts and other forms of legal arrangements and enable public access on the basis of a demonstrated ‘legitimate interest’ (which is to be defined by each member state).⁴⁰ Member states may also choose to grant wider public access at their discretion although, should they do so, they must have due regard to the balance between the public interest to combat money laundering and terrorist-financing (ML/TF) and the protection of the fundamental rights of individuals, in particular the right to privacy and the protection of personal data.

However, these proposals have been strongly criticised in a February 2017 opinion issued by the European Data Protection Supervisor (EDPS), which found that they

significantly broaden access to beneficial ownership information by both competent authorities and the public, as a policy tool to facilitate and optimise enforcement of tax obligations. We see, in the way such solution is implemented, a lack of proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection.⁴¹

The principle of proportionality requires that limitations to personal rights and freedoms may only be made if they (i) are necessary; and (ii) genuinely meet objectives of general interest (in this instance, as determined by the EU) or the need to protect the rights and freedoms of others. Accordingly, the EDPS has recommended that access to beneficial ownership information be limited only to those entities in charge of enforcing the law. The proposed amendments remain under review, with both the European Commission and European Council waiting for parliamentarians to agree on their final negotiating positions.

<https://globalwitness.org/en/campaigns/afghanistan/anti-corruption-summit-afghanistan-commitments-step-forward-fight-against-corruption/> (accessed 19 October 2017).

40 See <http://www.consilium.europa.eu/en/press/press-releases/2016/12/20-money-laundering-and-terrorist-financing/> (accessed 20 October 2017).

41 EDPS ‘Opinion on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC: Access to beneficial ownership information and data protection implications, 2 February 2017.

7 **Fall-out from the Panama and Paradise Papers disclosures**

On 3 April 2016, journalists from 107 media organisations in more than 80 countries released the first wave of stories reporting on 2.6 terabytes of confidential information leaked to the German newspaper *Süddeutsche Zeitung* from the database of Mossack Fonseca, the world's fourth biggest offshore law firm. The Panama Papers leak contained 11.5 million documents, representing more data than the US diplomatic cables released by WikiLeaks in 2010; the Offshore Leaks in 2013; the Luxembourg tax files in 2014; and the HSBC files in 2015 combined. The files contained the confidential records of over 214 000 companies, trusts and foundations set up across the 21 secrecy jurisdictions where Mossack Fonseca operates, and detailed the involvement of over 14 000 intermediaries (such as lawyers and tax advisors) who directed their clients to use the firm's services. These records revealed details of the previously-hidden financial dealings of 12 current and former heads of state; 61 associates of current or former heads of state; and 128 current and former political and public officials.

The political pressure was increased by the recent revelations, by what came to be known as the Paradise Papers, which once again highlighted the need to know who the ultimate owners of opaque vehicles are. There were over seven million documents that were analysed by the International Consortium of Journalists, suggesting that there was more than USD350 billion lost every year by countries in illicit flows. It is still too early to see how governments will deal with the latest revelation.

7.1 **G-20 call for action on tax and beneficial ownership transparency**

At their meeting on 13 April 2016 in Washington DC, the G-20 Finance Ministers and Central Bank governors called on the FATF and the Global Forum to consider ways of improving the implementation of the international standards on transparency, including on the availability of beneficial ownership information and its international exchange. In September/October 2016, the FATF and the Global Forum outlined their initial proposals:

- Greater emphasis must be placed on beneficial ownership in follow-up processes to both the FATF mutual evaluations and the peer reviews conducted by the OECD Global Forum.
- The Global Forum recently agreed upon new Terms of Reference (ToR) for the second round of peer reviews of the Exchange of Information Rules (EoIR) Standard. The new ToR require that all jurisdictions have access to information regarding the beneficial ownership of entities and

legal arrangements operating in their jurisdictions (as defined by the FATF), and allow for its international exchange for tax compliance purposes.

- This new round of reviews, which has just commenced, therefore will include the assessment of the effectiveness of the implementation of the beneficial ownership standard and should drive forward improvements in implementation.
- Enhanced cooperation between the FATF and the Global Forum to further ensure coherence and mutual reinforcement to ensure work is mutually supportive, and promote clear and consistent recommendations to improve implementation.
- Although the scope of FATF and Global Forum assessments differ, some practical challenges recur in the context of different legal and administrative systems, for instance how to ensure the accuracy of ownership information held in a company registry, or how to enable ownership information to be exchanged between fiscal and law enforcement authorities, in both directions. For this reason, it is important to ensure that countries receive clear and consistent recommendations on how to improve their implementation of the international standards on beneficial ownership for AML/CFT and tax purposes. This minimises confusion on the part of assessed countries about what steps they need to take to improve implementation. The FATF Secretariat and Global Forum Secretariat will map where the respective standards and assessment processes coincide, and consider ways to promote clear and consistent recommendations to countries.
- Engage with relevant bodies to compile and disseminate examples of effective implementation for ensuring the availability, timely access to and exchange of accurate and reliable legal and beneficial ownership information for tax purposes.

The OECD has also indicated its willingness to the G-20 Finance Ministers and Central Bank governors to undertake further work in the tax area relating to beneficial ownership information for legal entities and arrangements. Specifically, the OECD's contribution, which is designed to complement the FATF and Global Forum's proposals, would focus on the following components, with progress reported to the G-20 in 2017:⁴²

- **Gap analysis:** Conduct an analysis to determine whether there are gaps between tax compliance needs (both civil and criminal) for beneficial ownership information, and the relevant FATF standards for AML and, where gaps are identified, suggest possible solutions taking cost benefit considerations into account;
- **Designing structured and electronically searchable data sets of ownership information:** Review the existing data structures and formats used for the US Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS), referred to as 'FATCA/CRS', and explore the benefits, costs and issues involved in the wider adoption of the

42 OECD Secretary-General's tax report to G20 Finance Ministers, October 2016.

existing FATCA/CRS common structure and related formats for possible use by other repositories of ownership information such as registries, designated non-financial businesses and professions.

- **Domestic access to beneficial ownership information:** Map the current state of play with respect to the legal ability to countries and jurisdictions to share or access beneficial ownership information amongst different agencies domestically, including information received from a treaty party. With the results of this mapping exercise, explore the possibility of improving the sharing of beneficial ownership information between competent authorities as well as other authorities, including tax authorities in their 'civil' tax capacity.
- **Improving international access to beneficial ownership information:** Map the current state of play concerning the legal rules with respect to the ability to obtain beneficial ownership information both in the FATF and tax domains, and evaluating the practical issues associated with the existing framework with the goal of improving international access.

8 Conclusion

This is the background against which the chapters in this volume should be read. This publication focuses on the experience of African countries in counteracting illicit financial flows, which include bribery, money laundering, tax evasion and other criminal activities. These studies are part of a broader project on tax and good governance which were undertaken over a three-year period.⁴³

⁴³ See <http://www.wu.ac.at.at/taxlaw> (accessed 19 October 2017).