To the kind attention of:

Carmel Peters, Co-Chair, Committee of Experts on International Cooperation in Tax Matters
Eric Mensah, Co-Chair, Committee of Experts on International Cooperation in Tax Matters

June 15th 2020

Re: Submission to the UN Tax Committee ahead of the 20th Session of the Committee of Experts on International Cooperation on Tax Matters (22-26th June, 2020)

Your Excellencies,

On behalf of the Financial Transparency Coalition (FTC), the Independent Working Group on Illicit Financial Flows are pleased to share our recommendations and feedback ahead of the 20th Session of the Committee of Experts on International Cooperation on Tax Matters (June 22-26th 2020).

The current institutional architecture for global economic governance is fragmented into multiple international financial institutions that frame or revise rules on tax, transparency, anti-money laundering, anti-corruption, etc. - affecting all countries. It is important to iterate that the mandate of the Committee is not to align with the work done by OECD, which is known to represent a handful of interests, but to be a space for alternative solutions.

We consider the importance of the UN Tax Committee being vital in reflecting the perspectives and views of developing countries in international tax norm setting, even though the committee unfortunately does not have a full political mandate. This does not mean that the OECD should take precedence over the UN, we simply note that no organisation has a global reach in terms of tax rule making due to the lack of a genuine intergovernmental forum for tax rule and norm setting. In this regard, we concur with the inputs and concerns highlighted by Mr. Rajat Bansal, India's representative to the UN Tax Committee.

Beneficial Ownership

A critical gap remains in access to financial information for developing countries which impedes their ability to raise or mobilise resources effectively. International cooperation is therefore necessary to democratise access to information on corporate global footprint, corporate annual financial accounts, public beneficial ownership, public country by country reporting, links to tax havens, and participation in past or on-going tax avoidance schemes. In addition, mechanisms exist to document flows of finance and could underpin the accountability of financial flows, for example an overwhelming majority of illicit financial flows (IFFs) are cross-border in nature and are channeled via the SWIFT financial transaction messaging system – a valuable source for countries and UN agencies to access. SWIFT provides financial institutions with information on financial transactions, sent and received.

This information can play an important role in the statistical compilation of illicit financial flows. While the EU and the US have access to this information on regulatory grounds, Southern countries or even the UN institutions do not. We also find that corruption, bribery and tax abuse pass through the mainstream banking system, where large international banks provide banking services without adequate due diligence or know your customer checks.

FTC recommends that bank transfers using the SWIFT messaging system must also incorporate beneficial ownership details along with account holder information.

To further financial transparency, beneficial ownership (BO) information must be published in an open data format for all legal entities, instruments and arrangements – including but not limited to companies (listed/ unlisted companies), limited liability partnerships, associations (unincorporated/ incorporated), trusts, foundations and cooperative societies for state and public scrutiny alike. A beneficial owner is defined as a living person who exercises control or voting rights in an entity either directly or by using legal arrangements (i.e. indirectly) or accrues gains from the transactions made under that entity.

Further, to reduce errors in the data and increase the possibilities of verifying data, it has been argued that even for developing countries who may have to endure limited human resources or financial constraints an open national registry of beneficial owners over a closed or restricted one is more preferable for law enforcement agencies. For example, "In the UK, data use has grown exponentially, to 10 million searches a day, since the data was made free and open". Countries should ensure that they include "proper definitions of beneficial ownership, details on the ownership chain to be collected, regulations in relation to bearer shares and nominees, and sanctions (as incentives) to ensure that registered information will be registered and updated".

Due to the UK's public BO registry, Global Witness, a civil society watchdog and FTC member, was able to identify circular ownership in 328 companies. Similarly, Fundacion SES, another FTC member, has started to track companies 43.340 owned by Latin American residents in the UK in their mapping project 'Latin America Offshore', linking with investigative journalists, accountability and corruption campaigners, tax and budget advocacy in the region to investigate these linkages. More importantly, a public register on beneficial owners is a concrete effort towards improving global cooperation on tackling all types of illicit financial flows. Christian Aid, Fundacion SES, CBGA analysed collectively that tax losses in developing nations due to undeclared offshore financial assets amount to $58 billion in annual tax losses based on estimates by Gabrial Zucman. Additionally, companies must publish their corporate structures and provide subsidiary accounts openly free of charge so that they can be held accountable for their activities, in view of preventing any forms of tax abuse, money laundering or corruption.

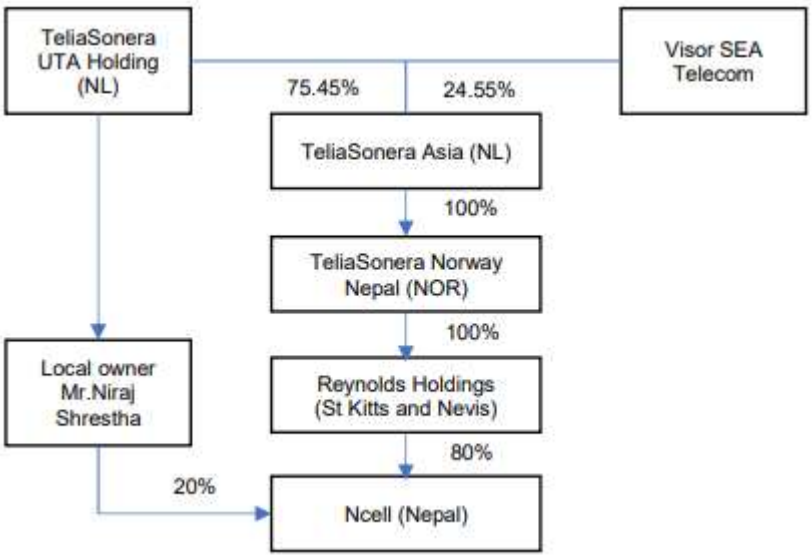
Offshore Indirect Transfers

The taxation of cross-border transactions such as interest, royalty, dividend and other intra-firm payments is often governed by double tax agreements (DTAs), such as the Ireland-Ghana DTA and the Mauritius-India DTA that we have analysed in a recent report titled 'Trapped in illicit finance' The applicable tax rates are often set at ever-lower levels in the hope that this

will increase investment, despite the lack of evidence to support this view. One of the members of the FTC, namely Tax Justice Network Africa (TJNA), sued the government of Kenya (GoK) on the process and content of the Kenya-Mauritius double tax treaty, and won the case in the high court on basis of lack of due process in international treaty making. However, their comments on content of the DTA in depriving revenue in Kenya due to low rates, and potential tax abuses are also critically important. In other cases, DTAs may allow companies to avoid paying capital gains tax (CGT) – as has happened in the case of Ncell, discussed below in which the parties invoked the Nepal-Norway DTA to claim that no CGT was payable. Also, more recently, some companies have invoked Bilateral Investment Treaties (BITs) which contain investor-state dispute settlement (ISDS) clauses to challenge tax charges levied in countries in the Global South, as also seen in the case of Ncell.

We have seen a number of high-profile cases where entire companies are being sold via offshore shell companies to avoid or evade (depending on the perspective and jurisdiction) capital gains taxes that are due in many developing nations on capital gains. To illustrate the issue it is important to use a concrete example as it highlights the concerns we are raising. The telecoms company NCell was sold from Telia (headquartered in Sweden) to Axiate (headquartered in Malaysia).

Ncell is Nepal's largest telecoms operator. From 2010 to 2016 it was owned by a Swedish-based telecoms company Telia, and bought by a Malaysian telecoms company Axiata in 2016. However, this acquisition caused national controversy over the applicable CGT on the transaction. The Nepalese Foreign Direct Investment law requires a local ownership of 20%. Two separate Telia holdings were involved in the sale which together were sold for $1.03 billion. In addition, once we take the assets of Ncell into account (its cash position of $284 million), the total value of the acquisition is amounted to $1.362 billion as shown in the Figure 5 below (Telia was at the time of the transaction called TeliaSonera).



Ncell and Telia argued capital gains tax was not due in Nepal on the ownership change, as Reynolds Holdings remained Ncell's parent company after the transaction and therefore nothing had changed in the sense of the Income Tax Act terms of ownership.

Telia considers no fault made and defended its position as follows: 'due to the complex ownership structure, the transaction consisted of two parts: one foreign where the seller was a partly Telia-owned company registered in Norway, and one local part in Nepal. The company position is that there are no tax obligations in Nepal on the foreign part of the transaction. Instead any taxes levied on the transaction should be paid in Norway, a country which has a double 'Ncell, Axiata and Telia attempted to avoid paying capital gains tax concerning the ownership change, arguing that Reynolds Holdings remained Ncell's parent company and therefore that nothing had changed'.

The DTA between Norway and Nepal dates back to 1996, and the Clause 13.5. of the DTA does not explicitly seek to tax indirect offshore capital gains and exempts any taxes not foreseen in the treaty. This clause should be reconsidered by both Norway and Nepal from the perspective of its extraterritorial impact on a third party in these two or other countries through a so-called 'tax spillover' analysis. Not to mention this provides opportunities for tax abuse.

In April 2019, a group of Nepali individuals filed a public interest litigation against Ncell Private Limited (Case 074-WO-0475), to essentially recover the full tax charge with the late interest and fines, that then would amount to NPR63 billion ($548 million). The letter by the tax authority was issued to Axiata as a followup to the full written order of the Supreme Court issued on April 9th 2019, which related to its oral order dated February 6th 2019 in a public interest litigation filed by Mr Dwarikanath Dhungel and other claimants. This establishes the basis for levying the tax in Nepal's jurisdiction.

Axiata considers that CGT should not be applicable on offshore transfers of assets, and even if applicable any balance not paid in CGT should be paid by the seller, ie, Telia. On 16 April 2019, the LPTO issued a written order to Ncell, stating that the assessment regarding Telia in relation to the transaction had been transferred to Ncell, and that the balance due of CGT due as a result of the transaction was NPR39.06 billion. The LPTO ordered Ncell to deposit this amount within seven days (ie, by 22 April 2019). Ncell made an appeal and won. Following this, the total liability was reduced to NPR45 billion. The operator has already paid NPR23 billion of this total, so the outstanding amount remains NPR22 billion as far as publicly communicated.

Nepal's Parliament has requested to hold a hearing as some lawmakers want to re-examine the court decision due to the Supreme Court's ruling of August 26 which reduced the outstanding tax liability on Ncell's buyout deal. In the latest twist in the tale, Axiata's UK subsidiary and NCell have filed a request for arbitration with the International Centre for the Settlement of Investment Disputes (ICSID), part of the World Bank Group, based in Washington DC, regarding the CGT bill. The instrument cited by Axiata UK is the 1993 UK-Nepal BIT, which has an ISDS clause designating the ICSID as the forum for the resolution of disputes. Axiata UK claims that the tax office calculated the CGT bill incorrectly. The case remains pending as of September 2019 (ARB/19/15), with no date for hearings as yet announced. Arbitrators are appointed from the US and the Netherlands, two nations in the global North - which in itself is an imbalance as their interpretation may well conclude the benefit to global North countries as a result of this arbitration. Moreover, one company in the transaction was based in the Netherlands, and the presence of an arbitrator from the

Netherlands may give rise to a favourable interpretation towards companies that are based in the Netherlands, and the primacy of Dutch legal interpretation capital gains taxes over Nepal's laws, including Nepali supreme court ruling. The latest development is that the The Claimants file a memorial on the merits of the case on the 12 May, 2020.

The case of NCell is concluded within Nepal as the Supreme Court has concluded that the CGT is payable, and in the absence of Telia making the payment, Axiata is due to pay the tax (and Axiata may indeed seek contractual payments from Telia that many sales agreements have for unexpected or unpaid taxes and fines). Norway has not reacted to the Telia Company commentary that the Nepal-Norway tax treaty allows for Telia not to pay tax on this transaction, and indeed Norway should conduct tax-related spill-over analysis to determine whether the Nepal-Norway DTA is harmful. Similarly, the UK should conduct a tax-related spillover analysis on the UK-Nepal Bilateral Investment Treaty (BIT), to determine whether this treaty causes illicit financial flows. The UN Tax Committee should explicitly state that Capital Gains Taxes (CGT) should always be paid in the jurisdiction where assets are located (residence jurisdiction), evidenced by company accounts (which we ask to be made public, asset registries (which should also be made public).

We are actively tracking capital gains tax cases, and demand transparency and accountability in this sphere, as there seems to be an open tension and disagreement between states on how to tax capital gains, and lack of paying taxes jeopardizes the enjoyment of human rights, especially of those who are vulnerable and marginalised in society due to lesser public spending in health, social protection and education.

We would be happy to provide further inputs. Kindly write to Matti Kohonen at MKohonen@christian-aid.org or Sakshi Rai at sakshi@cbgaindia.org.