



FinCEN files reveal important information sharing challenges and human factors in countering tax crimes in the EU

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PROTAX is conducting a cutting-edge research on information sharing challenges in countering tax crimes in the EU. In light of the recent financial crime scandals, we have identified a number of concerns for which we will be proposing a number of solutions in due course as part of our on-going work under WP5. Firstly, this article identifies a number of key policy concerns and vulnerabilities in relation to countering tax crimes. Secondly, from an organisational analysis perspective, it offers a critique of the role of human factors in information sharing among relevant key stakeholders in tax eco-systems.

The initial policy concerns

From the recent FinCEN files (2020), Paradise Papers (2017), Panama Papers (2016), Swiss Leaks (2015), Football Leaks (2016), LuxLeaks (2014) to the many other leaks especially promoted by International Consortium of Investigative Journalists (ICIJ) and European Investigative Collaborations (EIC), one can make a legitimate and reasonable observations that:

- Obligated financial entities are enabling criminals and/or are failing in their responsibilities to properly report suspicious activities in a timely manner;
- Competent financial institutions are failing in their oversight responsibility to ensure that they have the needed prudential data and ensure compliance; and
- At the heart of the above two observations is that information-sharing is not effective enough to ensure that all stakeholders in the financial crime countering ecosystem are provided appropriate access to relevant information on financial criminals on time.

The consequence is that sometimes the criminals would have covered their tracks and/or moved their assets beyond the reach of law enforcement and recovery agencies, before a leakage by a whistleblower in the criminal justice system or investigative journalists such as the ICIJ. For instance, with respect to the FinCEN leaks, the documents leaked indicate about US\$2 trillion of transactions

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from banks such as JP Morgan, HSBC, Deutsche Bank, and Standard Chartered. These transactions have shown the extent to which 'some of the world's biggest banks have allowed criminals to move dirty money around the world'.³ The leaked files from FinCEN consist of about 2,657 documents (including 2,121 SARs) mainly covering the period between 2000⁴ and 2017 when they were submitted to the authorities in the United States of America (US). That is about a 17-year long, and untoward secrets were just stuck somewhere without being shared with relevant international partners or acted upon.

Note however that not all SARs turn out to be actual or convictable criminal conduct. So, it is likely that some of these files would not have had a criminality outturn. However, more often than not, the potential of SARs to turn out to be actual criminal actions is high. This would depend on the quality of the SARs and how they have been actioned upon by the relevant authorities. This understanding was evidenced during the PROTAX focus groups in which participating LEAs emphasized the need for meaningful and high-quality SARs.⁵ The analysis of FinCEN files does show orchestrated international financial misconduct.

FinCEN files are not as huge as most of the previous leaks but it has a huge transaction amount running into trillions. FinCEN files present a picture that the continual exposure of financial crime such as money laundering, tax crimes and corruption amongst high profile figures - by journalists and whistleblowers rather than the mandated competent authorities or obliged reporting entities (e.g. accountants, lawyers, banks, etc.) - demonstrate just how big the problem of information-sharing and execution is - not just in the EU but across the world. It is thus presenting a huge global challenge needing an equivalent layer of massive global policy response. On the contrary, non-state entities such as whistleblowers and media seem to be pivotal in sharing key evidential data with over 100 news organisations in 88 countries.⁶

The US⁷ and UK⁸ - which have been affected most by these leaks - have already announced plans to reform their mode of identifying company owners and their transactions as well as enhancing transparency and exchange of information mechanisms.⁹ In the US, FinCEN published 'an Advance

³ BBC News, 'FinCEN Files: All you need to know about the documents leak' (FinCEN Files, 20 September 2020).

⁴ Some files were dated back to 1999.

⁵ Rasmouki F. *et al.* 'Approaches to tax crimes in the European Union' (Report number: D2.3, European Union Horizon 2020 PROTAX project, 2019); see also Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020).

⁶ BBC News, 'FinCEN Files: All you need to know about the documents leak' (FinCEN Files, 20 September 2020).

⁷ See FinCEN, 'FinCEN Seeks Comments on Enhancing the Effectiveness of Anti-Money Laundering Programs' (16 September 2020), <https://www.fincen.gov/news/news-releases/fincen-seeks-comments-enhancing-effectiveness-anti-money-laundering-programs> (Accessed 20 September 2020).

⁸ Department for Business, Energy & Industrial Strategy, 'Reforms to Companies House to clamp down on fraud and give businesses greater confidence in transactions' (Press release, UK.GOV, 18 September 2020), <https://www.gov.uk/government/news/reforms-to-companies-house-to-clamp-down-on-fraud-and-give-businesses-greater-confidence-in-transactions> (Accessed 20 September 2020).

⁹ BBC News, 'FinCEN Files: All you need to know about the documents leak' (FinCEN Files, 20 September 2020).

Notice of Proposed Rulemaking [ANPRM] to solicit public comment on ... potential regulatory amendments under the Bank Secrecy Act [BSA] of the US. These expected regulatory amendments would be required to make a very poignant statement: ¹⁰

*an “effective and reasonably designed” program is one that: assesses and manages risk as **informed** by a financial institution’s own risk assessment process, including consideration of AML priorities to be issued by FinCEN consistent with the proposed amendments, provides for compliance with BSA requirements, and provides for the **reporting of information with a high degree of usefulness** to government authorities.*

Highlighting useful information-sharing, this proposition seeks to achieve ‘enhanced effectiveness and efficiency of anti-money laundering [AML] programmes’.¹¹

While the EU had responded to the major leaks in its jurisdictions, the huge exposure of major players in the global financial system to these risks of information-sharing deficits must be a significant policy wake-up call. In addition, this paper emphasizes the urgent need for the EU to respond to find a durable solution to such scandals which show no sign of abetting.

The problem with the current institutional and organisational architecture

In regards to the EU legal and regulatory framework, previous PROTAX deliverables including D5.1¹² highlighted a number of instruments for information-sharing to counter financial crime in general and tax fraud in particular in the EU in Table 1 below. Corresponding key challenges therein are also identified.

Table 1: Challenges of selected key information-sharing instruments in EU

Instruments	Nature of instrument	Selected key challenges/limitations
1 Directive 2011/16/EU on administrative cooperation in the field of taxation with six amendments [DAC 1 – DAC 7] ¹³	Establishing a system of information-sharing on taxes targeting relevant institutions	<ul style="list-style-type: none"> • More focused on tax elements of administrative or civil nature and less on criminal matters. • Poor information seeking instruments • Many data output errors • Data harmonization is a challenge • Data security and protection issues

¹⁰ FinCEN, ‘FinCEN Seeks Comments on Enhancing the Effectiveness of Anti-Money Laundering Programs’ (16 September 2020).

¹¹ *Ibid.*

¹² Reger F., *et al.*, ‘Guidance report for practitioners and policy makers’ (Report number D5.1, EU PROTAX, 2020).

¹³ Council Directive 2011/16/EU on administrative cooperation in the field of taxation of 15.2.2011, OJ L 64/2011, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0016&gid=1596707926695&from=EN> (Accessed 24 August 2020); European Commission, ‘Administrative cooperation in [direct] taxation in the EU’,

			<ul style="list-style-type: none"> No provision for an EU-wide centralised coordinating unit for different types of financial crimes.¹⁴
2	Council Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax ¹⁵	Establishing a system of information-sharing on VAT fraud targeting relevant institutions	<ul style="list-style-type: none"> Not good enough information seeking instruments VAT carousel is still widespread partly due to the VAT system and ineffective cooperative mechanisms Does not show its relationship with money laundering Data harmonisation is a challenge Data security and protection issues No provision for an EU-wide centralised coordinating unit for different types of financial crimes.¹⁶
3	Council Regulation No 389/2012/EU of 2 May 2012 on administrative cooperation in the field of excise duties ¹⁷	Establishing a system of information-sharing on excise targeting relevant institutions	<ul style="list-style-type: none"> Although central register and authority at the national level are provided for, there is no provision of EU-wide an EU-wide central entity for coordinating activities on different types of financial crimes System disparities across EU is a major obstacle Poor information seeking instruments Data security and protection issues.¹⁸

https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en (Accessed 12 January 2020); European Commission, *Directive on Administrative Cooperation (DAC): Evaluation* (Platform for good tax governance meeting 26 March 2019), https://ec.europa.eu/taxation_customs/sites/taxation/files/presentation_dac_evaluation_v3.pdf (Accessed 21 November 2019).

¹⁴ European Commission, 'Evaluation of Administrative Cooperation in Direct Taxation (Final report, 24 April 2019),

https://ec.europa.eu/taxation_customs/sites/taxation/files/2019_evaluation_study_on_dac_kp021928_4enn.pdf (Accessed 24 August 2020); see Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

¹⁵ OJ L 268/1.

¹⁶ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

¹⁷ OJ L 121/1.

¹⁸ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting

4	Council Directive 2010/24/EU of 16 March concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures ¹⁹	Establishing a system of information-sharing on mutual claims' recovery targeting relevant institutions	<ul style="list-style-type: none"> • Not good enough information seeking instruments • Recovery assistance is difficult partly due to limited intra and inter organisational information-sharing • Data harmonisation is a challenge • Data security and protection issues • No provision for an EU-wide centralised coordinating unit for different types of financial crimes.²⁰
5	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union ²¹	Establishing a system of information-sharing on mutual assistance in criminal matters targeting relevant institutions	<ul style="list-style-type: none"> • Inadequate clarity in including financial crimes such as tax crimes and money laundering • Language barriers • Differences in legal systems • Trust issues leading to holding back of relevant information • No provision for an EU-wide centralised coordinating unit for different types of financial crimes that can harmonise inevitable differences between jurisdictions.²²
6	Directive (EU) 2015/849 ²³	Establishing a system AML with relevant information-	<ul style="list-style-type: none"> • Not good enough information seeking instruments

contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

¹⁹ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures OJ L 84, 31.3.2010, p. 1.

²⁰ European Commission, 'Report from the commission to the European parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures' (Brussels, 18.12.2017 COM(2017) 778 final {SWD(2017) 461 final}, https://ec.europa.eu/taxation_customs/sites/taxation/files/2017_report_mutual_tax_recovery_assistance_en.pdf (Accessed 26 August 2020); see Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

²¹ Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197/2000.

²² Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

²³ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60 / EC of the European Parliament and of the Council and Commission Directive 2006/70 / EC (Text with EEA relevance) OJ L 141, 5.6.2015, p. 73.

		sharing provisions targeting relevant institutions	<ul style="list-style-type: none"> • Data harmonisation is a challenge • Data security and protection issues • There is interconnection of Member States' central registers holding beneficial ownership information through the European Central Platform established by Directive (EU) 2017/1132 which necessitates the coordination of national systems having varying technical characteristics. However, this system is tailored towards AML without adequate coverage of other financial crimes.²⁴
7	Directive (EU) 2018/843 ²⁵	Expanding a system of AML with relevant information-sharing provisions targeting relevant institutions	<ul style="list-style-type: none"> • Not good enough information seeking instruments • Data harmonisation is a challenge • Data security and protection issues • There is supposed to be interconnection of Member States' central registers holding beneficial ownership information through the European Central Platform. However, this system is tailored towards AML without adequate coverage of other financial crimes.²⁶
8	Directive (EU) 2018/1673 ²⁷	Expanding a system of AML with relevant information-sharing provisions targeting relevant institutions	<ul style="list-style-type: none"> • Not good enough information seeking instruments • Data harmonisation is a challenge • Data security and protection issues • Just like the preceding AML Directives, there is no provision for an EU-wide centralised coordinating unit for different types of financial crimes.²⁸

²⁴ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

²⁵ 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, PE/72/2017/REV/1, OJ L 156/43.

²⁶ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

²⁷ Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (PE/30/2018/REV/1 OJ L 284/22).

²⁸ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU

9	Directive (EU) 2017/1371 ²⁹	Establishing a system of anti-fraud system for EU financial interests with relevant information-sharing provisions targeting relevant institutions	<ul style="list-style-type: none"> • Not good enough information seeking instruments • Data harmonisation is a challenge • Data security and protection issues • EPPO³⁰ and OLAF³¹ provide platforms for pursuing financial crime throughout the EU but the system provided is not effectively congruent and lacks the competence of an EU-wide centralised coordinating unit for different types of financial crimes.³²
10	Directive 2014/41/EU ³³	Establishing a system for information-sharing in support of appropriate investigative measures by relevant authorities	<ul style="list-style-type: none"> • Data harmonisation is a challenge • Data security and protection issues • Although national central authorities can be assigned to support competent authorities, there is no provision for an EU-wide centralised coordinating unit for different types of financial crimes.³⁴
11	Convention implementing the Schengen Agreement ³⁵	Establishing a system ³⁶ for mutual surveillance of parties' borders to counter criminal acts including as they relate to tax crimes	<ul style="list-style-type: none"> • Data harmonisation is a challenge • Data security and protection concerns • A centralised system is provided but its coverage, positioning and focus appear to be general. It has limited attention on fighting financial crime to qualify for an EU-wide centralised

PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

²⁹ Recital 7, Art 4(1).

³⁰ European Public Prosecutor's Office.

³¹ The European Anti-Fraud Office.

³² Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

³³ Directive 2014/41/EU of 3. 4. 2014 regarding the European Investigation Order in criminal matters, OJ L 130/2014.

³⁴ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

³⁵ The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders OJ L 239/2000 p 19.

³⁶ European Commission, 'Schengen Information System', <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system> [Accessed 26 August 2020].

			coordinating unit against financial crime. ³⁷
12	Directive 2019/1153 on rules facilitating the use of financial and other information ³⁸	Establishing a system for facilitating the access and use by the competent authorities of financial and bank account information as well as FIUs' access to law enforcement information for countering serious crimes	<ul style="list-style-type: none"> • Not good enough information seeking instruments • Data harmonisation is a challenge • Data security and protection issues • No provision for an EU-wide centralised coordinating unit for different types of financial crimes.³⁹
13	Fiscalis 2020 Regulation ⁴⁰	Establishing a multi-annual action programme to improve the operation of the taxation systems in the internal market and to support cooperation in relation thereto including for countering financial crime	<ul style="list-style-type: none"> • Data harmonisation is a challenge • Data security and protection concerns • No provision for an EU-wide centralised coordinating unit for different types of financial crimes.⁴¹
14	Swedish Initiative ⁴²	Establishing a system rules under which Member States' LEAs may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or	<ul style="list-style-type: none"> • Not good enough information seeking instruments • Data harmonisation is a challenge • Data security and protection issues • No provision for an EU-wide centralised coordinating unit for different types of financial crimes.⁴³

³⁷ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

³⁸ Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA, OJ L 2019/186 p. 122.

³⁹ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

⁴⁰ Regulation (EU) 1286/2013 of 11.12.2013 establishing an action programme to improve the operation of taxation systems in the European Union for the period 2014-2020 (Fiscalis, 2020) and repealing Decision No 1482/2007/EC, OJ L 347/2013, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32013R1286> (Accessed 28 August 2020).

⁴¹ Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

⁴² Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386/2006, p.89, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006F0960> (Accessed 12 September 2020).

⁴³ Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

		criminal intelligence operations	
15	E-justice ⁴⁴	Establishing an electronic platform tool for judicial cooperation and legal education on different jurisdictions to facilitate knowledge sharing in advancing justice	<ul style="list-style-type: none"> • Holds limited information, which are mainly for education purposes • No provision for an EU-wide centralised coordinating unit for different types of financial crimes.⁴⁵
16	European judicial network (EJN) ⁴⁶	Establishing a platform tool for judicial cooperation including sharing information on financial crime matters	<ul style="list-style-type: none"> • Data harmonisation is a challenge • Data security and protection concerns • No provision for an EU-wide centralised coordinating unit for different types of financial crimes.⁴⁷
17	Eurojust ⁴⁸	Representing an agency for criminal justice cooperation - supporting and building coordination and cooperation between national investigating and prosecuting authorities to pursue cases of cross-border serious crime	<ul style="list-style-type: none"> • Not good enough information seeking instruments • Data harmonisation is a challenge • Data security and protection issues • No provision for an EU-wide centralised coordinating unit for different types of financial crimes.⁴⁹
18	Europol ⁵⁰	Representing an agency a number of information-sharing platforms such as	<ul style="list-style-type: none"> • Data harmonisation is a challenge • Data security and protection concerns

⁴⁴ European Commission, 'Tools of judicial cooperation', https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation_en (Accessed 26 August 2020).

⁴⁵ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

⁴⁶ European Commission, 'European Judicial Network', https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-judicial-network_en (Accessed 12 September 2020); see 2008/976/JHA: Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, <https://www.ein-crimjust.europa.eu/ein/libcategories.aspx?Id=44> (Accessed 12 September 2020).

⁴⁷ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

⁴⁸ European Commission, 'Eurojust', https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/eurojust_en (Accessed 12 September); Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA PE/37/2018/REV/1 OJ L 295, 21.11.2018, p. 138-183, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1542787685176&uri=CELEX:32018R1727> (Accessed 12 September).

⁴⁹ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

⁵⁰ EU Regulation 2016/794 was promulgated in 2016 to revise the founding act in order to align it with the Lisbon Treaty 2007. European Commission, 'Agencies', <https://ec.europa.eu/home-affairs/what-we-do/agencies#2> (Accessed 8 January 2020).

		SIENA, ⁵¹ EIS, ⁵² FIU.net, and EPE ⁵³ that support national LEAs to counter serious crimes such as “terrorism, drug trafficking, people smuggling, cybercrime, and other organised crime activities” ⁵⁴	<ul style="list-style-type: none"> No provision for an EU-wide centralised coordinating unit for different types of financial crimes.⁵⁵
19	OLAF ⁵⁶	Representing an anti-fraud office of the EU whereby it carries out investigation into fraud against the EU budget, corruption and serious misconduct within the European institutions while also developing anti-fraud policy for the European Commission	<ul style="list-style-type: none"> No provision for an EU-wide centralised coordinating unit for different types of financial crimes.⁵⁷
20	EPPO ⁵⁸	Representing an independent Union body or agency with competence to fight crimes against the Union budget, especially those established by Directive (EU) 2017/1371	<ul style="list-style-type: none"> Data harmonisation is a challenge Data security and protection issues No provision for an EU-wide centralised coordinating unit for different types of financial crimes.⁵⁹
21	ECRIS ⁶⁰ and EU Agency for	ECRIS representing information-sharing	<ul style="list-style-type: none"> Not good enough information seeking instruments

⁵¹ Secure Information Exchange Network Application; see European Commission, ‘Information exchange’, https://ec.europa.eu/home-affairs/what-we-do/policies/police-cooperation/information-exchange_en [Accessed 26 August 2020].

⁵² European Information System.

⁵³ Europol Platform for Experts.

⁵⁴ European Commission, ‘Agencies’, <https://ec.europa.eu/home-affairs/what-we-do/agencies#2> [Accessed 8 January 2020].

⁵⁵ Reger F., *et al.*, ‘Guidance report for practitioners and policy makers’ (Report number D5.1, EU PROTAX, 2020)

⁵⁶ OLAF, ‘Legal background’ (Last update: 05 May 2020), https://ec.europa.eu/anti-fraud/about-us/legal-framework_en [Accessed 12 September 2020].

⁵⁷ Reger F., *et al.*, ‘Guidance report for practitioners and policy makers’ (Report number D5.1, EU PROTAX, 2020).

⁵⁸ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’); European Commission, ‘European Public Prosecutor’s Office’, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en [Accessed 12 September 2020].

⁵⁹ Reger F., *et al.*, ‘Guidance report for practitioners and policy makers’ (Report number D5.1, EU PROTAX, 2020); Turksen U., *et al.*, ‘Case Studies of Tax Crimes in the European Union’ (Report number D1.2, EU PROTAX, 2018).

⁶⁰ European Commission, ‘European Criminal Records Information System (ECRIS): Connecting national criminal databases centralised and decentralised information exchange’, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecri_en [Accessed 8 January 2020]; see Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 amending Council Framework Decision 2009/315 / JHA, as regards the exchange of information on third-country nationals

large-scale IT-systems (EU-LISA) ⁶¹	platform while eu-LISA representing an agency to host the ECRIS database	<ul style="list-style-type: none"> • Data harmonization is a challenge • Data security and protection issues No provision for an EU-wide centralised coordinating unit for different types of financial crimes. ⁶²
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It can be noticed that these instruments and their organisation are numerous – as much as 21 – there are even more! Though there are different layers of understanding for their establishment and purpose in the counter crime eco-system of the EU, the stark reality is that:

- Common broad challenges include poor instruments to collect information; and data protection, security and harmonisation issues;
- The multiple EU instruments – converged or diverged – hardly have any single platform that champions their unified policy discourse and action;
- It is difficult to align all these EU-level entities to similar or compatible institutions in EU Member States, thereby providing a convenient escape route for data sharing complications to fester (as illustrated and analysed in PROTAX D4.1);
- There is neither a clear EU-wide entity that is fit for investigating and prosecuting all cross-border financial crimes nor a clear EU-wide entity that is suitable for effectively networking and coordinating information-sharing;
- EPPO presents a structure and competence for investigating and prosecuting financial crime in every part of the EU. However, its remit is limited to crimes that affect the EU budget;
- ECRIS in EU-LISA presents an EU-wide database system on criminal activities and responses. However, all dimensions of financial crime particularly relating to tax crimes such as tax evasion and tax fraud are not effectively covered;

and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316 / JHA PE / 87/2018 / REV / 1 OJ L 151, 7.6.2019, p. 143; see also Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 PE/88/2018/REV/1 OJ L 135, 22.5.2019, p.1.

⁶¹ European Commission, 'European Criminal Records Information System (ECRIS): Connecting national criminal databases centralised and decentralised information exchange', https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecri_en (Accessed 8 January 2020); see also European Union, 'European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA)', https://europa.eu/european-union/about-eu/agencies/eu-lisa_en (Accessed 12 September 2020).

⁶² Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

- OLAF presents a structure and competence for the investigation and prosecution of financial crime in every jurisdiction of the EU. But the remit of OLAF is limited to financial crime that affect the EU budget;
- These instruments, regardless of any shortcomings, are serving useful purposes in their respective ways and, therefore, can be enhanced and left to continue operating;
- Financial crimes remain a serious problem, and have overarching relationship with the persistence of a number of the other crimes such as drug trafficking and robbery – for instance, money from these crimes are usually laundered (to avoid being noticed of income source) from which taxes are often evaded (at some point).⁶³ Financial crime, therefore, require serious attention in various ways of countermeasures – including the important measure of information-sharing;
- A fundamental question left unanswered by all these instruments is the lack of provision made for a super or supra-structure that can effectively and efficiently counter financial crimes of all dimensions through well-coordinated and robust information-sharing regime.

The above instruments/frameworks are widely patronised by EU Member States. PROTAX focus groups found that majority of the participating countries utilise most of the above instruments especially Europol, Eurojust, EIO and JITs. However, it is also evident that there are differences in the legal framework (with overlapping and competing legal regulations), definitions of tax offences and thresholds, competences and responsibilities across the LEA communities (such as between Austria, Hungary and Czech Republic), and language are characterised as some of the great challenges for international cooperation and information-sharing. These challenges adversely affect all the instruments.⁶⁴

Further analysis on some of the instruments

In the area of tax, by far, the Directive on Administrative Cooperation (DAC) has provided comprehensive information-exchange regime in the EU. However, the DAC framework cooperation does not pay attention to sharing of criminal records or direct information on criminal activities on tax. The only reason for consideration of DAC in criminal investigations is that a look at the granular details of information provided through DAC can help tax administrations to detect possible tax fraud and related financial crimes – so they can cooperate with LEAs such as the FIUs to trace criminal

⁶³ See Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

⁶⁴ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

activities of tax payers. DAC does not appear adequate as a safeguard to information sharing on criminal financial matters. But it is a very useful framework for complementing bespoke information sharing mechanisms in EU which focus on exchanging only information on financial crime matters. Nevertheless, it would be useful to have a filter embedded in the exchange mechanisms of DAC wherein criminal information can more easily be isolated, shared and pursued by the LEAs.

A 2018 report on AEOI by the EU found, amongst others, that the AEOI was challenged especially at the end-user level:

- Although a lot of information had been exchanged over the period, not all the information had sufficient quality;
- Not all the information exchanged were utilized;
- Most of the Member States did not assess the benefits of the exchanges, thereby may neither have known the benefits nor have had the proclivity to fully buy into the AEOI framework provided by the EU and the OECD.⁶⁵

These challenges continue to persist, which have highlighted the urgent need to ensure that there is improvement in the quality of the information collected, exchanged and that all the information that have been exchanged automatically are put to use by authorities. Even though the September 2019 evaluation of the DAC evidences that the intervention has been largely effective, relevant and coherent, the issue of inadequate data quality and limited evidence as well as end-user complaints about the nature of AEOI regime have, by far, made the DAC a qualified candidate needing continuous improvement.⁶⁶ At this point, the limited information quality and utilisation, limited level of coverage and participation, as well as limited efficiency and effectiveness of the DAC information exchange regime are critical areas of concern that require a greater sense of urgent attention.

There has been widespread maladministration of the DAC and the AMLD of the EU. These include the following:

- Relevant authorities of EU Member States have failed “to act upon the evidence of serious and persistent failure to identify beneficial owners in the context of customer due diligence or to require that the verification of the identity of the customer and the beneficial owner takes place before the establishment of a business relationship or the carrying-out of the

⁶⁵ European Commission, ‘Administrative cooperation in [direct] taxation in the EU’, https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en (Accessed: 12 January 2020); European Commission, *Directive on Administrative Cooperation (DAC): Evaluation* (Platform for good tax governance meeting 26 March 2019), https://ec.europa.eu/taxation_customs/sites/taxation/files/presentation_dac_evaluation_v3.pdf (Accessed 21 November 2019).

⁶⁶ European Commission, *Commission Staff Working Document Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC* {SWD(2019) 328 final}, https://ec.europa.eu/taxation_customs/sites/taxation/files/2019_staff_working_document_evaluation_on_dac.pdf (Accessed: 7 January 2020).

transaction (Article 8(1)(b) and Article 9(1) of AMLD III), and failure of the Commission to ensure effective implementation of AMLD III”;

- Relevant authorities of Member States have failed ‘to ensure that AML obliged entities can be effectively held liable for infringements of the national provisions, including reporting of beneficial ownership information to competent authorities (Article 39(1) of AMLD III), and failure of the EU Commission to ensure effective implementation of AMLD III’;
- Relevant authorities of EU Member States have failed ‘to spontaneously communicate tax information to another Member State in case of grounds for supposing that there may be a loss of tax revenue in other Member States (Article 9(1) DAC), and failure of the Commission to ensure effective implementation of DAC;
- Relevant authorities of EU Member States have failed ‘to apply administrative penalties and other administrative measures to institutions that are found liable for serious breach of the national provisions that have been adopted pursuant to AMLD III and Articles 67(1)(o) and 67(2) of Directive 2013/36/EU (CRD IV), and failure of the Commission to ensure effective implementation of CRD IV’;
- Member States of the EU have failed ‘to sincerely cooperate in the framework of the Code of Conduct Group on Business Taxation and failure to abide by the principle of sincere cooperation, as required by Article IV of the TFEU;⁶⁷
- Despite of the competence and jurisdiction of the PANA Committee of the EU Parliament,⁶⁸ there is limited cooperation EU institutions give to it - which amounts to ‘a breach of the principle of sincere cooperation’. This is problematic because the PANA Committee has the mandate and capacity to collect, analyse, harmonise and report on information regarding financial crimes and, therefore, should be given the needed cooperation by all stakeholders.⁶⁹
- The unequal evolution of FIUs across the world has contributed to the challenges in sharing information between FIUs and using information that is extracted from STRs/SARs.
- According to PANA, the clear roadblock to information sharing in financial crime law enforcement has been that not only that there are challenges with respect to information quality, utilization, effectiveness and efficiency but also “that sanctions are not always applied or sufficiently deterrent in relevant cases”.

⁶⁷ Ježek and Kofod (Rapporteurs), *Report on the inquiry into money laundering, tax avoidance and tax evasion* (European Parliament 2014-2019, November 2017), p 41.

⁶⁸ European Parliament, PANA committee of inquiry, https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_ATA%282017%29614619, and PANA Reports, <https://www.europarl.europa.eu/committees/en/archives/8/pana/home/publications> (Accessed: 23 October 2020).

⁶⁹ *Supra note*, Ježek and Kofod.

- Additionally, the opposition sometimes mounted by some EU Member against EU's imposition of sanctions on third countries with tax systems which are deemed to be damaging to the Union is an outstanding challenge. Weak sanction regime does not promote information exchange because some law enforcement personnel can develop low morale in cooperating with each other if they feel that the even if the information exchanged is used and culprits are fished out, the culprits are likely to evade appropriate sanctions.

As a result of these administrative and structural challenges, the bottlenecks for nearly every information-sharing mechanism become heightened in the EU ecosystem for sharing relevant information to fight financial crimes. These bottlenecks include:

- User privacy and data protection;
- Bureaucracy;
- Poor management (including poor decision making);
- Heterogeneous systems of ICT;
- System security (including leaking of data);
- Resistance to change;
- Ambiguity of power and authority to share or not to share information (including differences in data definition standards in jurisdictions);
- Cross purposes or opposing goals (such as misaligned economic interest);
- Rivalry (especially over-protected competitive behavior);
- Resource constraints;
- Legal barriers in relation to fear of legal or regulatory action against a particular form of usage (this is one of the consequences of the differences in legal framework and culture);
- Incompatibility of hardware and software;
- Nature of group size, if it is too large to handle;
- Type of participants involved, if participants have different backgrounds with entrenched interests;
- Cost in participating in information-sharing;
- Difficulties with internet connectivity or network failures;
- Low quality information;
- Information overload; and
- Low level or lack of trust.⁷⁰

⁷⁰ ENISA, 'Incentives and Challenges for Information Sharing in the Context of Network and Information Security' (European Network and Information Security Agency, 2010) p.28; Zhang, J., Dawes S. S. & Sarkis, J., 'Exploring Stakeholders' Expectations of the Benefits and Barriers of E-Government Knowledge Sharing' (2005) 18 *Journal of Enterprise Information Management* 548; Gil-García J. R., Chengalur-Smith I. N. & Duchessi, P.,

Zhang *et al.* found that the top two bottlenecks facing the implementation of electronic information-sharing, in particular, are funding constraints and resistance of people to change due their cascading nature of imposing impediments to other courses of action.⁷¹ Apart from these, Gil-García *et al.* articulated that opposing goals and project schedule constrains are major challenges in information sharing since they are also seen as foundational in dictating possible courses of action. This does not mean that the other constraints are not important. In fact, the challenges are interrelated. These challenges can be zoned into technical, organisational and political barriers.⁷² PROTAX focus groups' findings align with the above bottlenecks and with the submission of Gil-García *et al.* and Zhang *et al.* However, PROTAX, by way of sourcing, also found data protection and privacy issues with many underlying reasons are part of the broad challenges of information-sharing in the EU.⁷³

Data protection and privacy concerns have been at the centre of secrecy measures and difficulty in legislating to have access to as much the needed information as possible on persons in order to effectively trace the origin, transition and destination of illicit funds or any such funds that are prone to financial crime. In this regard, Je-Yoon Shin, the then president of the Financial Action Task Force (FATF), had, in December 2015, noted⁷⁴ at the United Nations Security Council that:

'Due to the differences in the data protection laws, the banks, as one of the largest sources of intelligence for LEAs, regulatory institutions, and related bodies, are usually prevented from sharing relevant 'information across borders within their own organisations, let alone with each other or with the authorities'.

'Collaborative E-Government: Impediments And Benefits of Information-Sharing Projects in the Public Sector (2007) 16 *European Journal of Information Systems* 121.

⁷¹ Zhang, J., Dawes S. S. & Sarkis, J., 'Exploring Stakeholders' Expectations of the Benefits and Barriers of E-Government Knowledge Sharing' (2005) 18 *Journal of Enterprise Information Management* 548; Gil-García J. R., Chengalur-Smith I. N. & Duchessi, P., 'Collaborative E-Government: Impediments And Benefits of Information-Sharing Projects in the Public Sector (2007) 16 *European Journal of Information Systems* 121.

⁷² Dawes S. S., 'Interagency Information Sharing: Expected Benefits, Manageable Risks. (1996) 15 *Journal of Policy Analysis and Management*, 377.

⁷³ Reger F., *et al.*, 'Guidance report for practitioners and policy makers' (Report number D5.1, EU PROTAX, 2020); Reger F., *et al.*, 'Report on comparative legal and institutional analysis' (Report number D3.1, EU PROTAX, 2020); Turksen U., *et al.*, 'A Comparative Analysis of Tax Crimes in the European Union' (Report number D3.2, EU PROTAX, 2020); Hall M., *et al.*, 'Conference Report summarising and documenting contributions from T2.7' (Report number D2.4, EU PROTAX, 2020); Turksen U., *et al.*, 'Case Studies of Tax Crimes in the European Union' (Report number D1.2, EU PROTAX, 2018).

⁷⁴ Inês Sofia de Oliveira, 'Challenges to Information Sharing: Perceptions and Realities' (RUSI Occasional Paper, July 2016), p.v, https://rusi.org/sites/default/files/20160708_ines_challenges_to_info_sharing_final1.pdf (Accessed 13 March 2020); Je-Yoon Shin, 'The Importance of Urgent Action to Implement FATF's Measures to Counter Terrorist Financing and Help Defeat ISIL' [Speech at the UN Security Council, New York, 17 December 2015].

Several data protection measures have since been provided after Shin's observation, which have sought to address the challenge. But the challenge goes beyond the differences in data protection laws of jurisdictions as a hindering factor of data sharing. The ongoing implementation of the following regulatory instruments on data protection, sharing and access appear to address the above challenge of differences but have yet to effectively address the issue of hesitant information sharing by/between companies and authorities.

- 2012 Recommendations of FATF;
- Directive (EU) 2015/849 (fourth AMLD);
- Regulation (EU) 2016/679 (Data Protection Regulation (GDPR)),⁷⁵
- Directive (EU) 2017/1371 (PIF Directive);
- Directive (EU) 2018/843 (fifth AMLD); and
- Directive (EU) 2018/1673 (sixth AMLD);⁷⁶
- Directive (EU) 2019/1937 (Whistle-blower protection).⁷⁷

Even with all these instruments which provide enormous infrastructure to address data protection and privacy concerns, there are still a number of challenges including the fact that some companies continue to '*file a glut of unfocused, poor-quality information with the authorities in an effort to protect [themselves] from further censure and penalty*'.⁷⁸ At the same time, the underlying challenge transcends the issue of requirements of information-sharing to concentrate on the enormous volume of data collected in light of the above regulatory instruments, which run contrary to 'necessity' and 'proportionality' principles that undergird data protection laws and regulations.

The urgent policy issue burdening the current policy framework which requires urgent action is how to make the information-sharing architecture for different types of financial crimes in the EU more effective, efficient and robust/resilient.

PROTAX is working towards addressing these gaps and will be disseminating our findings in the coming months.

⁷⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) (OJ L 119, 4.5.2016, p. 1-88).

⁷⁶ Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law PE / 30/2018 / REV / 1 (OJ L 284, 12.11.2018, p. 22-30).

⁷⁷ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law OJ L305/17.

⁷⁸ de Oliveira S. I., 'Challenges to Information Sharing: Perceptions and Realities' (RUSI Occasional Paper, July 2016).

The role of human factors in information sharing – a perspective from organizational analysis

As evidenced and mentioned above, ICIJ and whistle-blowers have probably played a more important role in uncovering the recent notorious criminal practices in the financial sector than professional staff in national tax administrations and the financial industry who are responsible to control financial transactions and identify tax-related and other criminal activities such as e.g. money laundering. When looking at investigations and prosecutions of major financial crimes this observation holds an important lesson for policy and reform. Investigative journalists have an obvious incentive to search for and reveal any suspicious financial transactions. They are motivated to cooperate across national borders, share information and invest their time and resources to identify and follow initial leads and signs of suspicious transactions and activities, collect evidence for a case and using their forensic creativity piecing together complex puzzles. As opposed to a tax auditor (whose fees are paid by the company they audit), who usually follows pre-described steps, investigative journalists, have a less structured, but at the same time more focussed approach in collection information to make a story.⁷⁹ Having collected sufficient evidence to publish the results of their investigation, journalists can expect significant rewards by creating public attention and adding to their individual reputation as investigative experts and civil society watchdogs.

Public and private sector expert staff rarely can present such spectacular revelations. But this does not reflect individual incompetence, or collective unwillingness, nor can it be fully explained through the notorious lack of resources and insufficient legal tools and frameworks to cope with seemingly hyper-smart criminal networks. As the European legal instruments, listed in Table 1 above clearly demonstrate, improving information sharing is a priority of policy makers at European level. However, breathing life into these regulations requires an adequate opportunity and incentive structure, collaborative and flexible forms of work, sustained by a supportive organisational culture.

The typical incentive structure emerging in the working environment of professional experts in public or private organisations is different from that of investigative journalists. It puts a

⁷⁹ Ettema, J. S., & Glasser, T. L. (1984). *On the epistemology of investigative journalism*. (Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (Gainesville, FL, August 5-8, 1984)

premium on routine standard procedures, favouring the ordinary over the extraordinary (and probably disruptive) way of doing things.⁸⁰ A tax auditor, a due diligence officer in a bank or a staff member of a national FIU have to process huge amounts of data related to financial transactions of tax payers and customers as part of their daily routine work and achieving a certain threshold (or case load) is considered as an important key performance indicator in these working environments. Employees who have to review files and figures, are tied into complex regimes of division of labour and are expected to collect, process and review incoming information in due time to deliver input for others downstream in the organisation. This puts a premium on swift standardised work flow and high volumes of processed cases. Any detected irregularity or initial suspicion constitutes a deviation from routine standard operating procedure adding to the workload of the individual staff member. Furthermore, flagging a suspicious activity or irregularity requires a more in-depth inquiry, slowing or interrupting the smooth work-flow and routine. While it may be difficult to overlook any obvious irregularities in the financial or tax data under review, it seems perfectly rational within the organisational environment to use a high threshold and turn a blind eye on any weak signals for suspicious transactions or irregularities that would require time-consuming in-depth scrutiny beyond the usual routine.⁸¹ Again, this should not be considered as ignorance or incompetence but as a legitimate interpretation of the key elements defining the professional role of staff.⁸²

Looking at the problem of information sharing from a human factor perspective demonstrates the role of organisational factors. In our focus groups we encountered a number of case narratives that can be synthesized into typical constellations to show how

⁸⁰ See Mookherjee, Dilip, "Incentive reforms in developing country bureaucracies: lessons from tax administration." *Annual World Bank Conference on Development Economics 1997*. World Bank, 1998. Brodtkin, Evelyn Z. "Bureaucracy redux: Management reformism and the welfare state." *Journal of Public Administration Research and Theory* 17.1 (2007): 1-17.

⁸¹ Information received from whistle blowers fall into this category. See Turksen, Umut, "The criminalisation and protection of whistle-blowers in the EU's counter-financial crime framework." *White Collar Crime - A Comparative Perspective*, (Hart Publishing, 2018) 331-366 and Lui Alison and Turksen Umut, "Vulnerabilities, Obstacles and Risks in Reporting Financial Crimes: Conundrum of whistle-blowers" in Ryder N, Pasculli L (Eds.) *Corruption, Integrity and The Law: Global Regulatory Challenges* (Routledge 2020).

⁸² Brodtkin, Evelyn Z. "Bureaucracy redux: Management reformism and the welfare state." *Journal of Public Administration Research and Theory* 17.1 (2007): 1-17. Aiken, Michael, Samuel B. Bacharach, and J. Lawrence French. "Organizational structure, work process, and proposal making in administrative bureaucracies." *Academy of management journal* 23.4 (1980): 631-652.

human actors in organisations adapt their frames of reference to organisational requirements.⁸³

(1) A due diligence officer in a bank is employed by a private firm, but is tasked with genuine law enforcement responsibilities, i.e. checking customers' financial dealings for any involvement in criminal activities. On the one hand s/he will be committed to the employer, the bank, who has an interest to establish a business relation with the client. On the other hand, there is the legal requirement to report any suspicious activity or transaction to the competent national authority (FIU) for further processing. In this context there are several options: a due diligence officer, reviewing financial and other data may recommend that the bank refrains from engaging with the prospective client, based on an initial suspicion that this person or the company represented by him or her is involved in illegal, illicit and/or suspicious activities and may constitute a risk and e.g. use the services of the bank to launder criminal proceeds. Alternatively, s/he may give a clearance, declaring the client is operating within the legal framework. Both of these options come at a cost: turning the client away, the bank loses a profitable business opportunity, accepting the client, despite signs for illegal behaviour, may lead to criminal charges against the bank. The optimal solution for the due diligence officer, who discovers signs of illegal activities of a customer is to externalise the problem and file an STR/SAR and forward it to the competent national authority (FIU). In this case, the bank may still conduct business with the client, but has fulfilled the legal duty to report any suspicious activity to law enforcement agencies. It is then the task of the FIU to follow up on the information from the bank and decide if any in-depth investigation should be initiated. While information is shared, the problem is not solved but transferred to another organisation, where it can create information overload or information pollution, given the available resources.

(2) An auditor from the national tax administration going through the books of a company may also be inclined to ignore early and weak signals of fraudulent activities or accept explanations provided by the company's CFO, so he can follow a routine procedure and avoid any further inquiries and the risk of getting involved in a court hearing as witness at a later stage. The perspective of having to defend the original suspicion about fraudulent activities and later being cross-examined by company lawyers in court as witness is obviously not a

⁸³ Rasmouki F. *et al.* 'Approaches to tax crimes in the European Union' (Report number: D2.3, European Union Horizon 2020 PROTAX project, 2019);

favourable option for a tax auditor.⁸⁴ Following routine protocols and operating with a strong assumption of innocence is a successful strategy to manage the challenges of a tax auditor's job. While information may be available there is no incentive to turn this information into intelligence.

(3) Another good example is the approach of onsite control teams from national financial or customs authorities searching for undocumented workers, often employed by companies that operate at the bottom end of long chains of subcontracting e.g. in the construction industry. These companies can maximise their profits by not registering their workers to avoid tax and social security costs, and paying them minimum untaxed wages in cash. These control teams, working within the customs or financial authorities are expected to perform a certain number of controls each month. High numbers of conducted controls are advertised at management level as a demonstration of serious efforts in the prosecution of social security and tax fraud by criminal employers. However, to achieve the expected number of controls, the teams working onsite tend to avoid any time-consuming in-depth investigations and hence, the rate of detected social security and tax fraud is not very high.⁸⁵

Compared to the situation of investigative journalists, the incentive structure for staff in all three cases favours a strategy that sacrifices in-depth inquiry in favour of routine protocols. At the same time, high numbers and volume demonstrate substantial activities and organisational output or performance. In addition, access to or sharing of information is only one aspect of the problem. Significant efforts to turn information into actionable intelligence and court proof evidence seem to be no feasible strategy, given the overall organisational framework and incentive structure shaping the work of staff in these organisations.

⁸⁴ Turksen U., and Kassem R., 'The Role of Public Auditors in Detecting Fraud - A Critical Review', Forthcoming 2021 in (Eds.), *Contemporary Issues in Public Sector Accounting and Auditing* – CSEF, Vol 105 (Emerald, forthcoming 2021).

⁸⁵ The control of illegal employment and the ensuing evasion of social security and tax payments was mentioned as an example for organisational problems of law enforcement in a national focus group discussion. However, there is little empirical research about the efficiency of control practices in this area, see Nippel, S. 1991 "Legale und illegale Leiharbeit: ein soziales Problem und dessen Kontrolle." *Soziale Probleme* 2.1: 17-35.; Fuchs W., Kreissl R., Pilgram A., Stangl W. 2011 Generalpräventive Wirksamkeit, Praxis und Anwendungsprobleme des Verbandsverantwortlichkeitsgesetzes (VbVG) Vienna, Report for the Austrian Ministry of Justice. Feld L. and Schneider F., "Survey on the Shadow Economy and Undeclared Earnings in OECD Countries," *German Economic Review* 11 (2).

The overall problem is how to integrate bureaucratic routine performance and targeted in-depth forensic investigation of tax crimes, as two distinct forms of professional practice. This problem can be analysed from different interrelated perspectives: it can be investigated from the perspective of the individual actor, looking at competences, motivations or incentives and it can be investigated from the perspective of social organisation of information processing (the so-called division of cognitive labour). Both of these “framings” of the problem of information sharing can add complexity to the policy discourse on adequate legal regulations and policies for fighting tax crimes.

Subsequently, in addition to the legal, technical and operational issues which require policy reform, human factors in the context of organisational structures need to be recognised and addressed as cardinal elements in improving tax enforcement (which ought to encompass prevention, deterrence, investigation, prosecution, conviction and asset recovery).