OECD's global principles and EU's tax crime measures

Umut Turksen
Center for Financial and Corporate Integrity, Coventry University, Coventry, UK, and
Adam Abukari
Department of Business and Law, Coventry University, Coventry, UK

Abstract

Purpose – This paper aims to investigate and provide pathways for leveraging the Organisation for Economic Cooperation and Development (OECD's) Ten Global Principles (TGPs) for countering tax crimes in the EU.

Design/methodology/approach – The study is guided by the combination of traditional and innovative research methods drawn from criminal law and justice, public regulatory theory and tax law, based on socio-legal and comparative methodologies.

Findings – The research shows that EU has achieved considerable amount of progress when it comes to meeting the TGPs. However, law and practice in EU Member States indicate that there are different legal, human and organisational approaches to fighting tax crimes. The TGPs could be strategically applied to complementing the EU's Fifth Anti-Money Laundering Directive (AMLD) and other initiatives on Administrative Cooperation.

Research limitations/implications – Although the TGPs appear encompassing, there are opportunities to harness the potency of these principles and to provide more tailored principles that can help engineer sustainable remedies for countering tax crimes in the EU.

Practical implications – The paper critically analyses, through a multidisciplinary approach, the main legal, human and organisational factors influencing the prosecution of tax crimes in the EU Member States.

Social implications – Realignment and harmonisation of tax enforcement paractices in the EU Member States thus help in the reduction of tax gap resulting from tax offences.

Originality/value – The paper provides novel approaches and findings based on empirical info obtained from face-to-face focus groups with end users and law enforcement agencies in tax enforcement eco-system in ten different EU Member States.

Keywords European Union, Tax crimes, Countering tax crimes, Ten Global Principles (TGPs)

Paper type Research paper

1. Understanding the contours of tax crime in the European Union and Organisation for Economic Co-operation and Development

Tax evasion, false accounting and reporting (tax fraud) are some of the broad terms of tax offences in EU Member States (MS). Tax fraud is found in direct taxes such as income or profit taxes and in indirect taxes such as the value-added tax (VAT) (OECD, 2018a; Bonch-Osmolovskiy *et al.*, 2018). While the presence and volume of tax crimes are acknowledged, and

Journal of Financial Crime
Emerald Publishing Limited
1359-0790
DOI 10.1108/JFC-09-2019-0118

estimated to be between 50 and 70bn euros per year in the EU (EU Commission, 2019a, p. 8), tax crimes such as tax evasion and fraud are understood and treated differently by MS (Panayi, 2015; PROTAX, 2018; Turksen, 2018).

Despite its prevalence, neither the EU nor the OECD have clearly defined tax crime/s. OECD has attempted to define tax crime aa:

> [. . .] a form of deliberate evasion of tax which is generally punishable under criminal law [. . .] [and that it] includes situations in which deliberately false statements are submitted, fake documents are produced, etc" (IBFD, 2009; Suso, 2014).

The EU, on the other hand, has not provided a unified definition of tax crimes in its *acquis communautaire* (Thirion and Scherrer, 2017)1 as it has been difficult to achieve consensus among its MS (Suso, 2014)2. Nevertheless, tax crime/s can be generally defined as any conduct by taxpayers that involves evasion, or fraud on tax payments that are due the State and for which the law recognises as a criminal conduct. The most common behaviours across the chain of tax offenses in almost all the EU MS are that of fraud and dishonesty (Suso, 2014).

Taxpayers use complex methods to commit tax crimes. By conducting 13 case studies pertaining to 10 EU MS, PROTAX (2018) has found that transnational companies use complex methods to commit tax crimes, including shell companies (missing trader), trusts, VAT carousel, profit-shifting, and free-ports (PROTAX, 2018).

Regardless of how tax crime is defined and operationalised, both the OECD and EU regard tax crimes as a grave concern and, therefore, is one of their topmost priorities, as they pose a threat to their economic and strategic interests (OECD, 2018a; Cobham, 2005).

Tax crimes are predicated upon the following factors: Inadequate legal frameworks, lax regulation, secrecy and weak inter-agency cooperation (OECD, 2018a). To find durable solutions for the dangers of tax crimes, the above non-exhaustive factors have to be addressed in tandem with issues such as the legitimacy and integrity of authorities (Tyler, 2006) such as tax administrations.

The OECD's Ten Global Principles (TGPs) for fighting tax crimes, under the fifth OECD's Forum on Tax and Crime, is a good example of an international initiative to counter such illegal activity. The EU is also active in this sphere by various actions, including, its task force at the EU Parliament, TAX3 (EU Parliament, 2019a), which focuses on tax crimes and *H2020* programme financing research consortiums such as PROTAX and COFFERS to provide the much-needed toolkits to counter tax crimes in the EU.

It is imperative that tax crime solutions are designed with durability in mind (Gimdal, 2016) as the methods tax criminals use evolve and exploit gaps continuously. Temporary fixes of tax crimes would have unintended consequences such as empowering tax evaders to develop more sophisticated strategies from the past experiences to evade taxes. It is not yet clear if and to what extent the OECD's TGPs provide durable solutions for fighting tax crimes in the EU. However, they can be the right direction to go in terms of harmonising policy and tax enforcement practices.

This paper examines the extent to which the current EU measures against tax crimes have been aligned to the TGPs. The non-criminal aspects of countering tax such as tax avoidance and aggressive tax planning are beyond the scope of this paper, thus have not been addressed.

2. Organisation for Economic Co-operation and Development – Ten Global Principles and the European Union's tax crime measures

The analysis of the TGPs indicates that they aim to foster and/or improve ten interlinked aims that have been examined in turn below:

2.1 Criminalisation of tax offences

The first of the TGPs urges States to establish a legal framework that will "ensure that violations of tax law are included as a criminal offence and that effective sanctions should be applied in practice" (OECD, 2017). The criminalisation of tax offences is a potent tool not only for empowering investigators and prosecutors but also for preventing tax crimes and raising the bar of no-nonsense-approach to tax offences (OECD, 2017).

Criminalising the violation of tax law could differ depending on the legal system of the jurisdiction (Thirion and Scherrer, 2017). However, regardless of the nature of the "particular culture, policy and legislative environment" which mirrors the nature of legal framework, this principle demonstrates that any legal framework "will be most effective" if, in effect, it endeavours to not only clearly define tax crimes but also make criminal sanctions harmonised and proportionate to the severity of the tax crimes so that criminals cannot exploit such differences.

PROTAX has found that in a number of countries the efforts to counter tax crimes are suffering from a lack of clear jurisdiction between criminal and administrative law and fiscal policy. So, there is "the need for clear jurisdiction over tax crimes" which includes the need to have clarity about simultaneously conducting both criminal and administrative trials. The lack of this clarity allowed the "criminal court judge [in *Wildenstein*3 case] [. . .] to favour an immediate court decision as opposed to waiting for the decision of the administrative court judge" (PROTAX, 2018). PROTAX also found that although the sampled EU States have operational legal frameworks for countering tax crimes, many of those legal frameworks are not highly effective in the criminalisation of tax offenses. PROTAX (2018) study revealed that:

- The criminal burden of proof is often difficult to satisfy. This makes civil or administrative action a more attractive option for tax officials. Apart from the challenges in proving *actus reus* or "criminal act" against tax laws, prosecutors often find it difficult to demonstrate *mens rea*, or intention of tax offenders to evade taxes and, therefore, the difficulty in establishing strict criminal liability in many EU jurisdictions where these two legal tests do apply.
- The threshold regimes for criminal sanctions in many of the case studies are deemed to be low and needs to be reviewed.
- Thus, related to the low sanctions' thresholds is to the effect that "some jurisdictions in EU impose heavy criminal sanctions for tax crimes with little consideration given to so-called 'sweetheart deals'". Poland is one of such countries (PROTAX, 2018).

These findings buttress the finding of the European Parliamentary Research Service (2017), which revealed that respondent EU countries "had a functioning legal framework to fight tax evasion" *albeit* with a mixture "of administrative and criminal offences and sanctions" (Thirion and Scherrer, 2017) in which the criminalising domain was widely conflictual and not stringent. Subsequently, the efforts towards improvements in the administrative legal regime to counter tax crimes in the EU, although commendable, have had limited success (Remeur, 2016).

While the Fifth AMLD (EU) 2018/843 has included tax crimes as a predicate offence, it has not provided any further information as to what amounts to a tax crime (EU, 2018/843). Sufficing to note that the proceeding AMLD (EU) 2018/1673), "Combating Money Laundering by Criminal Law" (CMLCL), appears to have enhanced level of stringent measures reasonable enough to deter tax crimes and for which all MS must adopt (pursuant to Article 8). The provisions therein essentially provide that in dealing with liability of legal persons, legal persons must be sanctioned effectively, proportionately and dissuasively with criminal and non-criminal fines. Additionally, it gives jurisdiction to judges to impose any additional punitive measures they deem fit; excluding tax offenders from having entitlement and access to public services support and funding; permanently banning tax offenders from engaging in commercial business; winding up the company and to completely shut down the businesses that have been used by the taxpayer to commit the tax offence (EU, 2018/1673).

Article 5 of the CMLCL equally provides for effective, dissuasive and proportionate criminal penalties on offences under Articles 3 and 4. Penalties range from "a maximum term of imprisonment of at least four years" to "where necessary [be subjected] to additional sanctions or measures". The CMLCL, therefore, gives impetus to enhancing the fight against tax crimes in the EU as it complements the Fifth AMLD to further highlight criminal offences and the sanctions thereof. These are obvious improvements in the sanctioning regime (EU, 2018/1673).

Criminalisation of tax offenses is still a far cry when it comes to EU anti-tax evasion and fraud laws. This averment is informed by the lack of harmony in definitions of tax crimes across the EU MS. The CMLCL does not address the lack of harmony in the definition of tax crimes (EU, 2018/1673).

2.2 Effectiveness of strategising against tax crimes

Laws on countering tax crimes must be effective. To achieve this, States should put in place a strategy for fighting tax crimes, which should be subject to regular review and monitoring (OECD, 2017b). There are varying strategies for the differing legal mechanisms to secure compliance of tax laws in many EU countries. Largely, EU and its MS, thus, have strategies and plans to fight tax crimes. For instance, in Spain, the Tax Agency comes out with a tax compliance plan that details "tax compliance and enforcement measures", almost every year (PROTAX, 2019). These strategies "range from deterrence-based enforcement strategies to persuasive and cooperative models". However, the defining characteristics between criminal tax offences and administrative tax offences are seen to be blurry in many EU MS and there is lack of clarity as to "whether these two types of sanctions are complementary or conflicting" (Thirion and Scherrer, 2017).

This confusion derives inspiration from the blurry and complicated nature of the strategies put in place to approach the distinction between criminal tax offences and administrative tax offences at the EU level (ECOFIN, 1997). It must be noted that the transitioning of EU legal order from traditional civil procedure/enforcement of tax law to criminal enforcement/criminal justice system and sanctioning of tax crimes appears chequered. This shift must be completely overhauled, in terms of legal provisions, LEA capabilities and capacities. For a start, EU criminal laws relating to tax crimes must be consolidated. Consolidation of EU law on tax crimes will bring greater clarity for both LEAs and the public. Although some strategies are functioning in respective national contexts, effectiveness of strategies to fight tax crimes do not show solid results particularly when cross-border tax evasion activities are concerned. In the EU's Single Market where goods, capital and people can move freely, it is imperative to create a harmonised tax enforcement strategy which must be underpinned by compatible legal provisions across all EU MS. This is notwithstanding the tax competition and sovereignty issues that may be used by some MS to resist the attempt to harmonise. Efforts must, however, be made to get it done because that would be a durable solution.

2.3 Adequacy of investigative powers

The third principle stipulates that States must establish "appropriate investigative powers sufficient to capacitate investigators in a way that result in successful investigation of tax crimes" (OECD, 2017 b). Article 11 of the CMLCL recognises this principle and mandates EU MS to take "necessary measures to ensure that effective investigative tools" are availed to competent authorities as established by Articles 3(1) and (5) and 4 thereof (EU, 2018/1673). The powers and obligations granted by this EU legal instrument may be considered as effective, as they move in the direction of the TGP. However, effective transposition and enforcement of these provisions across all the EU MS may still be challenged due to peculiarities in the national legal regimes of the EU. For instance, PROTAX (2018) found that although EU countries such as Germany, Luxemburg, Spain, Austria, UK and France have given significant powers to investigative authorities, the challenge of deficit in collaborative investigation of agencies loomed large in a number of these countries. The Case Study of France typically demonstrated that the court was faced with the weaknesses in the investigations mainly due to "limited capacity to collect evidence on some offshore trusts". However, there may be times when investigators can be tempted to abuse their powers when the needed investigative powers are granted them. Therefore, while EU strives to ensure that adequate investigative powers are granted tax authorities, there has to be checks and balances in which the efforts to establish culpability or otherwise goes with strict accountability and liability measures.

2.4 Effectiveness of powers to freeze, seize and confiscate assets

The fourth TGP requires States to put in place measures that give appropriate authorities 'the ability to freeze/seize assets in the course of any investigation of tax crimes, and the ability to get assets of tax offenders confiscated' (OECD, 2017). Article 9 of CMLCL (EU, 2018/1673) indeed obliges MS to ensure "that their competent authorities freeze or confiscate [assets], in accordance with Directive 2014/42/EU". Furthermore, the EU Directive 2014/42/EU has established the "minimum rules on the freezing and confiscation of the instrumentalities and proceeds of crime in criminal matters". However, only 11 of the 28 EU countries have been identified by OECD to equip their tax authorities with the powers to freeze, seize and confiscate assets of tax criminals (OECD, 2017). Findings of PROTAX (2018) support the limited number of EU MS that have granted requisite powers to tax authorities to freeze, seize and confiscate assets with criminal links. However, Estonia stands out as a country with remarkable powers for tax authorities to confiscate assets of tax criminals.

The CMLCL requires EU MS to transpose the provisions into national law by 3 December 2020 with the expectation that the loopholes from the Directive 2014/42/EU and the Fifth AMLD (Directive (EU) 2018/843) will be addressed, at the minimum. In fact, per Article 9 of the CMLCL, part of the loopholes that have been closed off is the clear featuring of the mandate of EU MS to empower their competent tax authorities to confiscate criminal proceeds that include those from tax crimes (EU, 2018/1673).

2.5 Organisational structure with defined responsibilities

The fifth TGP is aligned to the disposition that States are required to "adopt an organisational model that clearly defines responsibilities for fighting tax crime and other financial crimes" (OECD, 2017). This principle is still a major challenge in many EU countries, although the EU has urged its MS to ensure that this requirement is achieved (PROTAX, 2018). The key rationale behind this approach is that evaded taxable assets do not often derive from criminal activity. Thus, it requires a unique set of regulatory and investigative measures.

2.6 Adequacy of resources for tax crime investigation

In respect of the sixth TGP, states are required to ensure that institutions responsible for investigating tax crimes are given adequate resources to conduct their duties (OECD, 2017). These include financial, human and infrastructural resources. This principle has been recognised by the EU, but many EU countries still struggle with the adequacy of resources availed to their LEAs. PROTAX (2018) found that countries such as Spain, the UK, Portugal and Ireland had challenges with providing the necessary resources to tax crime investigators and tax authorities (Cross, 2017; Buchan, 2018). Tax authorities also lack access to specific types of expertise or tools for forensic analysis needed for complex and cross-border fraudulent schemes (PROTAX, 2018). The lack of resources becomes crucial when under-staffed prosecution faces several lawyers from top-end law firms in court. However, care must be taken not to pay undue attention to the resource provision at the expense of the other equally important areas such as ensuring efficiency.

2.7 Tax crimes as a predicate offence for money laundering

The seventh principle urges States to "designate tax crimes as one of the predicate offences for money laundering" (OECD, 2017). Tax crime is a predicate offence for money laundering in the EU under the Fifth EU AML Directive (EU) 2018/843. Tax crimes have now been well-established as predicate offences for money laundering by international institutions such as the EU, OECD, and FATF along with most of their compliant MS (OECD, 2017). However, while the EU is eager to progress to its Fifth AML regime, the standards required by the Fourth AMLD 2015/849 has not been implemented fully in at least 10 EU countries. On 24 January 2019, pursuant to enforcement action under Article 258 of the Treaty on the Functioning of the EU, the EU Commission sent a letter of formal notice to Germany; reasoned opinions to Belgium, Finland, France, Lithuania, Portugal; and additional reasoned opinions to Bulgaria, Cyprus, Poland and Slovakia for failing to completely transpose the Fourth AMLD into national law (EU Commission, 2019b)4. So, although tax crime is recognised by the EU as a predicate offence (EU, 2015/849), there are a number of MS that still have not transposed this provision (PROTAX, 2018). This does not augur well for the EU-wide fight against tax crimes. It does not appear that this principle would run into crisis in its pursuit. However, it is possible for a proposal to be made to rephrase this principle that, States should consolidate all Illicit Financial Flows as predicate offences for tax crimes as all these sources of funds have high potential risks of being used to commit tax crimes.

2.8 Effectiveness of framework for domestic inter-agency cooperation

With the eighth TGP, States are advised to establish "an effective legal and administrative framework for the facilitation of the collaboration between tax authorities and other domestic law enforcement and intelligence agencies" (OECD, 2017). The EU uses the Fiscalis 2020 programme to give assistance to its members in administering domestic tax systems (EU Commission, 2018d). This support consists of activities such as provision of necessary fora in "the exchange of best practices and cooperation between EU countries in several areas, including financial income, employment income, capital income, VAT and excises" (EU, 2015). Interagency cooperation is also used by the framework provided by the EU's Directive on Administrative Cooperation (DAC) (EU, 2011, 2011/16).

Directive 2011/16/EU (DAC 1) in Direct Taxation) is the key legal instrument that supports MS to ensure that information on direct taxation are exchanged harmoniously amongst the EU MS (EU, 2015; EU Commission, 2020b, no date 2; EU, 2015). DAC has since had five amendments to strengthen cooperation amongst administrative agencies in the EU. It must be noted that three forms of information exchange can be appropriated in the DAC.

These are "the exchange of information on request (EOIR); the spontaneous exchange of information (SEOI); and the automatic exchange of information (AEOI)" (EU Commission, 2018a, 2018b, 2018/844).

DAC 5 especially pierces the veil of company's owners. According to Article 1 of DAC 5, EU MS are mandated to enact legislations that enable competent tax authorities to have access "to the mechanisms, procedures, documents and information referred to in Articles 13, 30, 31 and 40 of Directive (EU) 2015/849 of the European Parliament and of the Council" relating to beneficial ownerships (EU Commission, 2020b, no date 2). Complementarily, the Fourth AMLD (Directive (EU) 2015/849) ushered in a regime of Ultimate Beneficial Owner (UBO) that unveils an additional layer to the information exchange framework in the criminalisation domain. UBO regime provides a register that takes custody of information about beneficial owners that are resident in the EU. According to Article 30 of the Fifth AMLD (EU) 2018/843, it is mandatory for EU institutions such as competent authorities, tax authorities, investigative agencies and FIUs to consult the UBO register in the course of conducting due diligence on money laundering issues. This is an important step because the reservoir of beneficial owners can avail relevant information to LEAs and asset recovery agencies. These measures characterise the OECD's requirements for administrative cooperation (EU Commission, 2015) and fairly feature the exchange requirements in the TGPs' 8. However, although progress has been made in this direction, more must be done in the area of seamless interagency cooperation since these measures have not been effectively used to counter tax crimes in the EU (Remeur, 2016). PROTAX (2018) revealed that interagency cooperation seems to rely on personal connections between LEA personnel rather than formal, legal agreements between the LEAs. Consistent with findings of previous studies, PROTAX (2018) also found inter-agency cooperation as a challenge in the EU; a particularity of challenge seems to be associated with the difficulty of "coordination and sharing of competence between administrative/financial and criminal procedures" amongst MS. This not only undermines effective investigation and prosecution but also forms a network of forces that results in resource wastage as obtained in the case of *Wildenstein* (PROTAX, 2018).

2.9 Availability of international cooperation mechanisms

The ninth principle states that "tax crime investigation agencies must have access to criminal legal instruments and an adequate operational framework for effective international co-operation in the investigation and prosecution of tax crimes" (OECD, 2017).

The cross-border dimensions of tax crimes underlie the fundamental basis for the difficulty in finding effective remedies to tax crimes in the EU. The EU Commission has reported that EU's VAT Gap in 2016 amounted to €147.1bn – thus, an equivalent of 12.3% total revenue loss across EU (EU Commission, 2018e). However, tax criminals with international networks do not only use the international platform to generate income hidden in one foreign jurisdiction or the other from tax administrations. They also transfer, layer and integrate the proceeds from tax crimes in foreign jurisdictions beyond the EU without the knowledge of tax authorities (OECD, 2017). International cooperation is essential for seizure, confiscation and recovery of criminal assets beyond the conviction of such crimes.

Usually, investigative and prosecutorial powers of LEAs of states are limited to their jurisdictional boundaries. This necessitates the requirement for competent State agencies to internationally collaborate in political, legal, operational and judicial spheres with each other to share information and evidence, as well as culprits (if need be), "facilitation of witness testimony taking, transfer of suspected persons for further questioning or interrogation, execution of freezing and seizing orders, and undertaking joint investigations" (OECD, 2017) and recovery operations.

Legal instruments required by this TGP to foster appropriate collaboration include "agreements on information sharing such as Tax Information Exchange Agreements (OECD, 2018b; Tax Justice Network, 2009); Exchange of Information and Administrative Assistance Agreements; as well as Bilateral Tax Treaties and other instruments such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD, 2018c; Nelson, 1990). There are also supposed to be agreements for cooperation in the use of investigative and coercive powers, such as the Mutual Legal Assistance Treaties" (ICC, 2012).

These agreements must assume a holistic approach in countering the tax crimes. International efforts have been garnered to operationalise some aspects of these provisions. For instance, the World Bank has joined forces with OECD to encourage states to adopt the "'whole-of-government approach' to tackling financial crimes [including tax crimes] by fostering inter-agency and international co-operation" (The World Bank, 2018). The EU could develop original positions that reflect the realities and needs of the EU with respect to fighting tax crimes across the Union (OECD, 2017; OECD and The World Bank, 2018; EU Commission, 2015).

The plethora of legal instruments in the EU make provision for the appropriate arrangements to be made on how MS should cooperate and exchange information on countering tax crimes in the EU. The 2012 European Commission's Action Plan to strengthen the fight against tax fraud and tax evasion, with more than 30 planned actions for fostering cooperation and information exchange, has been one of the key EU instruments for fighting tax crimes (EU Commission, 2012/722; EU, 2015). With respect to cooperation for information exchange, the DAC is particularly instructive.

The analysis in TGP 8 above demonstrates that, even with its inadequacies, there are many ways in which this exchange of information regime can help fight tax crimes in the EU. Principally, transparency and cooperation become a hallmark and suspicious activities of tax crimes in EU MS are readily detected and shared with other MS (EU Commission, 2018a, 2018b, 2018/844). In fact, Kaye (2014) observes that AEOI is deemed to present the most effective remedy to countering tax evasion. However, to date, not only establishing a beneficial ownership database has been a real challenge but also having access to audited accounts of companies (which should be open to the public for inspection and contain granular details of business transactions)5 (Owens and McDonell, 2018).

Even with the above instruments for transnational cooperation against tax crimes, stronger cooperation at global level may still be difficult to reach (Bonch-Osmolovskiy *et al.*, 2018) in general and in the EU, in particular. At the moment, international cooperation on matters of tax crimes is just as challenged as the domestic inter-agency cooperation in TGP 8 above (PROTAX, 2018). It is worth noting that the work of Joint Money Laundering Intelligence Task Force (JMLIT) in the UK has proven to create a sound public-private partnership and meaningful information sharing among key stakeholders (National Crime Agency (NCA), 2019). This model would be worth considering within and beyond the EU.

2.10 Protection of the rights of suspects of tax crime

The tenth TGP provides that taxpayers that have been "suspected or accused of committing a tax crime must be able to rely on basic procedural and fundamental rights" (OECD, 2017). EU MS have substantive laws that are generally in line with international and regional human rights instruments (Charter of Fundamental Rights of the EU, 2000 and European Convention of Human Rights and International Covenant on Civil and Political Rights, 1966) that require investigators and LEAs to respect. These legal instruments confer more protection than the rights established in the tenth TGP (Oberson, 2015; Mitsilegas and Vavoula, 2016; Endresen, 2017; Oberson, 2015). At the same time, what the TGPs and the EU AML legal framework neglect, is the protection and rights of whistle-blowers who have been instrumental in shedding light and aiding prosecution of financial crimes. The Panama Papers, SwissLeaks and LuxLeaks are some of the prominent examples. Despite the huge public service these disclosures offered, individual whistle-blowers faced criminalisation and/or retribution, reprisals, intimidation in the best scenario (Turksen, 2018). PROTAX (2018) revealed that, over 80% of EU MS earned a "zero" score in whistle-blower protection law (PROTAX, 2018; The Greens and European Free Alliance (EFA), 2017). This is a huge deficit in the EU which has a direct consequence for countering tax crimes.

3. In search of durable solutions

Just like any measure of criminal law, countering tax crimes has had two basic functions: to deter and punish criminality. The overall disposition of the TGPs and other measures adopted by the OECD and EU tend to be inclined to achieve deterrence, punishment and criminal justice. The following constitutes a brief analysis of the key measures on which the foregoing TGPs can be built upon to achieve durable solutions in countering tax crimes in the EU.

One of the effective measures against tax crimes is to use high-end research and partnership to explore for sustainable ways to eviscerate both the old and new strategies which tax criminals use to flout applicable laws, as well as where they hide the profit they generate. To succeed in doing this, it is important to intensify the building of collaboration and "partnership between countries, partnership across different parts of government, and partnerships between policy-makers and operational leaders" (OECD, 2018d; Gimdal, 2016; Knobel, 2018; MacLennan, 2016). It goes without saying that professionals in the financial services sector and prudential supervisors, as gate keepers and enablers, must also be incorporated into the anti-tax crime strategies.

Furthermore, it is imperative that anti-bribery and anti-money laundering obstacles are frontally addressed. To effectively harness the capacity of the systems of AML that can provide durable solutions for tax crimes, AML must be tackled with a multipronged approach that considers all layers of money laundering with a sense of responsibility and discipline (Turksen, 2015; Unger, 2014; Collovà, 2016; Savona and Riccardi, 2017).

Rather than generic provisions of the AMLDs, it would be more targeted if criminal law on EU taxation were to be enacted which specifically focused on the varied connotations of tax crimes with elaborate investigative and prosecution powers and procedures, deterrent and punitive measures, as well as how the overall criminal justice in EU's tax eco-system would be sustainably procured. The EU's Sixth AMLD (EU, 2018/1673), for instance, could not only contain detailed provisions on tax crimes as predicate offences but also put forward substantive mechanisms to counter them. An associated legal instrument to the Sixth AMLD, is the Regulation (EU) 2018/1672 which also has scanty disposition for tax crimes (EU, 2018/1672). These gaps do raise concerns as to the seriousness that have been placed on tackling tax crimes by MS.

Commitment to delivering transparency, through greater collaboration, broad-based automatic exchange of information and integration of tax systems, can help a great deal in delivering the other principles of durable solutions. Even though there are some misgivings about its practice (Woodward, 2016), transparency is highly needed to drastically improve, if not overhaul, the regulatory and legal framework of the current global financial system (GFS). This is because the GFS has been "characterised by laggard or outdated regulation and particularly by inadequate transparency" which has:

> [. . .] made it fairly easy for wrongdoers (including multinationals engaging in unfair tax agreements) to benefit from [. . .] [tax crimes], by hiding and mixing themselves, their assets and their transactions within legitimate uses of the global financial and tax system (Knobel, 2018).

Of course, the limited transparency is occasioned by the conduct of the States (Woodward, 2016), whose call to duty to address this is a pretty credible proposition to make.

Another issue worth considering is the need for persistent technological innovation. Continuous improvement in legislation relating to the relationship between technology and tax payment systems is equally crucial because the fast-growing digital economy must be confronted in similar measure by appropriate tax legislations (UN-IATF, 2017; OECD, 2017). PROTAX found Estonia's digitalisation process to be exemplary as the country "is pioneering electronic solutions to tax fraud with some considerable success" (PROTAX, 2018). Durable solutions should also include broadening the tax base and integrate the informal sector (where the black economy thrives) into the formal economy in ways that clear off, at least, most of the hidden places used for tax-related criminal activities (UN-IATF, 2017, p. 32).

It is also important that whistle-blower protection laws are not only protective of and compensatory for whistle-blowers but must also be empowering for LEAs and highly punitive against tax criminals (PROTAX, 2018; Willsher, 2015; Turksen, 2018). The current EU whistle-blowing resolution (EU Parliament, 2016/2224) lacks the aforementioned features of durable solutions in this regard (EU Commission, 2018a, 2018b, 2018/218). The 20 November 2018 vote by the Legal Affairs Committee to adopt an "EU-wide protection and support for whistle-blowers" is a step in the right direction because, importantly, the updated rules contained in the Commission's proposed directive grant protection for "facilitators" (EU Commission, 2018c).

Providing durable solutions for tax crimes must encapsulate operative instruments that are resilient with a broad-based framework that is anchored on the ability of the framework to be insulated against or withstand the pressures from tax evaders. This should factor in – as much as possible – all interests of stakeholders in a mutually aligned framework, no matter the challenges to do so. It must have clearly defined guidelines. The framework should be well-coordinated and highly transparent. It must have high-level cooperation and integrity, high level discipline and be very punitive, rehabilitative, efficient and effective. In addition, it must be rewarding to tax authorities, financial intelligence agencies, police, judges and magistrates (OECD, 2017; Markovits, 2015). It does not appear that the TGPs fully entail all these elements, neither does the EU legal regime against tax crimes provide all these imperatives – but the former is worth emulating by the latter.

4. Conclusion

The OECD's TGPs, by far, constitute a reasonably robust framework requirement for countering tax crimes relative to the existing framework in the EU. The TGPs are feasible propositions that could establish minimum standards, which when rigorously pursued by the EU and its MS, could significantly help in reducing tax crimes in the EU. The tax legal regime of EU is developing and has already absorbed a number of the TGPs of OECD and is set to even help in making the OECD's principles as legally enforceable as possible. Evidence provided by PROTAX and other researchers reveal that a number of EU countries have serious concerns for tax crimes and are adopting measures such as enshrined in the OECD principles to succeed (PROTAX, 2018). To counter tax crimes, it is imperative for EU countries to ensure that there is well-established sustenance of robust structures and processes in the EU that do not only frontally bring about highest transparency, effective coordinated intelligence gathering and analysis, effective cooperation and information sharing between LEAs and other relevant authorities in preventing, detecting and prosecuting tax crimes (OECD, 2018a). It should also ensure effective recovering of proceeds from tax crimes and delivering rehabilitation of convicts and public accountability in the use of tax proceeds.

Notes

1. Thirion and Scherrer (2017) opine that "the distinction between administrative tax offences and criminal tax offences is often blurred at Member State level and it is sometimes unclear whether these two types of sanction are complementary or conflicting" (p. 8).
2. It should be noted that the FIUs in the EU have reported difficulties in exchanging information based on differences in national definitions of certain predicate offences, such as tax crimes, which are not harmonised by Union law. See Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, para. 18.
3. The High Court of Paris (Tribunal de Grande Instance Paris- 32éme chambre correctionnelle) Decision No. 11203092066 of 12 January 2017.
4. Despite these Member States having declared their transposition to be complete, the Commission concluded after assessing the notified measures that some provisions are missing and stated that gaps in one Member State can have an impact on all others. All Member States had to transpose the rules of this Directive by 26 June 2017. EU Commission (2019b), "January infringements package: key decisions", Fact Sheet, 24 January, available at: http://europa.eu/rapid/press-release_MEMO-19-462_en.htm (accessed 1 February 2019).
5. The FATF has identified some significant implementation challenges on beneficial ownership whereby only two of fourteen countries – Italy and Spain – were found to have a substantial level of effectiveness in establishing and verifying the accuracy of information on such databases. See Owens and McDonell (2018).

References

Bonch-Osmolovskiy, M., *et al.* (2018), "Study and Reports on the VAT Gap in the EU-28 MS: 2018 Final Report", Institute for Advanced Studies, IHS, TAXUD/2015/CC/131, September 11.

Buchan, L. (2018), "Labour condemns 'disastrous' HMRC cuts after millions of taxpayer calls go unanswered", Independent, 30 May.

Cobham, A. (2005), "Taxation policy and development", *Oxford Council on Good Governance*, Economy Analysis 2.

Collovà, C. (2016), "Prevention of the use of the financial system for the purposes of money laundering or terrorist financing", DG EPRS, October.

Cross, C. (2017), "Resourcing and refocusing HMRC", in Snell, W. (Ed.), *Tax Takes: Perspectives on Building a Better Tax System to Benefit Everyone in the UK*, Tax Justice Network.

ECOFIN (1997), "The code of conduct for business taxation – conclusions of the council of economics and finance ministers (ECOFIN) on 1 December 1997", 98/C 2/01.

Endresen, C. (2017), "Taxation and the European convention for the protection of human rights: Substantive issues", *Intertax*, Vol. 45 Nos 8/9, pp. 508-526.

EU Commission (2015), "Register of commission expert groups and other similar entities", (accessed 19 December 2018).

EU Commission (2018a), "Proposal for a directive of the European parliament and of the council on the protection of persons reporting on breaches of union law", {SWD (2018) 116 final} – {SWD (2018) 117 final} (COM (2018) 218), EU Commission (2018/218).

EU Commission (2018b), "Report from the commission to the European parliament and the council on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation", (17.12.2018COM (2018) 844 final), EU Commission (2018/844).

EU Commission (2018c), "EU-wide protection and support for whistle-blowers", Press Releases, 20 November, JURI.

EU Commission (2018d), "Taxation trends in the European union: Data for the EU MS, Iceland and Norway", 2018 Edn. pp. 53-165.

EU Commission (2018e), "VAT GAP report", September, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/vat_gap_factsheet_2018_en.pdf (accessed 1 April 2019).

EU Commission (2019a), "Communication from the commission to the European parliament, the European council and the council: towards a more efficient and democratic decision making in EU tax policy", Strasbourg, 15.1.2019 COM (2019) 8 final.

EU Commission (2019b), "January infringements package: key decisions", Fact Sheet, 24 January, available at: http://europa.eu/rapid/press-release_MEMO-19-462_en.htm (accessed 1 February 2019).

EU Commission (2012), "Communication on an action plan to strengthen the fight against tax fraud and tax evasion", COM (2012) 722, 6 December, EU Commission (2012/722).

EU Commission (2020b), "EU commission (no date 2), "Administrative cooperation in (direct) taxation in the EU", available at: https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en (accessed 16 January 2019).

EU Parliament (2016), "European parliament resolution of 24 October 2017 on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies", (2016/2224(INI)), P8_TA (2017)0402, EU Parliament (2016/2224).

EU Parliament (2019a), "Special committee on financial crimes, tax evasion and tax avoidance", TAX3 Special Committees, available at: www.europarl.europa.eu/committees/en/tax3/home.html (accessed 1 February 2019).

EU (2015), *The European Union Explained: Taxation; towards Simple, Fair and Efficient Taxation in the European Union*, European Union, Luxembourg.

Gimdal, G. (2016), "Aggressive tax planning", The TAXE 2 report, DG EPRS, EU Parliament, July.

IBFD (2009), *International Tax Glossary*, 6th Rev. Edn. IBFD, Amsterdam.

ICC (2012), "Using mutual legal assistance treaties (MLATs) to improve Cross-Border lawful intercept procedures", Document No. 373/512 - (12 September), Policy Statement.

Kaye, A.T. (2014), "Innovations in the war on tax evasion", Brigham Young University Law Review, pp. 363-413.

Knobel, A. (2018), "Reporting taxation: analysing loopholes in the EU's automatic exchange of information and how to close them", *A Report Commissioned by the GREENS/EFA Group in the European Parliament, 15 October*.

MacLennan, S. (2016), "The questionable legality of the diverted profits tax under double taxation conventions and EU law", *Intertax*, Vol. 44 No. 12, pp. 903-912.

Markovits, S.R. (2015), "The general theory of the second best and economic efficiency analysis", *Akron Law Review*, Vol. 49 No. 2, Article 9.

Mitsilegas, V. and Vavoula, N. (2016), "The evolving EU anti-money laundering regime: challenges for fundamental rights and the rule of law", *Maastricht Journal of European and Comparative Law*, Vol. 23 No. 2, pp. 261-293.

National Crime Agency (NCA) (2019), "National economic crime Centre (NECC): joint money laundering intelligence taskforce (JMLIT)", available at: https://nationalcrimeagency.gov.uk/what-we-do/national-economic-crime-centre (accessed 15 May 2019).

Nelson, C.S. (1990), "American bar association section of international law and practice reports to the house of delegates", *The International Lawyer*, Vol. 24 No. 3, pp. 872-879.

Oberson, X. (2015), *International Exchange of Information in Tax Matters: Towards Global Transparency*, Edward Elgar Publishing, MA.

OECD (2017), "Technology tools to tackle tax evasion and tax fraud", 31 March, available at: www.oecd.org/ctp/crime/technology-tools-to-tackle-tax-evasion-and-tax-fraud.htm (accessed 21 December 2018).

OECD (2018a), "About tax and crime", available at: www.oecd.org/tax/crime/about-tax-and-crime.htm (accessed 10 November 2018).

OECD (2018b), "Tax information exchange agreements (TIEAs)", available at: www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm (accessed 26 January 2019).

OECD (2018c), "The multilateral convention on mutual administrative assistance in tax matters", Coordinating Body (CB), updated: 19 November.

OECD (2018d), "Global forum on tax transparency marks a dramatic shift in the fight against tax evasion with the widespread commencement of the automatic exchange of financial information", 22 November.

OECD and The World Bank (2018), "Improving co-operation between tax authorities and anti-corruption authorities in combating tax crime and corruption", Paris, Licence: CC BY-NC-SA 3.0 IGO.

Owens, J.P. and McDonell, R. (2018), "Creating mechanisms to get good access to beneficial ownership information in international context", 21 February, doi: 10.2139/ssrn.3161723 (accessed 1 February 2019).

Panayi, H.C. (2015), *Advanced Issues in International and European Tax Law*, Hart Publishing, Oxford.

PROTAX (2018), "Case studies of tax crimes in the European union", (787098 PROTAX – D1.2 Deliverable Report) PROTAX, 2018-2021, EU Horizon 2020 Project.

PROTAX (2019), "PROTAX provides solutions for the prevention and prosecution of tax crimes", EU Horizon 2020 Project, available at: https://protax-project.eu/ (accessed 6 December 2018).

Remeur, C. (2016), "Anti-tax-avoidance directive", DG EPRS, EU Parliament, July.

Savona, E. and Riccardi, M. (2017), "Assessing the risk of money laundering in Europe", (Final Report of Project IARM, April), Co-funded by the Prevention of and Fight against Crime Programme of the EU.

Suso, A.M., *et al.* (2014), "The boundaries of abusive practices: the grey zone", in Lang, M. (Ed.), *ECJ – Recent Developments in Value Added Tax: The Evolution of European VAT Jurisprudence and Its Role in the EU Common VAT System*, Linde, Schriftenreihe, pp. 55-66.

Tax Justice Network (2009), "Tax information exchange arrangements", Tax Justice Briefing, May, available at: www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf (accessed 26 January 2019).

The Greens and European Free Alliance (EFA) (2017), "Principles for European whistleblower legislation", available at: www.greens-efa.eu/en/article/news/principles-for-european-whistleblower-legislation/ (accessed 15 May 2019).

The World Bank (2018), "OECD and world bank call for whole-of-government approach to combating tax evasion and corruption", Press Release, 24 October.

Thirion, E. and Scherrer, A. (2017), "Member states' capacity to fight tax crimes: ex-post impact assessment", EPRS.

Turksen, U., *et al.* (2015), "Implications of anti-money laundering law for accountancy in the European union – a comparative study", in Ryder, N. (Eds), *Fighting Financial Crime in the Global Economic Crisis (the Law of Financial Crime)*, Routledge, London, pp. 75-109.

Turksen, U. (2018), "Criminalisation and protection of whistle-blowers in the EU's counter financial crime framework", in Ligeti and Tosla (Eds), *Economic and Financial Crime in Europe*, Hart Publishing, Oxford.

Tyler, R.T. (2006), "Psychological perspectives on legitimacy and legitimation", *Annual Review of Psychology*, Vol. 57 No. 1, pp. 375-400.

Unger, B., *et al.* (2014),. *The Economic and Legal Effectiveness of the European Union's anti Money Laundering Policy*, Edward Elgar Publishing Limited, Cheltenham.

UN-IATF (2017), "Financing for development: Progress and prospects", Report of the Inter-Agency Task Force on Financing for Development 2017, New York, NY.

Willsher, K. (2015), "Nina ricci heir convicted of tax evasion in France with help of HSBC", The Guardian, Paris, 13 April.

Woodward, R. (2016), "A strange revolution: mock compliance and the failure of the OECD's international tax transparency regime", in Dietsch and Rixen, T. (Eds), *Global Tax Governance What is Wrong with It, and How to Fix It*, ECPR Press, pp. 103-122.

Further reading

Agnew, H. (2017), "Guy Wildenstein cleared of tax fraud charges in Paris", *The Financial Times, 12 January*.

COFFERS (2020), "COFFERS, 'about coffers' (EU horizon 2020 project: combating fiscal fraud and empowering regulators)", available at: https://coffers.eu/ (accessed 17 December 2018).

EU Commission. (2020a), "EU commission (no date 1), 'a huge problem'", available at: https://ec.europa.eu/taxation_customs/fight-against-tax-fraud-tax-evasion/a-huge-problem_en (accessed 12 January 2018).

Legal instruments

Charter of Fundamental Rights of the European Union (OJ C 326, 26 October 2012, pp. 391-407).

Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11 March 2011, pp. 1-12).

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29 April 2014, pp. 39-50).

Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156, 19 June 2018, pp. 43-74).

Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156, 19 June 2018, pp. 43-74).

Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (OJ L 284, 12 November 2018, pp. 22-30).

Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No 1889/2005 (OJ L 284, 12 November 2018, pp. 6-21).

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

Corresponding author
Umut Turksen can be contacted at: umut.turksen@coventry.ac.uk