Tax Transparency and Corruption Project

WU Global Tax Policy Centre (GTPC)

In association with

World Bank Group, United Nations Office on Drugs and Crime (UNODC) and African Tax Institute (ATI)

ONLINE CONFERENCE ON TAX TRANSPARENCY AND CORRUPTION:

Summary – Discussion Highlights

Day 1 – Monday, 9th November 2020 – The misuse of client attorney privilege

Introduction

During the first round of this conference held on 23rd and 24th September 2020, we focused on the issues of beneficial ownership and unexplained wealth orders (UWO). This round focusses on client attorney privilege (CAP) and inter-agency cooperation. The background notes and presentation slides for all sessions are available on the cloud (PW:Vienna2020).

Overall, the Tax Transparency and Corruption project aims to provide a neutral forum for discussion between countries, governments, business, tax authorities, customs departments, financial intelligence units (FIUs) and other law enforcement agencies which are the key players in combatting Illicit Financial Flows (IFFs).

The emphasis is on the practical implementation challenges, and of developing best practice manuals, guidelines, draft MOUs, draft legislation and building the network. We have focused on developing practical case studies through the five focus groups:

- Beneficial Ownership
- Unexplained Wealth Orders (UWO)
- Inter-Agency Cooperation
- Client/Attorney Privilege
- Cooperative Compliance

The first session will begin with CAP, which is a new issue for many African countries. A few are dealing with this challenge, including Kenya and South Africa where the revenue authority's wide information access powers have been challenges in court in so far as they may violate privilege. Beyond Africa, the UK, Luxembourg, France and Australia to name a few are dealing with the issue of misuse of CAP and how it can frustrate or delay investigations on tax and other financial crimes. The question is not whether the concept is sound, but under what circumstances it has the potential to be misused to frustrate investigations by FIUs or tax authorities. It is an opportunity to hold a discussion between government, enforcement agencies, business and the legal profession to determine what is acceptable and what is not acceptable.

Presentation: Overview of the progress made on Client Attorney Privilege

- The financial crisis of 2009 and the data leaks which followed like Monsac Fonseca to paradise papers were the trigger points for the intense media scrutiny and pressure from civil society demanding increased transparency and scrutiny. Some legal professionals were found to use client-attorney privilege as an instrument to frustrate investigation.
- One of the most prominent cases where the use of privilege to frustrate claim was Glencore case in Australia. It not only brought to the forefront the issue of misuse of CAP but also the role of legal professionals in its misuse.
- The approach adapt was how to avoid Misuse of client-attorney privilege so it can be effectively addressed without questioning the fundamental principle of client-attorney privilege.
- Specific questions arise:
    - Transactions or activities that should be covered within the scope of the client-attorney privilege to make a clear demarcation in the study.
    - Implications on the right of taxpayers, especially for the right to privacy which is one of the most important fundamental rights of taxpayers and embedded in the Constitution of most of the countries.
    - The role and responsibilities of gatekeepers/enablers, especially the legal professionals and how can the acceptable and unacceptable uses of the privilege is identified.
- The virtual meetings of the focus groups concluded that we need to bring about behaviour change in the attitude of legal professionals towards misuse of CAP. Also, the need to have a robust ethical or professional codes of BAR association which can deter such misuse along with the constant dialogue between law enforcement agencies and legal professionals.
- Two papers on the issue capturing findings of the Focus groups and the issues which that are being addressed are attached as background documents to the conference.
- As a next step for the focus group, all the case studies and experiences coming out of a discussion from the focus groups are being documented, and a database of cases is being built up.
- The next call of Focus group is scheduled on 16 December 2020 (13.00 PM Vienna time). Everyone is invited to join the focus group calls to contribute. The main objective is to come out with practice manuals or guidance note to address the issue of misuse of CAP.

Presentation: South Africa

- In South Africa, like other common law countries, Client attorney privilege applied to a confidential communication between a client and attorney communicated while obtaining legal advice.
- As a rule of evidence, if the communication between attorney and client which is subject to privilege is recorded secretly or if it has been leaked then it cannot be used in the court of law as evidence.
- South African Constitution provides for the right to privacy. It also has a promotion of access to information act which upholds privilege by excluding access to privileged information.
- South Africa has C-AP under the common law system that also extends to in-house legal counsel. The same has been confirmed in **South African Airways Soc. v BDFM Publishers**

(Pty) Ltd and others[1] wherein it was clarified that all communications from an attorney who is not in private, independent practice but is an employee of an entity, such as an in-house legal advisor, are also subject to privilege.

- The law explicitly provides for privilege only for lawyers who are admitted as attorneys, advocate to practice law. Just having a law degree is not enough to claim privilege. Also, the South African law does not have any jurisprudence on the applicability of CAP to advice provided by foreign qualified lawyers.
- Non-lawyers like chartered accountants, professional accountants or tax practitioners in Africa have complained about lawyers having the advantage of privilege vis-à-vis them.
- In South Africa, whoever claims CAP, has to provide rational justification as to its claim. Judge look at the claim objectively as to whether to allow the privilege or not. In a way, the claimer has to disclose the documents to judge before the judge can decide whether to allow the claim of privilege on the document or not. This makes the position of the claimant of CAP quite tricky.

Discussion highlights:

- The situation is complex – we need to put this conversation in the broader context of confidentiality and citizens' rights. Some of the distinctions are not that clear.
- Privilege is a right of the client and a prohibitory obligation for the legal practitioner. The idea is to protect the client, and therefore the client can waive this privilege. Once the client discloses to a third party, they waive the privilege and the legal practitioner can no longer invoke it on behalf of the client.
- Different professions have different rights and obligations, nothing prohibits a form of privilege to be awarded or given to tax practitioners. However, there is little desire to grant a non-legal person a legal right or power that should be limited to legal practitioners. The preference may be to create a tax specific privilege that has a lower threshold than the legal one.
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- In the context of accountants seeking a level playing field with legal practitioners – this has been before the South African parliament three or four times in the last decade and the answer has always been no. This is in line with the UK *Prudential Plc* (2010) case – where the court said it is not by accident that this privilege is not extended to accountants. The government has decided against it as a matter of public policy.
- We must look at the importance of tax recovery, and there is no question that the privilege can be used to obstruct audits and more particularly transfer pricing or GAAR investigations by tax authorities.
- Generally, where an accountant provides advice to a client, they are not entitled to privilege, including for access to their working papers.
- We need to evaluate confidentiality as a whole and how to differentiate between the types. We all understand taxpayer confidentiality, and the question is when other authorities should have access to their information and which authorities? Not just revenue authorities but other institutions as well.
    - Then the AML intelligence confidentiality is rather different. With corruption taking place when there is a problematic commissioner, they may also hide under confidentiality (how do you deal with this).

[1] https://www.saica.co.za/integritax/2016/2531._Legal_professional_privilege.htm

  - When the AML authorities need information on how do they obtain it from the revenue service? (and vice versa)
  - How do we view banking secrecy? Whilst the FIU can access information; when authorities need to use that information for prosecution, they need to use another act to access it.
  - To what extent, where politically exposed persons involved (PEPs), can you ensure that their information is easily accessible how can you ensure that information will not be used against them by their political opponents.
- The extent that the commissioner or head of revenue agency is not seen to be a person of integrity, this affects tax morality.
- As much as we are limited to CAP, there is a lot that could be done by looking at confidentiality holistically without infringing constitutional rights. It is not an easy thing to do, considering the need to balance the rights of individuals and institutions as well.
- Where do we place this ring of confidentiality? In the past tax authorities could not share tax information with any other authorities, this is gradually changing, particularly with inter agency cooperation. Perhaps the confidential circle must include all government departments that are involved in combatting tax or financial crimes.
- The reality is that it is a narrow manifestation of globalization, and it demonstrates that national rules with territorial reach are not always the best way to deal with some of these issues especially since countries will deal with confidentiality differently.

Presentation: Thematic experience,

- We need to understand that we are having three parallel discussions in the international tax arena and the international regulatory policy community:
  - What are the roles and responsibilities of gatekeepers? (Even if they do not want to be identified as enablers) This discussion is taking place in a variety of international organizations and goes beyond the legal professions (Arts dealers etc.); it also goes beyond the law itself.
  - This discussion on Client attorney privilege is taking place in a number of countries that have different approaches.
  - There is the asymmetry that exists between tax administration and defense lawyers in terms of information, skills, capacity, human resources, technical resource etc.
- Focusing in particular on CAP: There are many terminologies used, including confidentiality or professional privilege.
- The right of privacy that exists between a lawyer and client is the primary focus – it is not reflected in the Universal Declaration on Human Rights (UDHR). However, in the context of the European Convention on Human Rights, there have been cases dealing with privilege (*Michaud v France*):
  - General protection of confidentiality exists, but Article 8 (privacy) provides additional protection and to go past it, one must be very cautious.
- From a public policy perspective, there are two public interests at stake the preservation of the ability to collect taxes and the preservation of the right to privacy. They are not contradictory policies but may conflict, mainly where the legal professional is used or misused because of that very privilege.
- There is a perception in the legal profession (which is often a reality) that the request for information can be abused for political purposes or other purposes. (This is why people need

to have confidence in the integrity of a commissioner or any other law enforcement agency's leadership)

- The French context:
    - There is a specific provision in the law on professional secrecy and a lawyer that does not fulfil the duty by providing protected information can face disciplinary sanctions or one-year imprisonment.
    - Attorneys who become in-house lawyers must request a temporary withdrawal from that status and cannot claim privilege since they will be considered as not having the same independence.
- What are the approaches to address misuse?
    - Financial Action Task Force – with the FINCEN files, it is clear that the full issue has not been addressed. We must distinguish between a legal professional participating in the scheme and one providing legal advice.
    - National Code of Conduct of the French Bar – requires the professional withdraw from the file but this does not prevent the client from doing lawyer shopping since there is no information shared on the scheme itself. No transaction can be reported as suspicious since they did not engage. Violation of this will lead to disciplinary action.
    - Task Force at the OECD, focusing on the legal profession and their role in international commercial transactions. They tried to set up a set of principles irrespective of the jurisdiction. They tried to capture the issue of misuse of confidence and privilege. Please see the report here.
        - The Council of Bars and Law Societies of Europe criticized it heavily – they felt that the report disrespected the majority of lawyers who did not behave in this way. They felt that it named and shamed all lawyers.
        - While it was a valid concern, it meant that the cases of misuse could not be effectively addressed. There was no consensus with the professionals, and this was telling.
- Perhaps the approach is to engage the professionals in awareness building –
    - To engage in the discussion differently will be key. Mossack Fonseca demonstrated that some will still be willingly involved and some will not be aware.
    - Are all lawyers fully equipped to understand and evaluate the risks?
    - Asymmetry needs to be addressed too in terms of the skills base that defence lawyers hold in comparison to the tax authority.

Discussion highlights:

- There may be information that the tax authority holds that the lawyer does not. However, it will be difficult for the authority to know that the lawyer has been approached. Perhaps there needs to be greater cooperation between the authority and the legal professional which could serve to build their awareness.
- Widespread use of mandatory disclosure reporting may be useful here.
- Norwegian concept of active investigations – carried out by the lawyer internally, on behalf of the company. These are still protected by privilege and this has given rise to concerns. Similarly, in France, lawyers are not required to publish the result of the investigation.

Panel discussion highlights:

- Nigeria Chartered Institute of Taxation:
    - Statement of taxation standards – for practitioners.

  - Even if a practitioner has a non-disclosure agreement with their client and it is discovered that it is intended to hide criminality or fraud, the CIT will hold the advisor liable.
  - There is an expectation that one should know their client.
  - Case study – the client did not inform the attorney that the transactions were facilitating money laundering and the FIU was monitoring the financial account transactions and froze the account.
  - Tax professionals and legal professionals are required to carry out KYC. They can be held liable where a client may be engaging in financial crimes.
  - Criminality will override confidentiality.
  - Privilege should be limited, particularly where fraud or tax evasion are suspected. Tax authorities must carry out risk assessments of taxpayers as well.
  - There have been efforts to connect databases in Nigeria, and this could support greater awareness amongst authorities and professionals.
  - The Ethical Standards of professionals have become key because their integrity has come into question.
  - The CIT are also willing to investigate their members and withdraw their practising license.
- The bottom line is how much due diligence the lawyer should do and how much they can do. If the client provides information that they claim to be true, should the lawyer go beyond that?
- Perhaps technology would be useful – providing beneficial ownership and other identifying information. Connecting databases is also key.
- In France, there is no difference between lawyers within a law firm and those within audit firms, but the independence of the lawyer should be maintained. There is a trend, however if they can demonstrate that they have a separate system of archiving (files are not mixed) and that they can maintain their professional secrecy, then the privilege should apply.
- It is important to understand where privilege lies. It lies with the particular attorney or advocate and not the firm that they work. So even if they work for an audit firm, they can still maintain that privilege. Indeed, persons working for law firms that are not legal professionals will not have the privilege.
- African Legal Network:
  - The Kenyan framework is quite similar to the South African one.
  - One issue that does stand out is the reason why privilege is important with respect to the communication. The Evidence Act provides for the privilege and ensures that certain types of information cannot be requested for by authorities. Article 30 of the Constitution provides for the right to privacy and this has to be respected as well.
  - The main challenge in Kenya is that the regulators have far-reaching powers that could be prone to abuse. In one instance (Samura Engineering v. Kenya Revenue Authority) the revenue authority seized hardware and other information from the taxpayer and this was not returned for several months. The High Court found that the right to privacy had been infringed upon and decided in favour of the taxpayer.
  - The Evidence Act also provides that privilege cannot be applied in favour of an illegal act. Any criminality will void that privilege. There is then a need to meet the balance between protecting the rights of taxpayers vis a vis, ensuring that no criminal act has been committed.
  - The Tax Procedures Act provides the tax authority with wide powers to access records and other information of taxpayers, and this overrides all other laws. In Robert K.

Ayisi v. Kenya Revenue Authority, the High Court initially found that this was unconstitutional. However, the High Court has since ruled that it is constitutional.
    - Lawyers do recognize that it is important to ensure that KYC is carried out and they do not support the furtherance of a criminal act. However, the law is up in the air regarding the extent to which the revenue authority can access information in violation of privilege. There needs to be a balance between protecting the confidentiality and the public interest.
- The Kenya Revenue Authority do not face a major challenge in accessing the information they require; most lawyers will provide information on the financial transactions but will not provide the working papers. The biggest challenge is dealing with telecommunication companies, MPESA (the mobile money platform) provider will not provide information citing confidentiality since they claim they do not fall under the central bank regulations. Significant amounts are transacted via this platform.
- Gatekeepers have often provided support to carry out transactions, to what extent can lawyers rely on the advice provided by gatekeepers?
    - Lawyers may not be able to provide some technical advice to the gatekeepers and, to some extent, it means that they must work closely with gatekeepers who are not covered by privilege. Is there a need to extend the privilege to them?
- There have been very few tax lawyers with technical capacity across African countries for some time and this is only now changing. The tendency has been that revenue authorities have invested more in their technical capacity which has made them more capable than the lawyers.
- In domestic legislation, there should be a mechanism providing that lawyers not acting within the ethical standards they should be held liable. This would ensure that they are required to act in line with their ethical standards.
- There seems to be a real disagreement about the evidence of misuse between the professionals and the authorities and we need to look into how to address this. The risks posed by abuse do differ from country to country, depending on the national frameworks. The most egregious examples of abuse should undoubtedly be addressed immediately.
- It is indeed challenging to collect data on this issue and determine how desirable a common framework or a national response would be. However, the OECD has evaluated foreign bribery cases, and the data revealed that in 75% of cases, there was an intermediary. A more recent study has shown an increase to 81%. 6% of the 75% were lawyers.
- We need to be clear about what we mean by the legal profession. Indeed the issue needs to be evaluated more given the role that law firms have played in recent scandals.

Day 2 – Tuesday, 10th November 2020 – Inter Agency cooperation to counter IFFs

Introduction

Inter-agency cooperation is the key to combatting IFFs, not only because it is low-hanging fruit, but also it does not necessarily require legislation, parliamentary approval is not always a determinant especially where the policymakers are hesitant. Indeed, it is a bottom-up process. By cooperating, law enforcement agencies, including revenue authorities, can draw upon their information access and seizure powers for purposes of exchange. There are constraints, and confidentiality requirements may be different for tax authorities in comparison to FIUs, platforms may be incompatible meaning documents cannot be shared in their digital version, cultural differences may also prevent agencies from sharing their weaknesses and successes or agreeing to collaborate.

The first presentation provides an overview of the focus group meetings and the outcomes realized and will form the basis of the discussion today. Please see the background document provided in the cloud.

Presentation – Overview of the progress made on inter-agency cooperation

- Much work on making inter agency cooperation effective was already done on our earlier project on tax transparency and good governance. Currently, we are focusing on what are the last barriers in making inter agency cooperation effective in African countries and how can we get the political leadership and the leadership of enforcement agencies to support the initiative of collaboration whole-heartedly.
- Our work on Inter agency cooperation has been focused on bringing practical challenges faced by law enforcement agencies in making inter agency cooperation effective and learning from the experience of each other.
- The overwhelming response from the discussion in the focus group was that we need politicians who govern the country and the officers who lead the law enforcement agencies from Tax authorities, FIUs, customs to support the initiative of better interagency cooperation..
- There are also other legal issues with respect to data confidentiality/privacy while sharing information with different agencies along with the integrity of the data so that it does not fall in wrong hands or put to the use for which it was not intended.
- As a next step for the focus group, we are documenting all the case studies and experiences which are coming out of a discussion from the focus groups on where inter-agency cooperation is working effectively and where it is not.
- The next call of Focus group is scheduled on 21 January. You all are invited to join for the focus group calls to contribute.
- The main objective is to come out with practice manuals or guidance note for assisting countries in implementing strategies for making inter agency cooperation effective in the fight against corruption and IFFs.

Presentation: World Bank

- At the international level, cooperation is vital for any investigation. It is a low hanging fruit and it is an opportunity, we do not need much to cooperate.
- The work on AML to support AML agencies and through the STAR initiative, the importance of inter-agency cooperation and the difficulties in promoting collaboration has become increasingly apparent.
- Legal framework for inter-agency cooperation is essential for tax investigations primarily because of the level of confidentiality that may apply to information and the extent to which and the mechanisms available for authorities to share this confidential information.
- Civil society is becoming more aware and involved in supporting law enforcement agencies to investigate illicit flows and tax crimes.
- Why Inter-agency cooperation?
    - Because law enforcement agencies work in silos (Even when they are in the same building) – this is not just a national issue. It expands into international organizations too.
    - The feeling is that the information being dealt with is very sensitive, and therefore they want to maintain confidentiality.

- However, more countries are beginning to understand that they cannot fence off an investigation from other authorities – sometimes duplicate efforts could be taking place, and this wastes the resources.
- Involving tax authorities is crucial because they examine the returns and other financial information of taxpayers that other agencies do not have access. Similarly, other law enforcement agencies have a lot of information that could be shared with tax agencies.
- Tax authorities access other types of transactions and identifying information (like beneficial ownership – tax officials may have more of this information than other authorities).
- There is a noticeable trend in Latin America where countries have introduced BO registries and there is a question about whether the authority hosting the registry should be the tax authority. There may be a realization that the tax authority needs the information but can also be a great ally to other law enforcement agencies involved in financial intelligence.
- When carrying out an audit tax authority can identify additional information about the assets held, finances held or sudden increases in wealth, this is very important for identifying potential cases of money laundering. Tax authorities can identify unjustified increases in wealth or inconsistencies that are highly relevant to other law enforcement agencies.
- FIUs have a wealth of data that is becoming increasingly important to other law enforcement agencies – they have access to banking information, suspicious transaction reports (STRs) from a number of stakeholders and cash transaction reports. All of this can be highly useful for tax authorities.
- In terms of STRs, the UK FIU identified that one-fifth of the STRs received identified a new subject of interest and one-quarter of them led to new inquiries related to tax matters.
- In the past, we have overlooked the importance of FIUs working with tax investigators. However, we are finding that more cases can be jointly initiated if there are some cooperation and exchange of information.
- Anti-corruption authorities have access to asset disclosures by PEPs and their importance should also be recognized.
- The link between tax crimes and other financial crimes requires this cooperation and the way in which the hiding of wealth gives rise to a number of crimes necessitates this.
- Within the OECD Oslo Dialogue Ten Global Principles – Principle 8 emphasizes the need for inter-agency cooperation between the tax officials and other law enforcement agencies.

- Legal framework:
  - This is a challenge – it is becoming clear that legal frameworks are not harmonized.
  - On beneficial ownership – differences in the definition between the legal frameworks that govern different financial crimes or mandates of different law enforcement

agencies. The FATF definition has been universally accepted, so the legal framework should be diminutive so that all agencies are working towards the same objective and based on the same framework. It is essential to have a legal framework that is in unity so that all agencies are in harmony (similarly reforms too).

- Are tax crimes a predicate offence to money laundering? If not, it may impede the ability of countries to investigate proceeds of tax crimes.
- Are the assets recoverable?
- Can authorities provide and receive mutual legal assistance?
- A global agreement is necessary – FATF has already set the recommendations, but we are not there yet.
- Where tax crimes are not included as a predicate offence to money laundering in their jurisdictions, practitioners are exploiting the gap..
- We should be concerned with how the definitions fit together! (Both from a perspective of tax crimes and beneficial owners)
- Other potential legal tools can support investigations – availability of unexplained wealth orders, investigation of illicit enrichment (we should have other legal avenues that we can use to investigate and recover), non-conviction based asset forfeiture. Even if a criminal conviction cannot be achieved, there should be avenues to seize the assets.
- A harmonized legal framework at the domestic and international levels will be important for cooperation.
- The existence of laws that permit the sharing of information (financial and tax info) is highly important. It is sensitive information that is often constitutionally protected. If there is going to be information sharing, it should be done in the right way so that there are no issues when in court regarding evidence and confidentiality.
- Authorities should be aware of the procedures required to access certain information and ensure that they do not circumvent any of the requirements since the ultimate objective is to prosecute.
- Access to beneficial ownership information is critical for tax and financial investigation. It is the mother of all investigations for corruption, transnational organized crime, tax crime and other complex financial crimes. Assets held by entities with obscure beneficial ownership structures are of interest, and it means authorities should have direct and timely access to this identifying information. It has been very important that the Global Forum on Transparency and Exchange of Information adopted the same definition of beneficial ownership as FATF. This has permitted more robust criteria providing the basis for the collection of information.
- The ability to use unexplained wealth is an essential tool to investigate people who obtain assets illegally like to enjoy them and flaunt them very publicly. This has been quite common with PEPs; for instance, the Vice President of Equatorial Guinea has had a long history of publicly flaunting assets. In Colombia, the daughter of a customs official based in Florida began posting pictures of a luxury vehicle and lifestyle on

social media and those pictures were used to use non-conviction based assets forfeiture to go after those assets. This is where UWO is a part of the joint project.

- Countries should incorporate unexplained wealth tools into their legal framework to support the recovery of illicit flows.

- How do we get more agencies to cooperate (operational aspects)?
  - Countries working on the STAR initiative have favoured MOUs because they provide a formal framework for cooperation.
  - Joint groups need to identify their objective – when establishing the MOU determine:
    - What are the objectives?
    - Is this to amend or establish policy?
    - Is it for operational work?
    - What are the political implications of setting up this group?
    - How many and which agencies? (How far and wide) or is it just the core agencies for operational purposes?
    - What kind of cooperation is being implemented?
  - Service level agreements between agencies – where one authority provides a service to another, it is a good way to support with technical skills. For instance, if an agency has forensic analysts they can cooperate with another to provide that technical assistance.
  - Specialized investigative units or fusion centres (likely the most ideal way) – people with different expertise from different agencies working to exchange information on a day to day basis. It is more integrated, combines resources, clearer mandate and roles, and allows ongoing cooperation and information exchange.
  - Informal cooperation is also essential:
    - Secondment
    - Networking and opportunities to build networks through meetings, platforms etc.

- Need to be mindful of data protection and overall security of data because we are dealing with sensitive information

- Body of international treaties supporting and promoting cooperation – including the United Nations Convention Against Corruption (UNCAC), FATF Recommendations, and the OECD Task Force on Tax Crimes and Other Crimes, amongst others. Take note that some of these forums can be used to informally exchange information or cooperate. For instance, the Egmont Group provides a platform for FIUs around the world.

- Consider what access agencies have regarding international/cross-border information: tax authorities and FIUs can obtain such information more directly through established mechanisms like the exchange of information on request or mutual legal assistance. Prosecutors should reach out to these agencies more.

- Trust is the most crucial factor – all resources may exist, but trust does not. Only way to work together is to promote trust (it cannot be imposed). It must be created by spending time together, learning what they each do and understanding the systems and frameworks in each agency. It is a crucial ingredient for cooperation and may prove the most challenging.
- There is greater recognition that tax and financial crimes affect citizens directly and the shared awareness has seen civil society become increasingly involved in this initiative.

Presentation: Nigeria

- In most cases, there have been differences in objectives between government departments. While one agency may be focused on corruption and determined to jail the suspect, the FIRS is concerned with recovering revenue and this may cause issues in cooperating.
- Issues of reluctance to share data – this comes down to trust. Even when shared, it may be incomplete and not useful.
- Many agencies frequently change technical systems – (this has been seen with customs) this makes it challenging to integrate under one platform.
- Data privacy and confidentiality:
    - They have signed MOUs with a few agencies which have tried to build internal IT solutions for data sharing.
    - Internal solutions have provided legitimacy and improved trust – if agencies feel their data may be shared with third parties, they are reluctant, when systems solutions are built internally, there is more trust.
    - MOUs include confidentiality clauses.
- Benefits:
    - Trust and willingness to collaborate
    - Reduced involvement of third parties.
- Weaknesses:
    - Network challenges
    - Bureaucracy in receiving approvals
- Information is currently received on request – they are working on automatic exchange of information.
- Information can be shared with other agencies – including the NFIU, if necessary.
- FIRS cooperate with several agencies (please see the slides on the cloud which include details of the type of information shared, the platforms used and whether an MOU exists).

Discussion highlights:

- Training is also a key opportunity for informal cooperation between officials. Countries that have used fusion centres and task forces have found them particularly successful since learnings can be drawn from all the strengths of each agency.
- The World Bank does not have a standard MOU since it varies based on the nuances of the countries. They do have roundtables with the authorities to discuss the issues, decide the objectives and identify the information that will be shared. They must ensure it is something that all the agencies want.
- One outcome of this project could be to provide a template MOU for countries seeking to engage in cooperation.
- Most tax laws have secrecy provisions which require balancing with the sharing of information with other agencies. To address this, FIRS has an MOU with a confidentiality clause.
- Authorities may want to reflect upon how many MOUs they have, whether they are bilateral or tripartite or include even more authorities. In Nigeria, FIRS has a bilateral MOU with NFIU, whilst the joint task force did not have MOU.
- Each law enforcement agency has a different way of dealing with confidentiality - tax compared to FIU compared to the central Bank, particularly where transfers going out of the country are concerned.
- Criminals are still able to shift their illicit wealth despite the cooperation and progress made. Unfortunately, this means there are still weaknesses that need to be addressed.
- Building networks with other jurisdictions' law enforcement agencies. There are still countries that will not cooperate on this level and still have been notorious in facilitating IFFs.
- Cultural changes within each agency are necessary.
- Politicians may be happy with the efforts, but may change positions seeing it as an unacceptable intermingling. Particularly with the informal cooperation and there is a likelihood that, where PEPs seeking to engage in the corrupt activity are concerned, there may be a political effort to undermine cooperative efforts.

Presentation: Uganda

- The URA frequently sign MOUs with other enforcement agencies and monitor their cooperation over time.
- The nature of inter-agency cooperation in Uganda:
    - Facilitating information exchange between the agencies
    - Sharing of resources – different agencies have different capabilities or facilities (forensic, analytical etc.)
    - Capacity building initiatives – training, knowledge-sharing sessions and other workshops

  - Cooperate to handle certain investigations – different entities may have different mandates but each entity will take on their mandate through the joint effort.
  - The objective is the whole of government approach where all agencies involved in financial intelligence can manage investigations jointly.

- URA has collaborated with a variety of agencies that include;
  - Police force who have facilitated in search and seizure operations, taken the lead in conducting arrests, confiscation of properties and evidence collection and management.
  - URA will then investigate tax crimes and their forensic lab (which has significant technical expertise) will also support other agencies with obtaining computer evidence
  - They also work with the Directorate of Public Prosecution (DPP), the lead prosecutors. The URA Legal team has delegated powers as prosecutors for purposes of tax crimes, whilst other agencies have to involve DPP to manage prosecutions
  - Inspectorate of Government (the government investigators for most corruption cases and abuse of office cases)
  - Uganda National Roads Authority – manage road construction and form the largest percentage of the government budget.
  - Uganda Registration Services Bureau – manage the registration of businesses.
  - National Identification Authority – issue the identification documents for Ugandan residents.
- In implementing they mainly do sign MOUs – they have them with several agencies:
  - Tripartite collaboration – URA, Kampala Capital City Authority, Uganda Registration Services – all involved in registration of businesses, all were collecting same information so introduced the same form and database for users to register.
- Uganda Police Force second staff to URA to support with arrest, seizure, charge and caution statement taking, etc.
- URA has supported other agencies to establish their forensic laboratories in addition to supporting the analysis of evidence.
- Additional success factors:
  - Signing of MOUs support guided collaboration, help in understanding the do's and don'ts and the confidentiality requirements.
  - Consistently learning – and incorporating as needs arise.
  - Integrated systems for business registration – use of the same database and forms to receive licenses, taxpayer numbers etc.
  - Periodic stakeholder engagements – at strategic and operational levels
  - Technical support – willingness to share support and expertise, identified which agencies have which strengths (to determine where support may be required)

- Enabling domestic laws – different laws govern different agencies, tax laws provide an edge in accessing information widely (whereas others may not have similar access). URA are also members of the Global Forum for Exchange of Information and can access information from foreign jurisdictions.
- Trying to integrate their databases with key agencies that they have MOUs with – like the Inspectorate of Government that have the asset declarations of public servants , the FIU on suspicious bank transactions, and national identification (since these are a primary identification document).
- Delegated competent authority – Commissioner General (used to be the Minister of Finance which made it difficult). They have an EOI office that is fully-fledged and host most of the intelligence held by the URA. There is also an initiative with several other agencies to initiate AEOI.

- Challenges:
  - Each agency may often seek to fulfil only their mandate and this may often cause issues.
  - Differences in organizational structures – a collaboration with a particular agency may be frustrated when not aware of which department they should be dealing with. Often the mandate may even be shared by several departments and requires their internal coordination.
  - Much information may be held manually within some agencies – they may have very few computers, whilst the URA has a computer for every staff member.
  - Bureaucracy in agencies – when seeking to second or get something done, receiving approvals may delay the entire process.
  - Absence of a whole of government approach to fighting IFFs – key issue that comes up is who takes the lead if a joint task force is led. Which ministry or agency will manage it all?

- Case studies:
  - Commission of inquiry into the Uganda National Roads Authority: brought together officials from key agencies as members of the commission, almost all the intelligence organizations had to participate in obtaining incriminating evidence of officials abusing their office. The URA Forensic Experts extracted and evaluated computer evidence that provided vital evidence. Some of the court cases have been concluded whilst others are still ongoing.
  - Recovery of financial gains – accused were asked to refund the amount they had stolen (approx. US$ 6 million). The discovery of the fraud was only possible through cooperation.
  - Corruption and abuse of office through Office of Prime Minister – suspects jailed and had to forfeit property to the state (this has been difficult to do in the past). This should send a strong message about recovery.

  - Tax crime referred from the FIU – suspicious bank transactions identified by the FIU and shared with URA. Loan agreements with related parties offshore. The related parties were in different countries, some in tax havens and others in African countries with no exchange of information. They were all dealing in the same products. The URA managed to recover some of the tax revenue (but not fully satisfied because some of the companies were located in countries with no EOI mechanism, so the money trail went dead)

- Regional collaboration amongst revenue authorities (CGs and investigators) – customs transit has been a significant area of focus, joint training as investigators in the region, network established between the regional authorities (URA, RRA, TRA, OBR and KRA). Informal collaboration is essential because the formal can delay the entire process.

- Some key recommendations:
  - Need to improve systems integration with other agencies that are engaged in exchanging information. Immediate access is much more useful and straightforward.
  - Digitalize any agencies that are still manual.
  - Form inter-agency task forces at the national level and beyond (Regional and international).
  - Informal cooperation is essential! It can speed up the process of accessing information or support.
  - Harmonized systems, and information collection processes and formats across agencies and countries can also prevent further delays.
  - Centralizing government revenues – when different agencies collect revenue for the government, the information will not be in one central place and makes it difficult to monitor the inflows and outflows of income.
  - Enact and enforce common laws – on BO and AML, often without proper beneficial ownership information they may end up prosecuting the wrong person.
  - Multilateral cooperation on exchanging information at the international level is essential for smaller countries that do not have DTAs with every country.
  - *Success stories should be made available in manuals for best practice purposes.*
  - Conference and forums like this that facilitate sharing of experiences are highly beneficial for officials.

- The case studies will be discussed in more detail in the focus group meetings on inter-agency cooperation.

Discussion highlights:

- When an agency initiates the cooperation, it will chair the initiative. The permanent joint task force between URA, Inspectorate of Government and other key agencies is chaired by the Minister of Ethics and Integrity and they periodically meet at those offices.

- EITI also follows a multi-stakeholder approach. They are trying to link the database for beneficial ownership with asset disclosure databases for public servants. The data quality may not be the same.
- URA and Inspectorate of Government had to collaborate because they identified that the public servants were submitting contradicting information to the two government agencies. The information exchanged can only be used for purposes of their mandate.

Panel discussion:

- **Zambia**:
    - Cooperation is working well between the FIC and law enforcement agencies. Both can request for information from one another. Spontaneous disclosures are also made to the FIU to evaluate.
    - The FIU are administrative and have to disseminate whatever information they analyze.
    - The signing of MOUs has improved communication and promoted more collaboration. They now have key contact persons identified in the MOUs that agencies can liaise with.
    - Connected to the companies' registry and the revenue authority and can request information from them.
    - Working in silos is an issue – rigid command and control structures, corruption within institutions and a desire to not share in successes.
    - Main barriers to achieving inter-agency cooperation:
        - Lack of a legal framework
        - Trust
        - Differences in skill sets
    - Practical steps to improve:
        - More harmony in the standards used which should push for greater coordination.
        - There is a need for more practical training for the officers who are expected to operationalize cooperation.
- **Africa Tax Institute:**
    - Agencies should recognize what is within the scope of other agencies. Recognize what they can or cannot do.
    - AU High-Level Panel Report on IFFs recommended greater cooperation to exchange information.
    - The Multi-Agency Team in Kenya has also had the notable success that we can learn from.

- A key question is which agency should always be involved? FIUs, anti-corruption, anti-fraud, tax authorities and customs authorities.
- Customs are very important as they often deal with all inflows and outflows – they often, however, cannot tie the customs offence to other financial crimes. Cooperation here could be key.
- In the past, Project Wickenby driven by the Australian Tax Office quite efficiently identified funds that were hidden offshore and were able to recover them.
- For more examples, see the WU GTPC Tax and Good Governance Project publication here: Inter-agency Cooperation and Good Tax Governance in Africa.
- Countries should start with the legal framework when trying to engage in inter-agency cooperation. They can then consider MOUs, identifying the objective (Share evidence, joint investigation etc.) will be key as it determines how to structure the procedures and the provisions to include. There are many templates – WCO has various examples.
- Improving technology systems is crucial and the tax administration will often have significant experience that can be shared with other agencies.
- Tax crimes should be a predicate offence as it makes AML efforts more efficient.
- In some instances, authorities may need to begin identifying the trends in common financial or tax crimes when initiating cooperation and establishing an understanding of what they each know or do not know. This will help in identifying how to work together.
- Barriers typically arise as follows:
    - Different responsibilities and priorities – what is important for tax authorities may be a non-starter for police so identify the minimum crime both agencies will review jointly.
    - The difference in powers – some agencies have more significant weight or pull and can easily direct the agenda. This can mean the smaller yet critical agencies are not as involved.
    - Some agencies may send the wrong people and it means they cannot commit – send people in similar, preferably senior positions for decision-making purposes.
    - There are difference expertise and capacity – take note of what this means for the understanding of roles.
    - Performance measures may differ – ensure that secondees or those involved in joint initiatives will still receive recognition for their efforts.
    - Identify who is responsible for what or it will delay decisions.
    - Budget constraints may limit one agency's involvement.
    - Practical aspects on the ground should be considered – analysts and investigators may not practically cooperate as quickly and this means MOUs must be built on experience from the practical level.

        - Corruption can limit the ability to build a relationship based on trust – it is the deal-breaker. Kenya and Uganda have made significant steps in this area that should be considered.

    - Ultimately the objective is to secure a conviction and this should be, at least to some extent, used as an indicator.

    - Data security and privacy – a lot of revenue authority staff are not using an official email. This is a huge security risk, especially since the authority cannot monitor the sharing of emails. Placing all staff on official email addresses should be a priority for all authorities.

Closing remarks:

World Bank:

- The position of the World Bank is to reinforce the commitment to fighting corruption and promoting tax transparency. This is part of the domestic revenue mobilization programme that the Bank is monitoring. This initiative and the partnership for this project is therefore vital.
- As a result of COVID-19 countries are facing massive public financing needs for healthcare and a stimulant for the economy. The number of poor has increased and any resource subtracted from public coffers means a cut back for government in the resources that can be put to use for social spending and the economy overall.
- Countries are now less willing to continue to deal with IFFs or any misappropriation of funds.
- We need an ecosystem that can support the authorities, political commitment to pursue illegal activity and strong collaboration across the border to support the tracing of funds.
- Apart from reinforcing and strengthening commitments to work in this area, the World Bank can also support with technical assistance, investment lending and development policy. There is also much innovation and the Uganda example demonstrated this. We should also evaluate the potential of big data.
- We should support countries through their frameworks and think outside of the box with the technology available. The World Bank have experts who can provide their experience in this area and they all remain available to support African countries.

UNODC:

- We continue to view this initiative as one of the most effective and value for funding programs that the UNODC continue to be involved in. This is because inter-agency cooperation has been the raison d'etre for this entire project (Phase I and II), to get tax authorities in the same room as AML/CFT authorities and break down the silos through joint training, sharing of best practices and exchange of information. It is an excellent example of regional cooperation and south-south development.
- The reason why Recommendation 2 of the FATF Standards focuses on cooperation is because implementation requires inter-agency committees to prepare for mutual evaluations and national risk assessments. Inter-agency cooperation is at the core of any AML/CFT framework implementation. Indeed, it is the low-hanging fruit and the difference between success and failure.

- Joint training, fusion cells, task forces and other bases for cooperation are essential, and we are now exploring this in the area of public-private partnerships. This increases the public sector collaboration as well as it addresses the trust and cultural issues if we can collaborate in how we educate the private sector about AML/CFT issues then we can equally collaborate for public sector purposes.
- Information is privileged and we must be careful how we use it and that the way we are using it is in line with human rights.
- If inter-agency cooperation is the low-hanging fruit, beneficial ownership is the key to the kingdom, but they cannot operate without one another. We need to be able to pass that information through the value chain – detection, investigation, prosecution and finally, recovery.
- We have the opportunity to address the draining of public finance through tax and other financial crimes and explain to the policymakers that AML/CFT and other policies on financial intelligence are not just technocratic. Their cooperation is also crucial in driving forward success in this area.

WU GTPC:

- New issues have been raised in the 2 days of deliberations and which need to be examined further:
    - The use of new technologies to support inter-agency cooperation and counter IFFs:
        - Track and trace the money trail
        - Systems integrations for authorities
        - Communications and security of data
        - Use of big data, AI and robotics for risk assessment
    - How do countries set up the task force or fusion centre?
    - Confidentiality rules and how they differ between agencies (Can we map out what these differences mean?)
    - Different approaches to risk assessment – tax authorities have a risk-based approach, whilst FIUs are only beginning to adopt it, what can they learn from one another?
    - How do we overcome the trust barrier?
    - Potential for joint FIU/ Tax administration forensic centres
    - Documenting success cases – it is often difficult for authorities to access their counterparts' experiences; we may want to have a repository of this data.
- Concrete outcomes are dependent on boots on the ground and the UNODC and World Bank will be critical in their ability to execute technical assistance.
- The partners are preparing for the next round of focus group calls and we would like to welcome you to participate well in advance:

- Focus Group on Client Attorney Privilege - 16 December 2020, 13h00 CET (Vienna Time)
- Focus Group on Beneficial Ownership - 17 December 2020, 13h00 CET (Vienna Time)
- Focus Group on Unexplained Wealth Orders - 19 January 2020, 13h00 CET (Vienna Time)
- Focus Group on Inter-Agency Cooperation - 21 January 2021, 13h00 CET (Vienna Time)
- Physical conference postponed from January 2021 to 14-15 July 2021

Please write to Eva Mader (Eva.Mader@wu.ac.at) indicating which of the sessions you would like to attend.