Strengthening information sharing processes

Think piece on enhancing information sharing to prevent and detect corruption and crimes linked to corruption, prepared by the OECD for the G20 Anti-Corruption Working Group.

1. With the globalisation of the economy, the prevention, investigation and prosecution of serious economic crimes, including corruption frequently has an international dimension. Since competent authorities, unlike criminals, have powers that are limited to jurisdictional boundaries, cross border co-operation amongst the relevant agencies is crucial for investigating corruption and crimes linked to corruption, prosecuting the offenders and recovering stolen assets and the proceeds of those crimes. An important element of effective international cooperation is the exchange of information. Effectiveness concerns not only the relevance and completeness of exchanged information but also its timeliness given the ability of criminals to quickly transfer assets and destroy evidence.

2. There is a broad range of information that is relevant to investigations of corruption and crimes linked to corruption. It can include information related to the misuse of complex corporate structures, legal and beneficial ownership information, financial transactions and records, and tax and accounting information. To facilitate cross-border exchanges of information, competent authorities must frequently make use of appropriate legal agreements, which set out the legal basis, terms and procedural requirements for the requests. Such agreements include multilateral administrative assistance agreements, bilateral treaties, multilateral treaties such as the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organised Crime (UNTOC), and competent authority agreements and other agreements. In practice, criminal investigators mostly rely on Mutual Legal Assistance Treaties (MLATs) for cross-border information requests (OECD, 2017, p. 68[1]).

3. In many cases, the use of these legal instruments by law enforcement remains focused on the exchange of information on request, whereas on the tax side there is an increasing use of automatic as well as spontaneous exchanges of information. For example, under the OECD/G20 Common Reporting Standard information is exchanged annually between more than 100 jurisdictions on financial accounts held outside of the jurisdiction of the account holder.

4. In addition, although the legal gateways for exchange of information on request in criminal investigations are in place in many cases, practical obstacles can impede the effective international sharing of information. These include delays caused by a lack of clear communication channels, confusion about

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1 This is without prejudice to articles 46(4) and 56 of UNCAC and the Egmont principles of exchange of information, which provide for spontaneous transmission of information related to criminal proceedings. In this regard, informal cooperation is happening with increasing frequency.
the organisational structure in the counterpart (and thus delays in identifying the correct agency to which to address the request), and practical communication difficulties including language, or lack of clarity in the presentation of the facts of the request. Results from OECD surveys also show that jurisdictions may not keep detailed data to monitor the use of international co-operation tools, which may contribute to a lack of awareness of these tools (OECD, 2017, p. 6912). The establishment by the UNODC of the Global Operational Network of Anti-Corruption Law Enforcement Authorities (GlobE), which was conceived under the “Riyadh Initiative” during the Saudi G20 Presidency, should help in addressing these challenges.

5. By following the directives set forth in the G20 Action on International Cooperation on Corruption and Economic Crimes, Offenders, and Recovery of Stolen Assets (G20 Anti-Corruption Working Group, 202019), this note develops ideas for streamlining exchange of information between agencies involved in the fight against corruption and crimes linked to corruption, in different jurisdictions. It is based on the understanding that better sharing of information is key to successful criminal investigations and prosecutions. This includes expanding the use of exchanged tax information for other criminal investigation purposes, interlinking beneficial ownership registries to allow for real-time searches, and exploring ways to reduce delays in the provision of mutual legal assistance.

Using exchanged tax information for investigating corruption and other serious crimes

6. Tax administrations have an important role to play in combatting corruption and other crimes linked to corruption. In the course of their activities tax auditors and examiners are in a very strong position to identify indicators of possible corruption, and the information stored in tax administrations can be of relevance for investigators and competent authorities involved in the fight against corruption.

7. The G20 ACWG has noted that information sharing in criminal investigations may draw from the previous G20/OECD experience in cross-border exchanges of information for tax purposes (G20 Anti-Corruption Working Group, 2020, p. 622). The previous decade has seen the effective implementation of international standards for enabling secure international exchanges of information for tax purposes between tax administrations across the globe, upon request and on an automated basis, monitored and evaluated by the Global Forum on Transparency and Exchange of Information for Tax Purposes. Following the introduction of the OECD/G20 Common Reporting Standard (CRS) in 2014, information is now automatically exchanged on an annual basis between almost 100 jurisdictions on financial accounts held outside of the jurisdiction of the account holder. Today, all G20 members take part in automatic exchange of tax information, through the CRS, FATCA or both. The actual exchange of information between tax authorities takes place through secure mechanisms, including the Common Transmission System developed by the OECD Forum on Tax Administration.

8. The international legal framework for the CRS lies in the multilateral OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (MAC), which has 141 participant jurisdictions, including all G20 and OECD members, major financial centres and an increasing number of developing countries.

9. While the MAC provides for administrative assistance in tax matters, including exchange of information and assistance in recovery, article 22(4) provides that exchanged tax information may also be shared with other law enforcement agencies, subject to authorisation by the transmitting country and provided that domestic law in both jurisdictions permits it2 (OECD/Council of Europe, 201113). The OECD

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2 A similar provision can be found in article 26(2) of the OECD Model Tax Convention on Income and on Capital. See also, the 2010 OECD Recommendation of Council to Facilitate Co-operation between Tax and Other Law Enforcement Authorities to Combat Serious Crimes, which encourages countries to incorporate this provision in their bilateral treaties. [https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0384](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0384).
2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions also encourages countries to include in their bilateral tax treaties language allowing the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters such as combating serious financial crimes. Ensuring that criminal investigators can make use of this provision would amplify their possibilities to uncover and combat serious crimes. This is due to the fact that tax examiners and tax auditors often hold information that can assist in criminal investigations of other illegal activities, such as the identification of unexplained funds or sources of income and suspicious activities (OECD/The World Bank, 2018[4]).

10. If most jurisdictions already allow domestic sharing of information between tax and anti-corruption authorities (OECD, 2017, p. 72[6]) (OECD/The World Bank, 2018, p. 55[4]), it seems natural that allowing the sharing of tax information received under international exchange programmes such as the CRS would be a beneficial next step in the fight against corruption and crimes linked to corruption.3

11. In concrete terms, in addition to a political call by the G20 for all jurisdictions to consider sharing CRS information with criminal investigators to combat serious crimes such as corruption, work would need to be carried out on the legal and operational framework to support such exchanges. This could include fostering a culture of information-sharing by making the most of existing law enforcement informal networks4, and assisting jurisdictions that may need to upgrade their domestic frameworks for allowing effective use of these tools, and for implementing international information sharing.

12. At present, law enforcement agencies in some G20 member countries still face legal and operational challenges at the domestic level for sharing information with anti-corruption agencies, tax administrations and other law enforcement authorities. The Anti-Corruption Working Group would need to consider how to address this. A workshop for discussing how to overcome these challenges, under the auspices of the G20 and the OECD Oslo Dialogue, could represent a positive step in that direction.

13. In parallel, this initiative could also entail the training of officials in charge of collecting information (such as tax auditors) on detecting relevant pieces of information which could be the subject of spontaneous sharing with domestic and foreign criminal investigators, and on the steps to follow after such discovery. These capacity building initiatives would draw from existing efforts such as the 2010 OECD Council Recommendation to Facilitate Co-operation between Tax and Other Law Enforcement Authorities to Combat Serious Crimes, and the G20 ACWG-supported OECD International Academies for Tax and Financial Crime Investigation (G20 Anti-Corruption Working Group, 2020, p. 7[2]), as well as from existing law enforcement informal co-operation networks.

Access to beneficial ownership information

14. Corporate vehicles such as companies and other types of legal arrangements may be misused for illicit purposes, including corruption and crimes linked to corruption. The opacity of these structures, which are often used in complex and opaque chains across jurisdictions, can make it difficult to conduct timely investigations through exchange of information on request, and are chosen by criminals for these reasons. In particular, the delays involved when complex structures are used across jurisdictions can frustrate effective investigations allowing criminals time to cover their tracks. The situation could be substantially

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3 In this regard, G20 members Argentina and Brazil, together with other Latin American jurisdictions, are committed to maximising the effective use of exchanged tax information to tackle tax evasion, corruption and other financial crimes (at the time of preparing this piece, they were working on the first action plan on the matter, with support from the OECD). G20 member Mexico has also joined the initiative as an observer (OECD, 2018[III])

4 Informal co-operation would be envisaged where it does not violate any national confidentiality framework (e.g. tax secrecy).
improved if cross-jurisdictional information regarding legal and beneficial ownership\textsuperscript{5} was readily available to the authorities (FATF, 2019\textsuperscript{6}).

15. A big step in transparency is the effective implementation of FATF Recommendation 24, which requires that jurisdictions ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons, and that it can be obtained or accessed in a timely fashion by competent authorities, and of article 12(2)(c) of UNCAC, which requires States parties to take measures to promote transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities. This would greatly boost the work of agencies involved in the fight against corruption when tracing the beneficial owners of the corporate vehicle within their jurisdiction.

16. In the international sphere, and to further enhance transparency and help investigators in pursuing cross-border cases of corruption and other serious crimes, G20 members could consider calling for the interconnection of national legal and beneficial ownership registries in a searchable form, allowing authorised investigators to obtain information across jurisdictions in real-time or close to real-time. This would not only improve timeliness but also make it easier for investigators to trace the links between complex cross-border structures.

17. G20 members may wish to explore the issues involved in setting up a common platform for interlinking national registries that safeguards confidentiality and only allows authorised access. The main benefits of a common, searchable IT-structure for capturing beneficial ownership information include improved speed and investigative capabilities, analytical and risk-mitigation capabilities, international cooperation, and quality of data for both investigators and potentially for financial institutions, if those have been granted access to the registries\textsuperscript{6}. As the CRS XML Schema already reflects a number of FATF Recommendations, it would be a logical departure point for developing a format that could more broadly accommodate legal and beneficial ownership information that could also be accessed by criminal investigators, and potentially other relevant entities and stakeholders.

\textit{Improving the timeliness and format of mutual legal assistance requests}

18. As mentioned before, criminal investigators can be faced with operational obstacles when requesting information from foreign jurisdictions. For these and other reasons, the requested jurisdiction may deem that the request was incomplete or defective, or have a strict interpretation of dual criminality requirements which may hamper the provision of assistance. These barriers represent challenges to successful investigations (OECD, 2012\textsuperscript{7}). It would be helpful to overcome them through, for instance, the implementation of article 46(9)(b) of UNCAC, which requires requested States parties, in the absence of dual criminality and where consistent with the basic concepts of their legal system, to render assistance that does not involve coercive action or, through more creative, simple mechanisms. This is particularly true in the context of asset recovery MLA and is further elaborated on in the related think-piece on asset recovery.

\textsuperscript{5} The Glossary of the Financial Action Task Force Recommendations defines “beneficial owner” as “the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement”.

\textsuperscript{6} If beneficial ownership information in domestic registers is captured in accordance with a common IT-structure, such information could then also be used by financial institutions when performing their AML/KYC obligations under the FATF Standards. While the cross-checking of the information available to financial institutions from domestic beneficial ownership registries would not discharge them from performing their AML/KYC obligations, it may provide a useful tool for assessing potential risk or quality issues when collecting beneficial ownership information from customers.
19. The streamlining process could start by ensuring that existing open-access online databases are updated and well-known to investigators and other competent authorities. These would display the contact details of investigators’ counterparts in other jurisdictions for sending/receiving requests. They would reduce the work of investigators in trying to understand who their counterpart is in another jurisdiction. Further, it would allow them to engage informally, either directly or through law enforcement networks, with the counterpart on the information contained in the request, as well as the appropriate format for the request, before submitting it.

20. Furthermore, the online database could contain templates agreed by jurisdictions for legal assistance requests, to assist investigators in completing them. This is something that has been developed in the tax space for exchange of information requests, and that international organisations such as UNODC have developed in the criminal sphere. Such templates would ideally be available in several languages and could form part of an automated electronic system in due course. They should also have the functionality to allow jurisdictions to add any other specific information they deem appropriate for investigators, particularly pertaining to potential limitations to assistance based on domestic regulations.

In the medium term, as they look at similar options in the law enforcement sphere, the G20 ACWG might wish to take into account the lessons learnt from the successful development and implementation of the OECD Common Transmission System (CTS) for the secure exchange of confidential tax information and requests. The CTS has already been used for the exchange of vast amounts of information on financial accounts under the OECD Common Reporting Standard and its most recent version allows for a wider range of tax relevant information and communications to be sent between tax administrations. The development of such a tool for use by the wider law enforcement community could significantly reduce time and operational constraints for investigators, prosecutors and competent authorities intrinsic to existing MLA mechanisms, and would ensure that the information is sent and received in a secure manner.

References


