

IBFD INPUT

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This contribution outlines matters that are not adequately addressed under the current framework of global tax transparency. It includes two papers, respectively on the fight against tax-related illicit financial flows (TIFFs) and on automatic exchange of information (AEOI), which could be included in a dedicated TIFFs Protocol to a future UN Framework Convention on International Tax Cooperation.

The Instruments Used to Counter Illicit Financial Flows at the International Level, and their Application to Matters of Taxation¹

1. The Issue of TIFFs

TIFFs deprive States of much-needed public resources, limit revenue mobilization, and hinder sustainable development efforts. Besides this common element, TIFFs vary considerably from a legal perspective and require conceptual clarity as a necessary condition for developing international cooperation to fight against them. The study has outlined the different behaviours and activities that fall under the umbrella of TIFFs and sound policy responses that reflect solutions proportionate to the gravity of the issues and catalyze effective collaboration.

2. The concept of Tax-related Illicit Financial Flows

There is no consensus on the definition of TIFFs. From a functional perspective, all TIFFs share the public revenue-limiting scope, thus depriving States of public revenue. However, the underlying behaviour that generates this effect may differ from a legal perspective and be qualified differently under tax, administrative, and criminal law, depending on the specific nature of the relevant actions. Hence, qualification of the underlying behaviour is key for assessing whether a legal remedy exists and if so which.

If resource deprivation is employed as a criterion for categorizing certain actions as illicit, tax avoidance and tax evasion may be considered instances of TIFF. However, from a legal perspective they are not the same. Tax evasion is generally understood as illegal because it entails a direct open violation of the law and often results in criminal charges. For such features, it generally determines a more severe violation than tax avoidance, which instead entails an indirect violation, frustrating the object and purpose of the law. This makes tax avoidance unlawful and brings countries to contrast it at the national and international level.

Rather surprisingly, there is no international obligation to counter tax evasion, but countries have concluded international agreements to counter various forms tax avoidance. Urgent action might be meaningful to establish an international obligation to counter tax evasion in the framework of a comprehensive package of measures that counters TIFFs.

¹ A comprehensive working paper on this matter will be accessible at the following link:
<https://ssrn.com/abstract=4759563>

3 Matters not adequately addressed under the current framework

3.1 International Tax Law framework

The fight against international tax avoidance is a significant achievement of international cooperation among States. The absence of international tax agreements to counter the more severe tax violations, starting by tax evasion, should constitute a starting point, or at least an agenda point in the global fight against TIFFs.

3.2 Tax crimes as predicate offence

In 2012, the Financial Action Task Force (FATF) added tax crimes as predicate offences of Money Laundering, opening the way for an indirect prosecution of tax crimes. However, the FATF did not provide any specific definition for the term 'tax crimes', leaving it up to individual countries to determine whether a particular behaviour would be regarded as such. While this approach does ensure flexibility and safeguards countries' sovereignty, it also has some drawbacks in terms of effectiveness, as demonstrated by the experience of the EU.

Learning from this, the ultimate goal should be to have a layered system of international law instruments available for States to define the core features of tax crimes, leaving countries with some degree of flexibility as to the determination of possible de minimis rules on the actual criminal relevance of some TIFF-related conduct. This approach to the problem would also provide a proportionate response that safeguards countries' sovereignty.

3.3 Addressing tax evasion through international criminal law

Tax evasion could also be considered as a derivative crime. Anti-money laundering (AML) provides an excellent example in that sense: it is requested of States to criminalise the laundering of proceeds of crime by the UN's Vienna and Palermo conventions in the EU's AML Directive, which refers to the (soft law) practices of the FATF as the common instrument to detect and counter money laundering. There is a synergy to be observed between the instruments that currently does not extend to the situation of a sole TIFF.

The UN Conventions in transnational criminal law can serve as a model. A Convention laying down the commitment of signatories to criminalise severe cases of tax evasion under national law and provide mutual assistance in criminal matters such as investigations and recovery of funds would close a significant loophole.

On the level below these most severe criminal instances, situated within the grey area of criminal and non-criminal but nevertheless unlawful or harmful tax-related behaviour, be it evasion or avoidance, an abundance of instruments is available. The main question is whether these provide the necessary safety for States to guard themselves against TIFFs. An interim measure in this regard can be the branding of tax crimes as a predicate crime for the more severe offences. For actions of taxpayers that fall outside criminal law, thresholds for access to the global system of exchange of information could be lowered by a multi-tiered approach.

4. Interim conclusion

Concludingly, this paper highlights three main matters not adequately addressed under the current framework. First, clearly outlining the conceptual scope of TIFFs from a legal perspective, considering the substantive behaviours and their different legal qualifications. Secondly, even though tax avoidance and evasion fall within the scope of TIFFs, the absence of an outright international law obligation to counter tax evasion calls for urgent action to create an international legal instrument to fill this gap. Third, international criminal law could help to counter those most serious behaviours by criminalizing tax evasion both as a predicate

offence as well as a derivative one. This might open the door to bundle tax and non-tax crime international legal instruments in the fight against TIFFs.

Automatic Exchange of Information and the Protection of Taxpayers' Rights. Towards a New Multilateral Multi-Tiered Architecture²

1. Scope and objectives

Exchange of information is more than mutual assistance and has a direct impact on the fundamental rights of taxpayers. Taxpayers are holders of actual rights and not just objects of administrative assistance between tax authorities of two or more countries. AEol has significantly grown across the world in the past decade for its efficiency, especially among countries that have sophisticated systems of tax administration. However, it raises a number of issues that require urgent attention as to its global validity, including in developing countries, and its implications for fundamental rights of taxpayers, including in particular the one to privacy and data protection.

This paper addresses such issues and outlines avenues for a more inclusive and efficient AEol, while securing an effective ex ante protection of the rights of private parties affected by the exchanged information. It proposes incorporating such measures into a multilateral early protocol to a future UN Framework Convention on International Tax Cooperation, which could also link the exercise of AEol to the pursuit of TIFFs.

The paper envisages a two-tier system, which might be compatible with other existing multilateral agreements both at the regional and global level. It proposes replacing bilateralism with a centrally coordinated multilateral data sharing system, which might allow some (top-tier) countries to opt for closer cooperation and thus preserve a sufficient degree of flexibility that suits the need of different types of jurisdictions. The UN might play an active role in coordinating either or both levels of such system, especially if framed within the reaction to TIFFs.

2. Core principles

The core principles that should guide reform are the following:

- **Agreement:** it is necessary to establish a global minimum standard of fundamental rights protection that satisfies all participating jurisdictions and meets their domestic or supranational constitutional requirements. International law can bind countries only if they have consented to that.
- **Two-tier approach:** It is essential to recognise that different countries have varying needs and capabilities when it comes to participating in AEol. Therefore, it is necessary to create multiple levels of AEol with increasing complexity and associated costs that countries can choose from.
- **Regional Flexibility:** the establishment of a global standard should not prevent some countries to apply closer or looser cooperation, either through multilateral or bilateral agreements.
- **Taxpayers as subjects:** Taxpayers should have the right to oppose AEol ex-ante if they can prove the shared information's inaccuracy or provide evidence of a clear breach of fundamental rights in the recipient country. AEol suspension on fundamental rights

² A comprehensive working paper on this matter is accessible at the following link:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4760152

grounds should only occur in exceptional cases, where taxpayers can demonstrate an imminent risk of harm to their fundamental rights recognised under the minimum standard. This might include situations where privacy rights are likely to be violated due to systemic leaks in the recipient tax administration's information management system or where there is evidence of potential harm to the taxpayer's personal safety.

- **Objective review and mutual confidence:** an objective review mechanism is essential to periodically assess participating countries' compliance. Once a jurisdiction passes this review, there should be a presumption of compliance (under a principle of 'mutual confidence'). Thus, other jurisdictions should not be allowed to refuse to share information on fundamental rights grounds except in exceptional circumstances. Additionally, a global taxpayers' rights ombudsman should be empowered to hear complaints, conduct investigations, and gather evidence for systematic breaches of taxpayers' rights. The ombudsman should regularly report to the objective review mechanism and recommend specific or exceptional reviews for individual countries or groups.
- **Quality over Quantity:** If the global standard for these rights is set too high, countries may engage in mock compliance just to be admitted to AEOI. The focus should be on a limited selection of fundamental rights crucial for the system's functioning and that may be effectively enforced, namely: (i) the right to privacy and consequently to adequate data protection; and (ii) the right to a fair trial.

3. Selected areas of intervention

Reciprocity and the involvement of developing countries in AEOI require particular attention. Developing countries may vary in their position as either 'net exporters' or 'net importers' of information. For example, those with financial centres and territorial tax systems may be required to share information despite limited interest in obtaining it. Conversely, developing countries lacking financial centre legacies but with global value chain involvement must participate in complex corporate transparency initiatives but may struggle to access information to monitor illicit financial flows, especially if they lack a developed banking industry and cannot reciprocate information sharing. To rectify these imbalances, implementing modular standards within a tiered approach or offering a grace period for capacity building without immediate reciprocity could be considered. However, any deviation from reciprocity norms should be balanced with good faith obligations. Developing countries benefiting from such arrangements should commit to not hosting tax shelters or other regimes that can benefit from the lack of transparency.

Alternative (or complementary) solutions related to **cost** considerations could be explored to address remaining imbalances. For instance, developed countries could financially contribute to gathering complex information that developing countries may not typically need to collect. In cases of significant disparity, provided there is good faith, a compensation mechanism based on a "cost-plus" approach could be considered. This approach would entail reimbursing the direct costs of complying with AEOI requirements, along with an additional markup. The markup could be proportionate to both the socio-economic indicators of the exchanging developing country and the complexity of the required information.

Another important aspect to consider is the possibility of moving from the AEOI to a **data-sharing** system. One of the main advantages of using centralised directories instead of bilateral exchanges is that it would make the information infrastructure easier to monitor, thus preventing data leaks more effectively and efficiently, with fewer resources required by individual jurisdictions. This approach would also ensure compliance with the minimum standards for data protection and confidentiality.