FROM PRIVACY TO TRANSPARENCY: AN UPDATE ON GLOBAL AND DOMESTIC STEPS TO IMPROVE TAX COMPLIANCE AND PREVENT MONEY LAUNDERING

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The right to privacy is essentially the freedom from intrusion by others in an individual's personal life. Globally, data about everyday lives is increasingly available, which means that privacy is not as well-protected as it once was. In the context of offshore wealth structuring, financial institutions are being compelled to gather and disclose customer data to regulatory agencies which are seeking to control money laundering and tax evasion. This paper traverses the tension between privacy on the one hand and transparency on the other, both internationally and with some reference to the Cook Islands.

Le droit à la vie privée est par essence une garantie de l'absence de toute ingérence dans la vie privée d'un individu. Or, dans le contexte mondial, les données personnelles sont de plus en plus facilement accessibles, de telle sorte que la vie privée n'est plus aussi bien protégée que par le passé. Ceci est notamment le cas dans le contexte de constitution de patrimoines offshore où les institutions financières amenées à recueillir des renseignements sur leurs clients doivent ensuite les divulguer aux organismes de surveillance qui cherchent à lutter contre le blanchiment d'argent et la fraude fiscale. Prenant notamment exemple sur la situation des Îles Cook, cet article analyse les conséquences tant au niveau international qu'au niveau national, de cette difficile conciliation entre les impératifs de la protection de la vie privée avec une nécessaire transparence fiscale.

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I INTRODUCTION

The right to privacy is essentially the freedom from intrusion by others in an individual's personal life or affairs. Privacy is protected by law and is a basic, but not absolute, human right. Privacy obligations also arise in, and can be varied by, contracts and other commercial and professional relationships. Total privacy does not exist as various laws, correctly, override the right.

Over the years, privacy rights have been abused by tax evaders and criminals. This mischief arguably contributed to a proliferation in offshore wealth structuring as wealthy people and multi-national corporations set up bank accounts, companies and trusts in so-called tax havens.

However, globally, a paradigm shift is now happening. Data about our everyday lives is increasingly available and valuable, meaning that privacy is not as protected as it once was. Some of this availability is volunteered by individuals who willingly share photos, information and other data on digital platforms. However, much of the availability is involuntary as financial institutions and professionals are being compelled to gather and disclose customer data to the regulatory, law enforcement and government agencies that are cracking down on money laundering and tax evasion.

New and rapidly evolving compliance regimes represent significant changes to the ordinary course of business for financial institutions and professional firms. The various compliance regimes have many similarities and generally require businesses to gather much more information before accepting client engagements.

These compliance regimes also impose obligations on businesses to disclose information to law enforcement and government agencies, in certain circumstances. This is a paradigm shift from the traditional "trusted adviser" role for many financial institutions and professional firms. It also means an increased cost of doing business – both for the service provider and the customer.

These compliance regimes are also a paradigm shift in the way that laws are enforced. Enforcement agencies and revenue authorities have shifted emphasis from the traditional approach of investigating offenders directly. Instead they are imposing information gathering obligations on the third parties and intermediaries with whom those offenders interact and have professional relationships. In terms of effectiveness, this "out-sourcing" may be equally as brilliant as it is controversial.

There are many human rights issues that arise from this new approach to law and tax enforcement, from risks to open access to justice to existential threats to the very foundations of democracy. However, the reality is these compliance regimes have been implemented and are here to stay. The Rubicon has been crossed and now financial institutions and professionals must meet the challenge of compliance.

What this wholesale erosion of privacy means for society as a whole remains to be seen. This paper is intended to provide some historical context and weave together the various strands to provide an overview of the current compliance landscape and offer some thoughts as to what might happen next.

II PRIVACY: A FUNDAMENTAL HUMAN RIGHT

Privacy is a fundamental human right. Article 12 of the Universal Declaration of Human Rights enshrines the right to privacy of individuals. This is often reflected in domestic legislation and international instruments (such as the European Union's General Data Protection Regulation 2016/679 (GDPR)), as well as the law of Equity (such as the equitable duty of confidentiality).

However, the right to privacy is not absolute and is overridden by law where other factors are seen as more important. Privacy can encourage corruption, hypocrisy and crime, including tax evasion.

There are two main areas in which the right to privacy is overridden. These are anti-money laundering ("AML")/countering the financing of terrorism ("CFT") measures, and taxation. The extent to which the right to privacy has been overridden in these areas has accelerated in recent years.

Government interest in the financial affairs of its citizens has been constant since the earliest forms of income tax emerged in the Roman Republic over 2,000 years ago. It is widely accepted that taxation is the price to be paid for a civilised society and well-functioning public services. As part of this trade-off, a taxpayer is generally afforded the right for personal financial affairs to remain confidential, subject to certain exceptions, including that information is required to be shared with revenue authorities for the purposes of tax assessment.

The last few decades have severely tested the philosophical limits between the personal right to privacy and lawmakers' desire for transparency.

The blight of tax evasion and money-laundering reached its zenith in the late 1990s and early 2000s. Widespread publicity of offshore tax havens led to a co-ordinated international response from inter-governmental agencies such as the United Nations and the Organisation for Economic Co-operation and Development (OECD). The 11 September 2001 terrorist attacks shone a new light on the use of the international financial system for money laundering and terrorism financing.

The Global Financial Crisis in 2008 accelerated the implementation of new tax transparency initiatives, due to the resulting plunge in tax revenues across the globe and the desire of tax authorities to identify and collect unpaid tax. The implementation of the Foreign Account Tax Compliance Act (FATCA) and Common Reporting Standard (CRS) turned traditional concepts of taxpayer confidentiality on their head. FATCA and the CRS ushered in the era of global exchange of taxpayer information on a multilateral basis. This was in stark contrast to the on-request, bilateral tax information exchange that previously existed under double taxation agreements or tax information exchange agreements.

In addition, governments around the world introduced anti-money laundering and countering the financing of terrorism legislation that includes requirements for businesses to obtain certain information in relation to customers, and, in certain circumstances, report the information obtained to government agencies. Such measures are intended to identify and prevent money laundering and related offences.

The newest phase of tax and fiscal transparency is the development of beneficial ownership ("BO") regulation. The implications for taxpayer privacy of BO regulation are even more profound than that of the multilateral exchange of tax information because, in many jurisdictions, there are proposals to make BO information publicly accessible.

The economic disruption caused by the COVID-19 pandemic has resulted in governments investing unprecedented amounts of money to stimulate economies and incurring significant amounts of debt as a result. This debt will need to be repaid at some point and will likely lead to new and/or increased taxes, and possibly a renewed focus on ensuring that taxpayers pay all tax owing.

The COVID-19 pandemic has other implications for privacy, given the huge amount of data collected by governments and contractors in relation to where citizens have been and with whom they have interacted in order to trace the spread of the virus. It is not inconceivable that this data could be used by even democratic governments for administrative purposes that go beyond a response to the health crisis caused by the pandemic.

The development in tax transparency initiatives has occurred contemporaneously with the emergence of "Big Data", and the monetisation of personal information. The era of Big Data has highlighted the tension between privacy and transparency and resulted in legislation to protect and enhance the fundamental human right to privacy, most notably the European Union's GDPR.

Anecdotally, there is concern that the disclosure of information in relation to wealthy taxpayers could compromise their physical safety, for example where information is disclosed to jurisdictions with insufficient data protection mechanisms in place or where corrupt officials could sell or otherwise pass information to criminals. There is also a risk of identity fraud where information is accessed by unauthorised users.

The increasing prominence of the fundamental human right to privacy raises important legal and ethical questions regarding the ever-increasing mass collection of taxpayer data, and, in some jurisdictions, the potential public disclosure of such data. In this paper we discuss some of the main recent trends in this area and the likely implications of recent developments.

A Banking Secrecy

Historically, companies, families and individuals living in developed countries with high tax rates would hold assets offshore in low tax countries and only pay tax on funds that they remitted. This led to large proportions of wealth being aggregated over several generations and the emergence of family dynasties. In developing countries, where the rule of law was not always strictly enforced, fortunes were made through unconventional and often criminal ways to accumulate wealth, such as bribery, corruption and the privatisation of public assets.

Such practices created an increased demand for safe havens where wealth could be warehoused privately. Jurisdictions took advantage of this demand and established themselves as offshore finance centres or "tax havens." A common feature of such jurisdictions is that wealth held there by non-residents is generally not taxed in any conventional way or even at all.

Banking secrecy was particularly prevalent in "offshore" financial centres. Banking secrecy is when some jurisdictions provide privacy requirements for banking relationships, including via secrecy laws, numbered bank accounts and criminal sanctions for unauthorised disclosure. Banking secrecy is based on the idea that the relationship between a bank and its customers instigates an obligation of privacy, as there is an implied condition that all dealings and financial affairs between the parties are treated as confidential.

B None did Privacy better than the Swiss

Switzerland is perhaps the best-known example of an "offshore" financial centre.

Banking secrecy in Switzerland can be traced back to the early 18th century. In 1713, prior to the formation of Switzerland as a federal republic, the Great Council of Geneva barred bankers, who were holding substantial funds on behalf of European aristocracy, from disclosing information about their clients.[1] This tradition of secrecy continued and developed over the years, which led to increased investment from other European powers, attracted by both Switzerland's reputation for secrecy and position of neutrality. Swiss bankers and other financial services providers found that times of war within Europe led to increased investments in Switzerland, which was a safe and private haven in which to store assets.[2] As technology developed and globalisation increased, financial service providers in Switzerland attracted customers from around the world.

The Swiss Banking Act 1934 provided for the requirement of numbered bank accounts. Swiss legislation further enforced secrecy by requiring that banking information could not be shared with third parties except when requested by a judge's subpoena. Criminal sanctions were imposed for violations of confidentiality. It has been suggested that these measures were implemented to protect German Jewish assets from Nazi Germany. However, it is possible that this is a myth and the real reason for their introduction was as a way of defending the banking sector from anger about bankers during the beginning of the Great Depression.[3]

Switzerland was heavily criticised for this excessive emphasis on privacy and accused of facilitating the underground economy and organised crime. In recent years, Switzerland agreed to exchange certain taxpayer information pursuant to FATCA and the CRS. Clients who had previously exploited Switzerland's legal position turned to private banks in Singapore and Hong Kong.

Other well-known examples include Jersey, Guernsey, the Isle of Man, the Cayman Islands and the British Virgin Islands. Perhaps less well-known, examples include Panama, Gibraltar, Malta, the Cook Islands, the City of London, the US state of Delaware, and Luxembourg.

Each financial centre has unique benefits and the centres often compete for business. The success of offshore financial centres turned many jurisdictions into

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1 Tax Justice Network *Financial Secrecy Index 2020 Narrative Report on Switzerland* (Tax Justice Network, 2020) 2.

2 Above n 1.

3 Above n 1, at 3.

unwitting victims and sometimes willing accessories to tax evasion and money laundering.

C Privacy in the Cook Islands

In the early 1980s, the Cook Islands Government became aware of the lucrative nature of the offshore financial sector, and enacted legislation to attract such business, including the Offshore Banking Act 1981, the International Companies Act 1981, and, some years later, the Insurance Act 2008.

As a result of the increased interest of offshore businesses in the Cook Islands, greater transparency was required to counter the risk of money laundering and financing of terrorism.

The Cook Islands Government recognised the tension between privacy, as well as also ensuring that money laundering and related activity can be successfully investigated. As shown in later legislation and amendments made to several existing pieces of legislation, the Cook Islands has increasingly prioritised regulatory functions over secrecy provisions.

The International Companies Amendment Act 2003 provides an example of this. Section 7 overrides several secrecy provisions relating to international companies.

Relatedly, under the Criminal Procedure Act 1980-81, warrants can be issued to obtain information about international companies.

Similarly, amendments to the International Companies Act 1981 and International Trusts Act 1984 provide that it is not an offence to disclose information about a trust or company if:[4]

(a) the disclosure is required or authorised by the Court; or
(b) the disclosure is made for the purpose of discharging any duty, performing any function or exercising any power under any Act; or
(c) the disclosure is made as required by or under a search warrant.

The Cook Islands implemented an AML/CFT regime (discussed in more detail later in this paper) with the enactment of the Money Laundering Prevention Act 2000 (MLPA). The MLPA aims to regulate offshore funds entering the Cook Islands and prevent illicit funds in general, and specifically overrides secrecy requirements in certain circumstances.

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4 Asia/Pacific Group on Money Laundering *Anti-Money Laundering and Combating the Financing of Terrorism, Cook Islands* (9 July 2009) 98.

III PRIVACY: HOW IT IS ABUSED

A Tax Evasion

Tax evasion is the illegal failure to pay taxes. It generally involves deliberate misrepresentation to tax authorities of the true value of capital and/or income. By not declaring certain income, gains, profits or capital assets or by overstating deductions a person (whether an individual or entity, such as a company) may reduce their tax liability.

1 The revenue rule

Tax evasion has historically been distinguished from tax avoidance, which is the legal structuring of affairs and use of tax laws to reduce liability to pay tax. In *Inland Revenue v Duke of Westminster* [1936] AC 1, Lord Tomlin reinforced the general principle that:[5]

> Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

This judgment stands as authority for the proposition that individuals and entities are entitled to structure their financial affairs in such a way as to minimise their tax liability, provided such structures are within the bounds of the law.

At a governmental level, the common law "Revenue Rule" expressed in *Government of India, Ministry of Financial v Taylor* [1955] 2 WLR 303, held that a common law jurisdiction would not entertain an action brought in its courts by a foreign state to collect taxes owed to that foreign state. In other words, one country would not help another to collect taxes purportedly owed to it. The Revenue Rule was justified on the basis that any exception to the rule would offend the concept of independent state sovereignty.

The Revenue Rule applies with equal force in England and Wales and other common law jurisdictions, such as Canada, the USA, Australia, New Zealand, Ireland, and Singapore, subject only to certain legislative exceptions.

One recent application of the Revenue Rule has been in the high-profile English litigation of *Skatteforvaltningen (The Danish Customs and Tax Administration) v Solo Capital Partners LLP & Ors.*[6] In his judgment in that case dated 27 April 2021,

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5 At 19.

6 [2021] EWHC 974 (Comm).

Justice Andrew Baker dismissed a claim by the Danish National Tax Authority for repayment of Danish tax refunds in the region of £1.5 billion on the basis that the claim offended the Revenue Rule under English law. It remains to be seen whether the Danish National Tax Authority will secure permission to appeal to the English Court of Appeal.[7]

Under the Revenue Rule, domestic courts will carefully examine the foreign claim or foreign judgment debt to determine if it would, in substance, be directly or indirectly enforcing a foreign tax claim. The primary basis for the Revenue Rule at common law is (in summary) to protect the national sovereignty of a country, as a matter of public policy. This is because the imposition of tax is an exercise of sovereign authority, and the exercise of that sovereign authority, directly or indirectly, within another sovereign state, is impermissible at common law. The domestic court will not therefore aid an attempt by a foreign government to act in excess of its jurisdiction by enforcing sovereign acts of that government outside its own territory.[8]

The Revenue Rule is not to be confused with the rules relating to international tax information exchange, whether on an automatic basis or on a requested basis, or the rules relating to mutual legal assistance in criminal and regulatory matters. The fact that the Revenue Rule prevents the compulsory enforcement of a foreign tax liability does not necessarily mean that a local entity (whether a company, a fund, a partnership, or a trustee) might not decide voluntarily to settle any foreign tax liability levied against it under applicable foreign law. Such an entity might settle a foreign tax liability if it is the entity's best interests to do so, taking into account the entity's ability to settle claims and contingent liabilities (and the extent of the entity's solvency or available assets), as well as the interests of the entity's stakeholders as a whole. However, from the perspective of local law, the directors, officers or trustees of a structure could not properly be criticised by a local court if they were to decide that the relevant entity is not liable, under local law, to pay (or to reserve for) a foreign tax liability. Such a position might be reached in light of the Revenue Rule, and in light of the fact that such a foreign tax liability would be unenforceable, whether by way of court proceedings or in the process of proving debts in a liquidation.[9]

7 <www.conyers.com/wp-content/uploads/2021/07/2021-07-BVI-CAY-Article-The-Revenue-Rule-in-the-Cayman-Islands-and-British-Virgin-Islands.pdf.>.

8 Ibid.

9 Above n 7.

The problem is that these well intended principles have been abused over many decades, facilitated in part by a degree of privacy that historically applied to taxpayers' affairs, and a consequence has been large scale underreporting of wealth and income.

The response to tax evasion by tax authorities has been to blur the distinction between tax evasion and tax avoidance, both now being typically viewed as forms of non-compliance intended to subvert a country's tax system, and introduce measures to obtain information about taxpayers' affairs, including by seeking the assistance of other jurisdictions.

2 The Winebox Inquiry

The Commission of Inquiry into Certain Matters Relating to Taxation, popularly known as the Winebox Inquiry, provides a New Zealand example of alleged tax evasion and its impact. The Winebox Inquiry, headed by Sir Ronald Davison, involved an investigation into alleged tax evasion by a Cook Islands based company, European Pacific Investments (EPI) and alleged incompetence and corruption within the New Zealand Inland Revenue and Serious Fraud Office (SFO).

The Winebox Inquiry resulted from a number of allegations made by Winston Peters in the New Zealand Parliament. The central transaction in the inquiry, known as the "Magnum Transaction", involved EPI gaining a net $2 million tax credit in New Zealand through a complex process involving EPI paying tax to the Cook Islands Government and then receiving a refund.

While the inquiry did not result in any ruling of fraud or incompetence, in New Zealand the law relating to claiming foreign tax credits was amended and new rules relating to the disclosure of information to Inland Revenue and new penalties for non-compliance with tax obligations were introduced.

B Money Laundering

Money is the lifeblood of a professional criminal enterprise. The proceeds of crime can be applied to advance further criminal purposes and to facilitate an organisation's growth. Laundering the proceeds of crime reduces the risk that the offenders will be prosecuted and prolongs and enhances criminal activity.

The story of the life of Pablo Escobar, the Colombian drug lord, is well documented and much of what is said may be apocryphal. However, it is generally accepted that at the peak of his career of manufacturing and exporting cocaine, Pablo Escobar was one of the richest men in the world. He made good use of tax havens, notably Panama, and was ably assisted by Miami based private bankers. These banks would charge an *ad valorem* fee just for counting the cash and then some for banking it. It has been said that during the 1980s the Miami branch of the Federal Reserve received more cash deposits than all the other US branches combined, in no small part thanks to Pablo Escobar and the Latin American drug cartels. He was making so much money that he could not launder it quick enough and he started burying bales of cash in the ground all around the city of Medellin in Colombia. His accountant had the dubious responsibility of maintaining a map showing all the locations where the cash was buried. This worked well until he realised that the cash was susceptible to rotting and being chewed by rats. He apparently wrote off 10 per cent of his annual revenues to account for this somewhat unconventional business risk. This shows just how valuable it is for criminals to be able to access the global financial system.

1 *What is money laundering?*

Money laundering is the process by which criminals attempt to conceal the true origin of the proceeds of their criminal activities to make it appear as if they were obtained legitimately. Money laundering can be undertaken by both the perpetrators of the original crime and third parties on their behalf. The scale of money laundering ranges from crimes such as tax evasion through to financing acts of terror such as those that occurred in the US on 11 September 2001.

Money laundering is typically achieved by placing the proceeds of crime into the financial system, creating complex layers of financial transactions to disguise the origins of the funds, and then integrating the laundered funds into the legitimate economy. Laundering the proceeds of crime reduces the risk that the offenders will be prosecuted, prolongs and enhances criminal activity, and affects financial markets.

2 *The problem with money laundering*

By its very nature the proceeds of crime are virtually impossible to quantify. There are various estimates but is has been suggested that criminal profits between USD 800 billion to USD 2 trillion are laundered each year. It has been further suggested that money laundering is the world's third largest industry and between 2-5 per cent of the global economy involves laundered money.[10]

When all the assets and liabilities of every country in the world are added up, in theory, they should balance. However, economists have attempted to do this and there exists a significant "black hole" where assets are unaccounted for. It has been suggested that this comprises about 10 per cent of all global assets.

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10 <www.unodc.org/unodc/en/money-laundering/overview.html>.

Money laundering is thought to pervade, to some degree, all economic, political and social institutions. It affects financial markets as large amounts of money are moved across borders, affecting exchange rates, interest rates, inflation, employment and economic stability. This has an especially material effect on developing countries, as capital is drained from economies and development is constrained and poverty perpetuated.

In some cases, a small group of oligarchs entrench themselves in positions of power, authority and prosperity financed by the proceeds of crime. Organised crime also often leads to the development of an alternative, underground economy, which is untaxed and unregulated and can contribute to societal problems.

IV GOVERNMENTS FIGHTING BACK

The terrorist attacks of 9/11 were a seminal moment in the global fight against money laundering and resulted in a new focus on the financing of terrorism. It was clear that the terrorists were well funded and supported by the global financial system.

Following the 9/11 terrorist attacks, the Financial Action Task Force's (FATF) remit was expanded to assist in fighting terrorist financing. Terrorist financing refers to activities that provide capital to fuel individual terrorists or terrorist groups. Terrorist financing involves similar processes to money laundering.

In general terms, AML/CFT legislation criminalises money laundering. It makes it a criminal offence for a person to inject the proceeds of their crime into the global financial system. However, more significantly, it also makes it a criminal offence for a financial institution to allow this to happen. It also imposes requirements on financial institutions to verify the identity of customers and the legitimacy of funds held in accounts. It therefore prevents financial institutions from assisting criminals or even turning a blind eye, which is what often happened in the past.

Actions that might give rise to the offence of money laundering could be much wider than one might expect. After the laundering process has commenced, the nature of property may change from being the direct proceeds of crime to representing the proceeds of crime. For example, a bank may commit the offence of money laundering if it allows cash derived from illegal activity to be placed into an account. However, an offence may also be committed if, for example, the bank takes security over property which is derived from illegal activity and then provides credit to a criminal organisation.

A AML/CFT Legislation and Regulations

Money laundering has a material effect on developing countries particularly, as capital is drained from their economies and development is constrained and poverty perpetuated. AML/CFT laws and regulations are aimed at detecting and preventing this type of activity.

In recent years, governments globally have reacted to this abusive conduct by implementing regimes and mechanisms to counteract money laundering and tax evasion. AML/CFT measures are conducted by both the public sector and the private sector and involve:

(a) legislation to criminalise money laundering, expedite prosecution and empower investigations and enforcement agencies; and
(b) imposing due diligence and reporting obligations on financial institutions.

Due to the international nature and scale of the problem, these countermeasures have had to be consistent at both domestic and international levels. Without uniformity, jurisdictional arbitrage opportunities arise as launderers are attracted to countries with less effective AML/CFT mechanisms in place.

During the 1988 UN Convention, the EU released Directive 91/303 outlining AML/CFT compliance requirements for member states, which provides for the following:

(a) member states must legislate against laundering proceeds of drug-related crime and proceeds of serious criminal offences;
(b) financial institutions must carry out extensive know your client ("KYC") checks and report suspicious transactions.
(c) a direct conflict between reporting requirements and bankers' duties to preserve confidentiality; and
(d) disclosures made in good faith are authorised.

In 1990, the FATF released a report containing 40 specific recommendations for money laundering regulations including:

(a) criminalising money laundering;
(b) power of seizure;
(c) forfeiture of proceeds of crime;
(d) mutual legal assistance between member states;
(e) duties to "know your client"; and
(f) a duty to report suspicious customers/transactions.

Current AML/CFT legislation (both in the Cook Islands and in other jurisdictions) incorporates most of these recommendations.

Once the money laundering process has commenced, the nature of property may change from being the direct proceeds of crime to representing the proceeds of crime. Consequently, it is also a criminal offence for a financial institution to allow individuals to launder money through their business. AML/CFT legislation usually imposes duties on financial institutions to verify the identity of customers and the legitimacy of funds held in accounts to prevent them from assisting criminals or being wilfully blind to the fact they are assisting criminals, which is what has often happened in the past.

1 Global AML/CFT initiatives

AML/CFT measures are conducted by both the public sector and the private sector and involve:

(a) legislation to criminalise money laundering, expedite prosecution and empower investigations and enforcement agencies; and
(b) imposing due diligence and reporting obligations on financial institutions.

Due to the international nature and scale of the problem, these countermeasures have had to be consistent at both domestic and international levels. Without uniformity, jurisdictional arbitrage opportunities arise as launderers are attracted to countries with less effective AML/CFT mechanisms in place.

2 Domestic AML/CFT frameworks

The AML/CFT frameworks of most developed countries are very similar and comprise the following:

(a) legislation, which defines and criminalises money laundering;
(b) regulations, which contain the procedural requirements with which financial institutions must comply to detect and prevent money laundering;
(c) guidance notes, which are issued by the relevant supervisory bodies and are intended to assist financial institutions to comply with the obligations contained within the primary legislation and regulations.

3 AML in a Cook Islands context

As noted previously, in 2000, the Cook Islands enacted the MLPA. In part the MLPA arose out of the inclusion of the Cook Islands on FATF's blacklist of jurisdictions with insufficient AML/CFT measures. The MLPA established an AML/CFT regime in the Cook Islands.

In 2002, the Cook Islands Government established the Cook Islands Financial Intelligence Unit (CIFIU), which, in 2003, was tasked with coordinating the implementation and regulation of the new AML/CFT regime.

The Cook Islands was subject to multiple system reviews by FATF, responded to its recommendations, and was removed from the FATF's blacklist of non-cooperating countries in 2005.[11]

In 2009 the Asia/Pacific Group on Money Laundering (APG) and Offshore Group of Banking Supervisors conducted an on-site visit to undertake a further evaluation of the country's AML/CFT risk as part of the FATF's mutual evaluation process.[12]

Unsurprisingly, given the small population, the evaluation showed the highest AML/CFT risk originating from the offshore financial sector. Terrorism financing out of the Cook Islands is unlikely, and there have been no money laundering prosecutions (although there has been an application to seize the proceeds of a domestic predicate offence).[13]

The mutual evaluation report[14] noted that overall, the Cook Islands had made significant efforts towards implementing an effective AML/CFT regime but identified a number of areas in which further improvements were required.

A further mutual evaluation was undertaken in 2018 with the resulting report noting that the Cook Islands had further improved the regime and had a "high level of technical compliance and a strong AML/CFT framework".[15]

The CIFIU's role includes supervising what are known as "Reporting Institutions", being:[16]

(a) banks;
(b) financial service providers;
(c) trustees;
(d) insurance including international insurance;
(e) international companies;
(f) real estate agents, accountants, lawyers, money brokers; and
(g) investment and portfolio advisors.

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11 Asia/Pacific Group on Money Laundering, above n 4, at 11.

12 At 4.

13 Phil Hunkin *Cook Islands Money Laundering and Terrorist Financing: Financial Institutions and Designated Non-Financial Businesses and Professions Sectors Review of Risk* (October 2017) 53.

14 Asia/Pacific Group on Money Laundering, above n 4, at 10.

15 Asia/Pacific Group on Money Laundering *Anti-Money Laundering and Counterterrorist Financing Measures, Cook Islands* (September 2018) 3.

16 <https://www.fsc.gov.ck/cookIslandsFscApp/content/fiu>.

The CIFIU merged with the Financial Supervisory Commission in 2012, but retained its operational independence and powers, and is now regulated by the Financial Intelligence Unit Act 2015.

The most recent Financial Report for 2019/2020 indicated that during the year in question the CIFIU had achieved its key performance targets regarding continuing AML/CFT compliance and regulation of Reporting Institutions.[17]

V AUTOMATIC EXCHANGE OF ACCOUNT INFORMATION

In recent years governments, led by the US, have joined in the global fight against tax evasion. FATCA and the CRS are the latest manifestations of their efforts. Earlier regimes (which largely still apply) include:

(a) European Union Savings Directive (Council Directive 2003/48/EC of 3 June 2003), which required member states to provide other member states with information in relation to interest paid to taxpayers (since repealed as a result of subsequent developments in this area);
(b) the Bank Secrecy Act 1970, which targets money laundering by requiring financial institutions to provide documentation to regulators whenever their customers deal with suspicious cash transactions involving sums over USD 10,000;
(c) tax information exchange agreements, under which the US agrees with other countries to exchange information about taxpayers;
(d) the Qualified Intermediary Programme, which is intended to ensure that tax is collected on US investment income generated by US securities held by non-US financial institutions for the benefit of US persons, by requiring non-US financial institutions to disclose information about account holders to the next entity above them in the income chain to ensure the correct tax is withheld;
(e) Foreign Bank and Financial Accounts Reports, which must be filed in respect of US persons who have ownership or control of foreign accounts with an aggregate value of over USD 10,000 in a calendar year; and
(f) The Offshore Voluntary Disclosure Programme, under which taxpayers with potential exposure to criminal liability or substantial civil penalties due to a wilful failure to report foreign financial assets and pay tax due can disclose the unpaid tax in return for reduced penalties.

FATCA and CRS represent a generational shift in the way in which personal financial information is gathered, held and exchanged between financial institutions

17 <https://www.fsc.gov.ck/cookIslandsFscApp/content/assets/a6c2e5340cd1c6e41ea9f46fefbc1d17/2019-20%20Annual%20Report%20and%20Financial%20Statements.pdf.>.

and governments. The intrinsic brilliance of FATCA and CRS is that they shift the burden of compliance away from taxpayers (after all, tax evaders could never be relied upon to report honestly) and instead imposes that burden on the financial institutions (for example banks and trust companies) who serve them. If those financial institutions do not comply then withholding taxes and other penalties can be applied by competent authorities and regulators. For example, if a financial institution refuses to comply with FATCA, then the institution and its clients can be denied access to the global financial system since the US is the global clearing house for virtually all financial transactions. Non-compliance is just not an option.

These mechanisms also fundamentally challenge the way long-established property and privacy rights are interpreted and upheld. Essentially, the world has evolved dramatically from a system in which countries could request from other countries the exchange of information about their residents to one where data is now exchanged automatically. This is highly significant from practical, legal and sociological perspectives.

The introduction of FATCA and the CRS signifies a global trend towards transparency. Key international events have influenced this trend. The new global focus on AML/CFT requires a broad approach to regulations and legislation and so this new concern widened the scope of tax regulation. The 2008 Global Financial Crisis shifted the focus back to tax evasion and catalysed the creation of FATCA and, subsequently, CRS. Edward Snowden's 2013 revelations influenced a social trend towards the desire for privacy and data protection regulations. However, by then CRS was already in force.[18]

FATCA and CRS are government tools to fight tax evasion. The goal of both systems is to find people who are hiding accounts at offshore financial institutions and ensure these individuals satisfy their tax liabilities. It is estimated that automatic exchange of information ("AEOI") agreements cover over 90 per cent of global gross domestic product.[19]

FATCA and CRS apply directly to financial institutions, which could include client entities (such as trusts), even though they are not in this business. This is because both regimes "look through" entities such as companies and trusts to identify and report the real owners of assets. Consequently, FATCA and CRS are of great

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18 OECD *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (2nd ed, OECD Publishing, Paris, 2017) <http://dx.doi.org/10.1787/9789264267992-en>.

19 Her Majesty's Revenue and Customs *No safe havens 2019: HMRC's strategy for offshore tax compliance* (Her Majesty's Revenue and Customs, May 2019).

importance to lawyers. It is important to note that neither regime is (directly) about raising revenue. Instead, the regimes are essentially massive data collecting systems.

A FATCA

FATCA was enacted by the US Congress on 18 March 2010 as part of the Hiring Incentives to Restore Employment Act. It outsources the gathering and provision of information about US taxpayers to other countries and financial institutions operating in them. Compliance is enforced via 30 per cent withholding on payments made from, or through, the US, imposed on countries that do not sign up to FATCA.

1 Basic obligations

FATCA creates a mechanism under US law that requires financial institutions (for example banks) in other countries (for example the Cook Islands) to register with the Internal Revenue Service (IRS), gather information from customers, and disclose information relating to US persons to the IRS.

FATCA is a fundamentally different approach to other anti-avoidance measures as the onus is on the financial institution to comply rather than the individual. The definition of "financial institution" under FATCA is extremely wide. For example, a trust is not an entity in the legal sense of the word (as it is a relationship) but FATCA regards trusts as entities and imposes on some trusts the obligation to register on the IRS website as a "financial institution". This is the case even where there are no US citizens, tax residents or US investments connected with the trust in question.

2 Inter-governmental agreements

FATCA effectively has extra-territorial scope, in most jurisdictions by virtue of being incorporated into domestic law by way of an intergovernmental agreement ("IGA") between the US Government and the participating jurisdiction. However, the Cook Islands has not entered an IGA, so financial institutions must report to the IRS directly.

Financial institutions in the Cook Islands, and in other jurisdictions, have little to gain from complying with FATCA, but have no realistic alternative given the threat of the 30 per cent withholding. The US is the clearing house for the global financial system. If Cook Islands financial institutions are to continue to operate within the global financial system, they have no choice but to comply with FATCA.

FATCA requires financial institutions to:

(a) register with the IRS;
(b) carry out due diligence on US account holders;
(c) look through any passive entities (for example companies and trusts) that hold accounts with them to identify the true owners and controllers; and

(d) submit information to IRS on an annual basis.

B CRS

The knowledge gleaned from FATCA that many taxpayers are hiding assets in other jurisdictions, and therefore depriving their home countries of much-needed revenue, led to a strong political and popular desire among the OECD member governments to ensure that everyone pays their fair share. It was determined that sharing information between tax authorities would be necessary for an effective system.

The OECD thus created the CRS, which is based on the FATCA model. As the OECD borrowed heavily from FATCA in the creation of the CRS, the CRS effectively signifies an attempt to fit a US structured document into European law.[20]

The CRS is a set of protocols drafted by the OECD. CRS is a misnomer and the system is perhaps more accurately referred to as GATCA (ie global FATCA). The CRS is part of a wider movement championed by the OECD for the AEOI relating to financial accounts. The function of the CRS is to provide a system of global automatic data exchange. It requires financial institutions to provide client information to domestic law enforcement agencies for onward sharing with tax authorities in the country of residence of the client.[21]

CRS was adopted by participating jurisdictions in several waves from 2017, with Cook Islands being a "second wave country", undertaking the first exchange of information in 2018.

1 Basic obligations

In the Cook Islands, financial institutions must:

(a) register with the Revenue Management Division of the Ministry of Finance and Economic Development of the Cook Islands;
(b) carry out due diligence on all account holders and report any who are residents of partner CRS jurisdictions; and
(c) "look through" passive entities and identify and report any controlling persons of passive entities who are residents of partner CRS jurisdictions.

FATCA and CRS provide for different mechanisms to deal with non-compliance. As noted, FATCA is enforced by the 30 per cent withholding payment on countries

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20 Eckhart Binder (ed) *Implementation of the EU requirements for tax information exchange* (online looseleaf ed, European Parliamentary Research Service) at 25.

21 Above n 18.

that do not join the regime, whereas enforcement of the CRS depends on local regulations.

2 *Competent authority agreements*

The CRS is one of two major documents developed by OECD to establish a global standard for AEOI between revenue authorities. The other document is a model competent authority agreement ("CAA") which sets out the framework for the AEOI. The terms CRS, GATCA and AEOI are often used interchangeably. Technically, the CRS only refers to the common reporting standard but the CAA and AEOI are equally as important. As a result, it is arguably more correct, but less common, to refer to GATCA.

C BEPS

In 2019 the Cook Islands joined the global BEPS project and, as part of its commitment to the project, agreed in 2020 to implement rules relating to international business companies.

These rules have removed the exemption from Cook Islands tax on income for international business companies, with immediate effect for new companies and with effect from 31 December 2021 for companies incorporated before 1 January 2019.[22]

Once the tax exemption ceases to apply, international business companies are subject to the standard 20 per cent company tax rate. This is a major change for a country that is heavily reliant on the offshore financial sector.

D EU 4th AML Directive

In recent years, there has been a push towards collecting extensive information around BO. In many offshore jurisdictions there are, and have been for some time, requirements for trust and corporate services providers to collect BO information. However, this new trend around BO information is focused on establishing centralised, national databases of BO information. Europe has been a frontrunner of this movement and is moving rapidly towards the establishment of BO registers.

The 4th Anti-Money Laundering Directive (4AMLD), which entered into force in June 2017, was the first practical measure implemented to achieve this goal. It requires EU member states to implement central BO registers for trusts and trust-like entities. 4AMLD is primarily focused on tax concerns, rather than AML/CFT. This is due to the origins of the EU regulations in the US's FATCA legislation.

22 Council of the European Union Cook Islands' International Companies regime (CK001) – Final description and assessment (30 April 2020).

4AMLD is a prime example of how policymakers often do not understand the unintended consequences of poor regulation. Article 31 provides that 4AMLD applies to all trusts which generate "tax consequences" in an EU member state. That means all taxpaying trusts are within scope – not just tax return filers.

For example, non-UK trustees are subject to 4AMLD reporting if they incur stamp duty, even when it is automatically collected through CREST upon the purchase of shares in a UK listed company. This demonstrates how 4AMLD can have bizarre and disproportionate effects. Here a trust is subject to a reporting regime apparently aimed at preventing tax evasion because tax has been collected and paid on its behalf through an automatic clearing system.

The following information is reportable under 4AMLD:

(a) name, date of establishment, and country of administration of the trust;
(b) contact details, tax number, passport number and date of birth of all connected individuals;
(c) description of class of 'potential' beneficiaries – including as contained in a letter of wishes; and
(d) values of assets when they were settled on the trust (several states, including the UK, declined to implement this into domestic law).

Unusually, 4AMLD requires you to identify named trust beneficiaries, but then trace further to "reasonably identifiable" contingent beneficiaries. That might include persons who the settlor has requested to be added as beneficiaries in the future in a letter of wishes.

For now, registers under 4AMLD are only practically open to tax authorities and law enforcement. However, 4AMLD requires member states to allow persons demonstrating a "legitimate interest" to access the registers. Some states have chosen not to implement this into domestic law, potentially leaving themselves exposed to challenge. It is easy to foresee the International Consortium of Investigative Journalists and similar organisations attempting to gain access through this pathway. The introduction of 4AMLD has prompted jurisdictions both in and outside of the EU to introduce central BO registers with different degrees of public access.

4AMLD includes obligations that are extraterritorial, will impose significant compliance costs, and complicate planning for wealthy and internationally mobile families. It is extraterritorial in the sense it applies regardless of whether the settlors, trustees and beneficiaries are residents of a member state. 4AMLD also raises significant data protection and privacy concerns given the amount of new information that will come to the attention of tax authorities.

E EU 5th AML Directive

The 5th Anti-Money Laundering Directive (5AMLD) came into force on 10 January 2020. 5AMLD is essentially an extension of 4AMLD. The initial draft of 5AMLD provided for unfettered public access to the BO registers of trusts maintained by each Member State, which would remove the requirement to prove legitimate interest. In addition, the initial draft proposed to extend BO reporting to all trusts created, administered or operated in the EU, and not only those that have a tax consequence in a Member State.

The revised draft of 5AMLD removed unfettered public access and reintroduced the access rights for persons holding a "legitimate interest". It appears that each member state will define their own meaning of "legitimate interest" in domestic law. The extension of BO reporting to all trusts has been retained in the revised draft.

Article 3(13) of 4AMLD, which is not amended by 5AMLD, states:[23]

> a business relationship means a business, professional or commercial relationship that is connected with the professional activities of an obliged entity and which is expected, at the time when the contact is established, to have an element of duration.

There is uncertainty as to how this provision applies in practice, but it could be applied broadly to cover professional advice. This would mean that tax accounting, legal or investment professionals providing advice within the EU could be required to register.

5AMLD has prompted the Crown Dependencies to examine their AML/CFT regimes. Over 2018-2019, Guernsey undertook a review of the BO records for companies managed or administered by fiduciary licensees.[24] Jersey and the Isle of Man have undertaken similar reviews.

As a result of 5AMLD, the Crown Dependencies are also formulating a common approach to establishing central and public BO registers.[25] Whilst the Crown

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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 at L 141/88.

24 Guernsey Financial Services Commission Thematic Review "Beneficial Ownership of Guernsey and Alderney Legal Persons" (2018/2019) Guernsey Financial Services Commission.

25 Sara White *Crown Dependencies plan public beneficial ownership registers* (online looseleaf ed, Accountancy Daily) <www.accountancydaily.co/crown-dependencies-plan-public-beneficial-ownership-registers>.

Dependencies are not technically part of the EU, they have committed to sharing their BO registers with EU jurisdictions.

Transparency concerns have been raised in response to the proposed 5AMLD. However, the view that public access to BO information is required to combat money laundering and terrorist financing seems to be increasingly outweighing arguments respecting the individual's right to privacy.[26]

5AMLD is representative of the fact that the EU believes non-EU tax structures are not subject to the same degree of transparency as required in the EU.[27] This belief is based upon the idea that the EU has enforced a greater degree of public scrutiny around BO, for example through corporate registers, than non-EU jurisdictions.[28]

F Beneficial Ownership Registers

As referred to earlier in this paper, a BO register is a centralised register that records the individuals who ultimately own or control a particular entity or asset. BO registers are intended to increase the transparency of the ownership of entities and assets, in part to help prevent or investigate money laundering or other crimes.

The two most important questions in relation to a BO register are:

(a) What types of entities does it cover?
(b) Who has access to the information?

Both aspects of BO registers present potential issues for privacy and data protection. Theoretically, BO registers could apply to any form of BO, including partnerships and trusts. This means BO registers can essentially act as databases of extensive personal property information. Due to the level of information that can potentially be included in BO registers, the accessibility of the information is a material issue. At this stage, jurisdictions with functioning BO registers generally restrict access to specific classes of people, such as law enforcement or tax agencies. Some jurisdictions have implemented the standard outlined in the EU Directives

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26 Ministry of Business, Innovation and Employment Discussion Document "Increasing the Transparency of the Beneficial Ownership of New Zealand Companies and Limited Partnerships" (1 June 2018) Ministry of Business Innovation and Employment Hikina Whakatutuki 22 <www.mbie.govt.nz/assets/8a3f53e039/increasing-the-transparency-of-the-beneficial-ownership-of-new-zealand-companies-and-limited-partnerships.pdf>.

27 European Parliament resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance (2018/2121(INI)) "Report on financial crimes, tax evasion and tax avoidance" (26 March 2019) Official Journal of the European Union.

28 Theo Van der Merwe *Beneficial ownership registers: Progress to date* (online looseleaf ed, U4 Anti-Corruption Resource Centre) <www.u4.no/publications/beneficial-ownership-registers-progress-to-date.pdf>.

(discussed earlier) of allowing access to individuals or groups that can evidence an "legitimate interest" in the information. This class is generally considered to include journalists.

The UK already has a BO register in place. The People with Significant Control (PSC) register was implemented in 2016. However, this register only addresses BO registers in relation to companies. In 2018, the UK passed legislation requiring overseas jurisdictions that conduct business with the UK to introduce their own versions of the PSC register. The Crown Dependencies were exempted from this requirement as they have their own statutory arrangements with the UK. However, many other offshore jurisdictions raised complaints about the BO requirements, on the basis that it would disadvantage them in competition with other offshore jurisdictions.[29] In response, the UK pushed the legislation to 2023.

G EU Mandatory Disclosure Rules

The Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, known as DAC6, was created as a practical measure to strengthen tax transparency in the EU. DAC6 applies to any transaction between jurisdictions if at least one of them is an EU member state and the transaction qualifies as an "aggressive tax planning position". All jurisdictions in the EU were required to pass DAC6 into domestic law by 1 July 2020. The Crown Dependencies (Jersey, Guernsey, and the Isle of Mann) are not required to meet the DAC6 requirements as they do not belong to the EU. However, the Crown Dependencies announced that they will implement mandatory disclosure rules complying with DAC6.

In 2017, the EU announced a proposal to amend DAC6 to include mandatory disclosure requirements. The disclosure obligations came into force on 25 June 2018 and were implemented with retrospective effect. The DAC6 mandatory disclosure requirements were implemented as a mechanism to aid tax authorities in the identification of potential money laundering or tax evasion practices and prevent non-compliance with the CRS. The measure requires anybody involved in evading the CRS to disclose this to their local government. The retrospective nature of this requirement and the general circumstances which must be disclosed seem like a problem for privacy. At this stage, intent to evade the CRS seems to be irrelevant to the reporting obligations.

29 Bernadette Carey (ed) *Offshore company beneficial ownership registers and trusts: key questions for CSPs* (online looseleaf ed, Carey Olsen) <www.careyolsen.com/briefings/offshore-company-beneficial-ownership-registers-and-trusts-key-questions-csps>.

For an arrangement to fall within the ambit of the DAC6, it must be:

(a) a "cross border arrangement"; and
(b) a "reportable" arrangement per the list provided in the DAC6.

The reporting obligations fall on "intermediaries" or, in some circumstances, the taxpayer itself. The information reported will be contributed to a central directory accessible by the competent authorities of the Member States. The OECD has not clarified the logistics for the mandatory disclosure requirements, but it is likely that they will combine with existing reporting obligations under the CRS.

DAC6 has been termed "the next FATCA/CRS" due to its potentially wide ambit. Practical detail is left to jurisdictions when implementing domestic law and guidance. The DAC6 states that it does not go beyond what is necessary to discourage the use of aggressive cross-border arrangements and therefore does not offend the basic EU principle of proportionality. Given how broadly drafted it is, this is a bold statement.

The DAC6 is primarily intended to address large corporate transactions, but it has potential for broad expansion in the realm of tax avoidance regulation or even into the realm of standard tax transactions. For example, Poland has implemented a version of the regulations that extends its practical application to transactions that are not cross-border reportable. This measure may lead to practical issues for businesses or intermediaries operating out of non-EU jurisdictions.

The wide drafting of DAC6 means that ordinary transactions such as cross-border leasing, securitisation structures, certain types of reinsurance and many standard group corporate funding structures may be reportable. There is no safe harbour for arrangements with an underlying commercial purpose. It is also a likelihood that DAC6 could affect private wealth arrangements such as family trusts.

It is not certain how DAC6 will practically apply to transactions with multiple intermediaries. However, the intermediaries will bear the burden of reporting the transaction correctly. There is an exemption to this duty where the intermediaries can prove that one of them has filed and all other parties intend to rely on that reporting.

Despite uncertainty around its application, DAC6 may benefit the financial community as it will encourage collaboration between intermediaries. However, the DAC6 is also the EU's most aggressive move to transparency to date.

VI THE PRIVACY REAR-GUARD

Many parties have raised concerns around the privacy and data protection consequences of the 4AMLD and 5AMLD and other information disclosure regimes.

The EU's own data protection regulator issued an opinion in 2017 criticising the 5AMLD's introduction of public access elements.[30] The opinion stated specifically that this feature would infringe the privacy right under the European Convention on Human Rights (ECHR). The following paragraphs discuss major privacy and data protection concerns raised in relation to DAC6, 4AMLD, 5AMLD and the CRS.

A Legality

Article 8 of the ECHR and the Charter provide that "interference with an individual's right to privacy and data protection must be in accordance with the law".[31] This principle requires that not only must there be a specific law that permits the interference in question, but also that it must be reasonably foreseeable and accessible to enable the individual to address their conduct before the interference occurs.[32]

B Proportionality

Proportionality is a bedrock principle of the EU legal system. Essentially, this means that an action of the EU must be limited to what is necessary to ensure the functioning of the EU. In other words, are central registers proportionate or necessary in the fight against tax evasion and financial crime? Arguably the existing tools at the EU's disposal mean these measures are disproportionate, and it raises the question of what exactly the data is being collected for if existing AEOI and AML/CFT regulations are sufficient tools.

The OECD Model art 26 preserves proportionality by allowing for the exchange of information that is "foreseeably relevant" for domestic tax administration or enforcement. The CRS appears to be in direct conflict with this provision, as it facilitates the exchange of general information without the need for a connection with specific tax liability.[33] This is largely because the CRS was not developed in reference to a particular tax jurisdiction, but was instead intended to apply universally. These features mean that the CRS is not restricted by requirements of relevance, thus increasing the likelihood of the exchange of excessive and irrelevant information.

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30 European Data Protection Supervisor "EDPS Opinion on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC Access to beneficial ownership information and data protection implications" (January 2017) European Data Protection Supervisor.

31 Council of Europe "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14" (4 November 1950) ETS 5, at 10.

32 Ibid.

33 OECD *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD Publishing, Paris, 2019) <https//doi.org/10.1787/g2g972ee-en>.

C GDPR

It is likely these registers will hit a stumbling block in the form of the GDPR, which is the EU's new data protection framework. The GDPR represents the most significant development in European privacy and data protection law in many years. The GDPR sets out several data protection principles that apply across the EU, including requirements to minimise the collection of data from individuals and to ensure that data is kept secure.

Several aspects of the GDPR appear to be in plain conflict with 4AMLD/5AMLD, and the GDPR does not exclude public bodies from its scope. Particularly, this aspect is the subject of litigation in the English courts.

D EDPS Opinion 1/2017

The European Data Protection Supervisor issued a fairly scathing opinion on 4AMLD in February 2017,[34] commenting:[35]

> The amendments, in particular, raise questions as to why certain forms of invasive personal data processing, acceptable in relation to anti-money laundering and fight against terrorism, are necessary out of those contexts and on whether they are proportionate.
>
> … the amendments significantly broaden access to beneficial ownership information by both competent authorities and the public…We see, in the way such solution is implemented, a lack of proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection.

E Re Helen S Decision

Interestingly, the French Government pre-empted the EU by introducing its own public register of trusts in 2016. The French Constitutional Court promptly struck the register down in the case of *Re Helen S.*[36] In this case, an elderly woman challenged the legality of the register on the basis it would infringe her privacy and would require public disclosure of the bequests left in her will.

The French Constitutional Court held that the public registry of trusts infringed the right to privacy in a disproportionate manner compared to the aim of

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34 Filippo Noseda "CRS, FATCA and beneficial ownership registers: The battle for privacy continues" (1 February 2021) Mishcon de Reya <www.mishcon.com/news/crs-fatca-and-beneficial-ownership-registers-the-battle-for-privacy-continues>.

35 Filippo Noseda, above n 34, at 3.

36 Decision of the French Constitutional Court number 2016-591 QPC of 21 October 2016.

fighting against tax fraud and evasion. The Court declared the register illegal in its entirety.

In another interesting turn of events, the Isle of Man Information Commissioner has been advising Manx fiduciaries that complying with 4AMLD is likely to breach Manx data protection law. The Information Commissioner is in discussions with Her Majesty's Revenue and Customs (HMRC) on this issue.

F French Association of Accidental Americans (AAA)

In 2020, the French AAA filed proceedings in France objecting to the sharing of personal information in relation to US citizens under FATCA. The court rejected the complaint and the France AAA has subsequently complained to the European Commission.

G UK Legal Proceedings

British law firm Mishcon de Reya (Mishcon) has commenced legal proceedings in London claiming that AEOI and public BO registers breach the fundamental rights to privacy and data protection enshrined in the ECHR and the GDPR. The claim argues that the CRS is disproportionate and contrary to art 8 of the ECHR.[37]

In January 2018 Mishcon released a document explaining the basis of their claim against the CRS and proposed BO registers. This document includes recommendations for alternative measures to replace those implemented in the EU. For example, Mishcon has suggested the introduction of a centralised clearing house such as "PayPal".[38]

This system would be funded by governments and banking sectors and would allow financial institutions to calculate and settle any tax liability without the need to share personal data. Once the liability was determined, the institution could then send this information to the country of resident of the taxpayer in question, without disclosing client identity.[39] Such a system would also allow for clients to opt for the automatic transfer of their information, as would occur under the CRS, if they did not have any privacy concerns with this process. Mishcon's PayPal system is an evolution of the "Rubik" structure, which is a final withholding tax agreement between Switzerland and the UK.

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37 Filippo Noseda, above n 34.

38 Filippo Noseda (ed) *The Big Debate: Transparency Versus Privacy Common Reporting Standard and Beneficial Ownership Registers* (online looseleaf ed, Mishcon de Reya) <www.mishcon.com/upload/files/The%20Big%20Debate%20-%20Transparency%20Versus%20Privacy.pdf>.

39 Above n 38, at 77.

Mishcon argues that a final tax withholding agreement would centralise compliance without encroaching on individual rights of privacy and data protection. This is because the system operates on a 'no information without taxation' basis, meaning that taxpayers would only be required to disclose tax-relevant information.

It is unlikely that the CRS will be retracted now that it has been fully established. However, it may be possible to better safeguard the rights of individual privacy under the system. One way of achieving this could be working with governments to ensure data is protected during the gathering process, and to assess AEOI partners on their ability to protect data they hold under the CRS.[40]

In September 2019, a British citizen known only as Jenny, also represented by Mishcon, brought a case to the Information Commissioner's Office against HMRC for sharing personal taxpayer information with US tax authorities under FATCA. The Information Commissioner's Office found in favour of the HMRC but did highlight concerns that the HMRC may not have fully complied with its obligations under art 14 of the GDPR. Jenny appealed the decision, which is making its way through the courts and if successful could be referred to the EU Court of Justice.[41]

VII WHY THESE THINGS MATTER

There are human rights issues that arise from this new approach to law and tax enforcement, from risks to open access to justice to existential threats to the very foundations of democracy. The following paragraphs identify and discuss some of the issues.

A Privacy as a Basic Human Right

Privacy is protected by law and is a basic human right. The right to privacy essentially involves freedom from intrusion of others in a person's private life or affairs. However, there is no absolute right to privacy. Various laws override the right to privacy for certain reasons, such as to combat corruption, hypocrisy and crime. Therefore, total privacy does not exist.

Recent developments in technology and business have changed the social landscape of privacy. Personal data is increasingly available and valuable and has

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40 Ibid.

41 <https://www.reuters.com/business/finance/how-little-known-g7-task-force-unwittingly-helps-governments-target-critics-2021-08-05/>.

Jenny's case and Mischon de Reya's battle continue (as at 1 April 2022), although in recent months the debate about proportionality and privacy issues associated with FATCA has been overshadowed by the implementation of a Register of Overseas Entities under the Economic Crime (Transparency and Enforcement) Act 2022 (UK). This is a less controversial but still significant counter-measure to money laundering in the UK.

become a commodity. Data sharing has become a central and necessary part of business and regulation. These new developments bring new threats to privacy and present challenges to regulators in protecting individual privacy and data protection rights.

Privacy regulations control how "agencies" collect, use, disclose, store and give access to "personal information."

B Sir Cliff Richard

In August 2014, the South Yorkshire Police raided the home of Sir Cliff Richard. They were investigating an allegation made by a man who claimed that he was sexually assaulted by Sir Cliff when he was a child in 1985. Before raiding the mansion, the Police tipped off the BBC. BBC then mobilised a film crew and helicopter and broadcast the raid live on TV.

This happened even though Sir Cliff had not been charged with any offence and, to this day he has not been charged. In the meantime, his reputation and musical career have suffered irreparable harm.

In July 2018, Sir Cliff won a privacy case against the BBC and was awarded GBP 210,000 in damages.[42] This followed an earlier out of court settlement between Sir Cliff and the South Yorkshire Police for their role in notifying the BBC. The Judge said:[43]

> It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached. It is, as a general rule, not necessary for anyone outside the investigating force to know, and the consequences of wider knowledge have been made apparent in many cases.

C Erosion of Solicitor-Client Privilege

As noted earlier, a key element of AML/CFT laws around the world is the obligation to report suspicious activities to the Police or other authorities. In a banking context this normally involves monitoring and reporting unusual financial transactions.

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42 *Richard v The British Broadcasting Corporation (BBC) & Anor* [2018] EWHC 1837 (Ch).

43 Above n 42, at 248.

For example, multiple deposits into a single account from various different sources might be suspicious and reportable. In many ways this is uncontroversial.

However, with AML/CFT laws now capturing lawyers carrying out certain activities, the issue of solicitor-client privilege becomes very relevant.

There are many court cases around the world that affirm the principle that solicitor-client privilege is a cornerstone value in any democracy and a fundamental human right. However, this is being gradually eroded, and even more so as a result of mandatory disclosure requirements ("MDR") (discussed in more detail later in this paper).

The current president of the UK Supreme Court, Lord Neuberger, has said that privilege is solely for the benefit of the client and does not extend to the provision of tax advice. There is a risk of these mandatory disclosure obligations being transferred to criminal law. Lawyers and other professional advisers could be required to report information disclosed by clients in confidence which would disincentivise clients from seeking advice in the first place.

Legal professional privilege provides the necessary conditions for a client to fully discuss matters with a lawyer. The client is free to disclose all relevant matters to his or her lawyer safe in the knowledge that these communications cannot be disclosed or compelled. Legal professional privilege precludes communications between a lawyer and client made for the purposes of obtaining or receiving legal assistance from being disclosed without the permission of the client.

Law firms have been put in a difficult position whereby they must balance their obligations under AML/CFT legislation with their obligations to clients to protect the confidentiality of privileged communications.

D How FATF Unwittingly Helps Governments Target Critics

In late 2020, when Ugandan President Yoweri Museveni faced a new challenge to his 35-year rule, AML/CFT legislation promoted by FATF helped to silence his critics. FATF, which was established by the G7 to protect the global financial system, had written to Uganda's government eight years earlier directing it to do more to combat money laundering and terrorism financing or risk being placed on a "grey list" of deficient countries. Such a classification could damage Uganda's ties to foreign banks and investors, which closely follow the FATF's updates.

Uganda's parliament quickly passed a new law to criminalise money laundering and terrorism financing and established an intelligence unit to enforce it. However, Uganda did not use the law as the FATF intended.

In December 2020, as Museveni prepared for a January election, authorities used the law to temporarily freeze the bank accounts of three rights groups and arrest a prominent lawyer, Nicholas Opiyo, on money laundering charges related to the funding of an NGO he founded. Opiyo, who was later released on bail, called the charges "spurious."

The government has denied using the new law to silence its critics. In January 2020, the electoral commission declared Museveni had won re-election, despite accusations of voter fraud by Museveni's main rival.

Reuters has found that in at least four other countries, being Serbia, India, Tanzania, and Nigeria, legislation enacted to allay FATF concerns was used by authorities to investigate journalists, NGO workers, and lawyers. The reporting by Reuters, which is based on interviews with the people who were targeted, government officials, and financial crime experts, provides the first account of the unintended consequences of the FATF's standards.

Through regular evaluations of countries' AML/CFT measures, the FATF plays a key role in shaping financial crime legislation and in dictating governments' security priorities. The FATF's work has resulted in a strengthening of AML/CTF laws around the world. However, by pressuring nations with weak democratic frameworks to adopt and strengthen AML/CFT laws, the FATF has inadvertently given to authoritarian governments a new legal instrument, according to researchers at think tanks and human rights groups.

Particularly, from the early 2000s, there has been a focus by FATF on fighting terrorist financing through non-profit organisations and has allowed some governments to pursue legitimate civic groups under the cover of enforcing international AML/CFT standards, according to researchers.

Terrorist financing experts interviewed by Reuters said the FATF's efforts have reduced the funding of terrorist groups like al Qaeda by making banks more risk averse and giving authorities more powers to investigate an entity's finances. However, the experts criticised the FATF's blanket approach to improving standards on the basis that this approach fails to consider the political motivations of governments, and the risk of misuse of the laws. Since 2020, Turkey and Myanmar, where authorities have jailed journalists and democracy campaigners, have introduced new laws to meet FATF standards that enable authorities to seek more financial information from NGOs.[44]

44 Above n 41.

E Data Security

Data protection agencies have also expressed concerns that the collection, storage and sharing of such data required under the CRS may create vulnerabilities in relation to hacking and data theft risks.[45] Most data protection concerns arise due to the sharing of information with jurisdictions that have had documented problems with corruption in the past. In 2018, seven members of the Argentine tax authorities were arrested for selling taxpayer information to third parties.[46]

However, it is clear that many existing systems already collect large amounts of generalised data about individuals. For example, search engines like Google retain data on individual searches and can make this information available to the authorities.[47] In 2012 Google made a change to its privacy settings to enable the company to share data across a wide range of services. These embedded services include millions of third-party websites. This followed a comment by the CEO in 2009 that "[i]f you have something that you don't want anyone to know, maybe you shouldn't be doing it in the first place". In 2010 he predicted that: "true transparency and no anonymity is the path to take for the internet".[48]

In March 2018, The Guardian newspaper revealed that a company called Cambridge Analytica had harvested the personal profiles of 50 million Facebook profiles. This information was allegedly used to map out voter behaviour in 2016 for both the Brexit campaign and the US presidential election. Cambridge Analytica is a British company that helps businesses "change audience behaviour" and supposedly helped US president Donald Trump to be elected. Back in 2015 a partner of Cambridge Analytica built an app that was a personality quiz for Facebook users. 270,000 Facebook users then signed up and took the personality test. However, the app also collected the information of each user's Facebook friends, who could not have possibly provided consent. This was only exposed when a Cambridge Analytica whistle-blower exposed the whole affair to *The Guardian*.

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45 Dawn Register "Insight: Tax Transparency – Risks and Rewards" (19 November 2019) Bloomberg Tax <https://news.bloombergtax.com/daily-tax-report-international/insight-tax-transparency-risks-and-rewards>.

46 William Hoke "Police arrest data traffickers at argentine tax agency" (2 March 2018) Tax Notes International <https://www.slideshare.net/diegotefraga/police-arrest-data-traffickers-at-argentine-tax-agency>.

47 Josh Taylor "Web browsing histories are being given to Australian police under data retention powers" *Guardian* (7 February 2020). <www.theguardian.com/world/2020/feb/07/web-browsing-histories-are-being-given-to-australian-police-under-data-retention-powers>.

48 Ibid.

The transparency of a public register could aid in the democratic sharing of information. However, this position does not seem able to respond to the idea that privacy is an intrinsic value that provides the foundation for our status as individuals. Some have gone so far as to label the CRS an "unprecedented mass-surveillance exercise".[49]

In June 2019, the Bulgarian National Revenue Agency (BNRA) experienced a cyber-attack that stole the personal data of millions of citizens.[50] Researchers determined that the attack would have compromised personal data for the majority of Bulgaria's seven million citizens. The stolen information included addresses, names and personal income information. It was reported that the stolen information was provided to the media.[51] The Bulgarian authorities have arrested a man on suspicion of his involvement in the attack.[52]

The Global Forum on Tax Transparency and Exchange of Information for Tax Purposes immediately suspended Bulgaria from the information exchange under the CRS and sent a team of data security experts to aid the BNRA in assessing the situation.[53] The Global Forum has indicated that the suspension will remain in place until there has been a thorough review and correction of the deficiencies in the Bulgarian system.[54]

In August of the same year, the BNRA confirmed that personal information of citizens residing in other jurisdictions had also been affected by the breach due to information sharing under the CRS. Those affected included a small number of Bulgarian taxpayers with financial accounts in Canada and Canadian taxpayers with

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49 William Ahern "The lives of others" (1 September 2015) STEP Journal <www.step.org/step-journal/step-journal-augsept-2015/lives-others>.

50 Angel Krasimirov "In systemic breach, hackers steal millions of Bulgarians' financial data" *Reuters* (16 July 2019) <https://www.reuters.com/article/us-bulgaria-cybersecurity-idUSKCN1UB0MA>.

51 Ibid.

52 Alice Tidey "Bulgaria's 'biggest leak': Suspect arrested after cyberattack" *EuroNews* (17 July 2019) <https://www.euronews.com/2019/07/17/bulgaria-s-biggest-leak-suspect-arrested-after-cyber-attack>.

53 Global Forum on Transparency and Exchange of Information for Tax Purposes "Statement on the data breach in the National Revenue Agency of Bulgaria" (30 August 2019) OECD <https://www.oecd.org/tax/transparency/documents/statement-on-the-data-breach-in-the-national-revenue-agency-of-bulgaria.htm>.

54 Ibid.

financial accounts in Bulgaria.[55] The Canadian Revenue Agency has stated that it will notify affected taxpayers in writing.[56]

VIII WHAT IS NEXT

Governments are already experiencing positive economic results from CRS and related measures. For example, HMRC experienced a 14 per cent rise in recoveries in 2018-2019 as compared to 2017-2018, due to the increase in resources and data.[57] These results may encourage governments to push further into the realm of transparency. Some have already begun to take their tax regulation further, as evidenced by the MDR regimes already instituted in many jurisdictions.

Critics of the new measures are suggesting that many of the new tax laws effectively have a retrospective effect. If this is correct, then individuals acting in good faith, on advice and within the law at the time could be challenged and punished after the fact. This retrospective punishment could be facilitated by the fact that the *mens rea* requirements for related tax offences are being replaced by objective tests.

The impact of the COVID-19 pandemic will likely lead to increased and new taxes, given the huge fiscal stimulus pumped into economies around the world to mitigate the economic disruption caused by the pandemic, and, potentially, new mechanisms to collect and analyse taxpayers' information to enforce such taxes.

In New Zealand, the Government has predicted deficits for several years. New Zealand's comparably low debt-to-GDP ratio will increase as a result of Government borrowing. The size of the strain placed on the Government purse will inevitably mean that the sustainability of our tax base will come under scrutiny. The Government has already implemented a new top tax rate of 39 per cent on income over $180,000, with effect from 1 April 2021, and introduced disclosure requirements for trusts to monitor potential avoidance of the new tax rate.

A report published by the Asian Development in November 2020 came to the following conclusions:

(a) The Cook Islands' short-term growth prospects deteriorated because of the pandemic and its impact on the global economy.

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55 Canada Revenue Agency "Information on the Bulgarian Data Breach – 7 August 2019" (7 August 2019) Government of Canada <https://www.canada.ca/en/revenue-agency/news/2019/08/information-on-the-bulgarian-data-breach--august-7-2019.html>.

56 Ibid.

57 HM Revenue and Customs Annual Report and Accounts 2018-19 (for the year ended 31 March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment data/file/824652/HMRC_Annual_Report_and_Accounts_2018-19__web_.pdf>.

(b) The Cook Islands had been recording budget surpluses of on average 5.2 per cent of GDP since 2016 but these fiscal balances are projected to turn into deficits and fiscal revenues will drop significantly.
(c) Higher fiscal deficits will put the Cook Islands' public debt on a rising trend.[58]

A fundamental difficulty for smaller nations such as the Cook Islands is that there is much less scope for raising taxes to plug fiscal deficits.

A Increased Enforcement Activity

Until recently, revenue authorities in some countries have taken a restrained approach to enforcing compliance with FATCA and CRS but audit and enforcement activity is increasing.

The Cayman Islands legislature recently vested the Cayman Tax Information Authority (TIA) with comprehensive FATCA and CRS audit powers for "monitoring compliance" with the Cayman FATCA and CRS law. These provisions authorise "scrutiny of returns, on-site inspections or audit reports, or in such other manner as the [TIA] may determine, the affairs or business of any person". In doing so, the Cayman Islands legislature set the legal basis for FATCA and CRS audits on the island and added new penalty provisions of up to five years of jail time for fraudulent statements made to the TIA. The long-anticipated audit amendments follow the introduction in late 2019 of a new CRS Compliance Declaration form. On this form, Cayman Financial Institutions must certify, amongst other things, that they have valid and comprehensive written policies and procedures in effect.

Switzerland has also imposed statutory CRS audits. The Swiss Federal Tax Administration audit team requests and reviews written documents related to the CRS compliance of Swiss Financial Institutions, such as policies and procedures, training materials, IT updates and form templates.

There is also evidence of Inland Revenue in New Zealand increasing its enforcement activity in this area, and there are situations where trustees in New Zealand have been requested by Inland Revenue to provide evidence of compliance in relation to trusts under their administration.

In one matter the authors were involved with, a "please explain" letter was sent by the Federal Central Tax Office of Germany (Bundeszentralamt für Steuern) to the appointor of a trust who was living in Hamburg after an AEOI between tax authorities about a trust in which she had no beneficial interest.

58 <https://www.adb.org/projects/documents/coo-54289-001-rrp>.

B Naming and Shaming

In June 2012, the British comedian Jimmy Carr was the subject of an investigation by *The Times* newspaper for his involvement in a tax avoidance scheme. The Prime Minister at the time was David Cameron and he commented as follows:

People work hard and pay their taxes; they save up to go to one of his shows. They buy tickets. He is taking the money from those tickets and he is putting that money into some very dodgy tax avoidance schemes.

This led to Jimmy Carr pulling out of the scheme (which was not illegal) and apologising for "a terrible error of judgement". Rather than leave the matter for the tax authorities or even engage Parliament to pass laws to prevent such activities, the Prime Minister saw fit to comment on the morality of the steps taken by Mr Carr.

Wealth inequality is a major social issue of the time, and families and businesses are increasingly protective of their reputations and wary of being vilified by the press. It is predicted that naming and shaming in this way will become a tactic used in the future not only by journalists and politicians but also revenue authorities.

C Panama Papers and Paradise Papers

In 2016, 11.5 million financial and legal documents were leaked from former Panamanian law and corporate service provider Mossack Fonseca. The documents related to over 200,000 offshore entities and implicated wealthy and high-profile individuals in crimes such as tax evasion, fraud, and avoiding international sanctions.

Several countries were associated with the entities and individuals named in the leak and it is estimated that 500 entities incorporated in the Cook Islands were involved.

Similarly, starting in 2017 over 13.4 million documents relating to offshore investments were leaked to journalists from a German newspaper. The documents originated from a law firm and several corporate service providers and business registries.

The leaks demonstrated how privacy can be, and in fact had been, abused to shelter wealth and evade scrutiny, and have led to many prosecutions.

However, they also demonstrated that privacy is not necessarily guaranteed and can be overridden, whether by legal means (such as the many tools employed by governments that have been traversed in this paper), or, as in the case of these leaks, illegal means.

D Unexplained Wealth Orders

Unexplained Wealth Orders (UWOs) are a recent measure to combat tax evasion and money laundering. The orders allow law enforcement agencies to ask taxpayers with assets valued over a certain threshold to provide evidence of how they can afford these assets if their income seems insufficient.[59]

UWOs have already been implemented in several jurisdictions. In 2018, the UK introduced UWOs with a threshold of £50,000. Several UWOs have already been ordered in the UK. UWOs have been ordered against both Politically Exposed Persons (PEPs) and suspects involved in organised crime.

The first UWO in the UK was issued at the request of the National Crime Agency against Mrs Zamira Hajiyeva, the wife of a banker jailed in their home country of Azerbaijan for stealing money from the bank he worked for. Mrs Hajiyeva was ordered to explain the wealth that allowed her to acquire a property in London worth £15,000,000 and a golf course in Berkshire. She was unsuccessful in appealing the UWO to the High Court and the Court of Appeal and the UWO was upheld.[60]

E Mandatory Disclosure Requirements

Many jurisdictions have introduced MDR for foreign or offshore tax structures. This measure has been introduced to address CRS non-compliance, tax avoidance, and opaque offshore structures.

In 2018, the OECD released a document containing public comments on the proposed mandatory disclosure rules for CRS, released at the end of 2017. The majority of responses raised concern with the wide ambit of the proposed MDRs, as it proposed to apply to tax structures without regard to whether they were standard or inoffensive arrangements. The OECD proposal also raises retrospectivity issues, as it will require information about activities back to July 2014.

A response by the Association for Financial Markets in Europe (AFME)/UK Finance suggested that a "dominant purpose" test should be introduced into the MDRs.[61] This recommendation was based on the fact that similar disclosure

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59 Briefing Paper Number CBP 9098 "Unexplained Wealth Orders" (8 January 2021) House of Commons Library <https://researchbriefings.files.parliament.uk/documents/CBP-9098/CBP-9098.pdf.>.

60 N*ational Crime Agency v Hajiyeva (Rev 1)* [2018] EWHC 2534 (Admin) (3 October 2018); *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108 (5 February 2020).

61 Association for Financial Markets in Europe "Public comments on the discussion draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures" (15 January 2018) <https://www.oecd.org/tax/beps/public-comments-mandatory-disclosure-rules-for-CRS-avoidance-arrangements-offshore-structures.pdf>.

requirements existed under the general anti-avoidance rules (or GAARs). AFME/UK Finance suggest that such a test would ensure the MDRs would only cover targeted structures, rather than applying generally to tax arrangements.[62] A "dominant purpose" test would also remove the obligation for an intermediary to report an arrangement where that intermediary did not have knowledge that the structure was created with the intention of avoiding CRS reporting obligations.[63] Other responses also recommended the standard of liability for financial institutions be changed from "reasonable to conclude" to the standard of "actual knowledge" to ensure the standard is not excessively severe on the intermediaries.[64]

Much of the concern around MDRs is founded on the wide nature of the ambit implemented under the CRS. It is arguable that by starting from such a wide position, OECD is signalling intent to expand the MDRs even further. This could mean MDR obligations in the telecommunications sector or for Internet Service Providers. Some have even suggested the MDRs could be placed on criminal lawyers if the trend continues. The concept of a "private" trust may become non-existent as the disclosure requirements for trusts continue to move towards more and more disclosure. Reporting obligations are being extended so that we may soon be required to report on our fellow professionals.

The EU implemented MDRs via DAC6 (discussed earlier), although DAC6 goes further than the OECD's recommendations. DAC6 requires organisations, in their capacity as intermediaries or taxpayers, to disclose certain cross-border arrangements to the tax authorities. The requirement to disclose is triggered where the arrangement in question meets one of five hallmarks. The United Kingdom has recently limited the application of DAC6 in the United Kingdom to only Hallmark D, to align the reporting required with the OECD's recommendations.

MDRs have been implemented in New Zealand for income years beginning on or after 1 July 2018. The required disclosures focus on three key areas, being:

(a) hybrid and branch mismatches;
(b) thin capitalisation group information; and
(c) restricted transfer pricing rules.

F The Future of the Revenue Rule

There has been much discussion by the G7, the G20, and the OECD, of international harmonisation of minimum corporate tax rates. It seems unlikely,

62 Above n 61, at 3-11.

63 Ibid.

64 Ibid.

however, that the Revenue Rule at common law will be re-written on a wholesale basis any time soon, whether by multi-national international treaty, or by appellate reform of the common law principles.

That is not to say that bilateral treaties might not be negotiated and enacted between individual nations: indeed, the English Court of Appeal decision in *Ben Nevis (Holdings) Ltd & Anor v HM Revenue & Customs*[65] offers an example of an exception to the Revenue Rule, in the case of the Double Taxation Agreement in force between the United Kingdom and South Africa. In that case, the English Courts recognised and enforced a South African judgment in the sum of £222 million against two British Virgin Islands companies.

As the English Court of Appeal noted in that case, the Revenue Rule can certainly be varied or removed by international treaty or local legislation, and in recent years, substantial inroads into the Revenue Rule have been made by international agreements, such as the Council of Europe's and the OECD's 1988 Joint Convention on Mutual Administrative Assistance in Tax Matters.[66]

G FATF Mutual Evaluation Report

As noted earlier in this paper, the Cook Islands was evaluated for FATF purposes most recently in 2018. APG released the report "Anti-money laundering and counter-terrorist financing measures: Cook Islands mutual evaluation report",[67] providing an evaluation of the AML/CFT regime in the Cook Islands.

The overall assessment of the Cook Islands AML/CFT regime was positive, with the report noting:

> The Cook Islands' generally robust regulatory framework, tight-knit community and sharp focus on ML/TF issues amongst key agencies, such as the [CI]FIU and FSC [Financial Supervisory Commission], has resulted in a high level of technical compliance and a strong AML/CFT framework. However, there are structural deficiencies in the use of financial analysis, and the prioritisation of ML/TF [money laundering and terrorism financing] and proceeds of crimes issues by LEAs [law enforcement agencies].

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65 [2013] EWCA Civ 578.

66 <www.conyers.com/wp-content/uploads/2021/07/2021-07-BVI-CAY-Article-The-Revenue-Rule-in-the-Cayman-Islands-and-British-Virgin-Islands.pdf>.

67 Asia Pacific Group "Anti-money laundering and counter-terrorist financing measures: Cook Islands mutual evaluation report" (Asia Pacific Group, September 2018).

The report provided many recommendations for the Cook Islands to implement to improve the overall AML/CFT regime.

H Joint Money Laundering Task Force

RiskScreen recently published a paper that considered the idea of a joint money laundering task force ("JMLTF")[68] and argued that a JMLTF should be created in order to establish a global model for an effective AML regime. This proposal arose from the recognition that while jurisdictions have developed their own agencies and groups to address money laundering and the financing of terrorism, there is no existing global group to aid in the prevention of large-scale money launderers.

The JMLTF would have a primarily global focus. The paper suggests that the primary focus of the organisation would be to identify the top active money laundering organisations in a country and work to prosecute the leaders, members and beneficial owners of the laundered funds.[69]

I Global Asset Registry

In March 2019, the Independent Commission for the Reform of International Corporate Taxation (ICRICT) released a paper proposing the implementation of a global asset registry ("GAR").[70] The ICRICT has not provided specific details for how the GAR would look in practice but has indicated that it would essentially take the form of a global BO register with information relating to a wide range of areas including companies, securities, land and trusts.[71]

The ICRICT argue that the potential social benefit of a GAR, for example preventing the facilitation of financial offences and inequality, outweighs the issues of privacy a GAR would represent.[72] However, it has also proposed an alternative solution, in which only some GAR information would be publicly accessible, such as information related to politically exposed persons (PEPs).[73]

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68 Robert Mazur *A Plan to end Global Money Laundering Whitepaper* (online looseleaf ed, RiskScreen).

69 Above n 68, at 1.

70 Independent Commission for the Reform of International Corporate Taxation "A Roadmap for a Global Asset Registry" (2019) Independent Commission for the Reform of International Corporate Taxation.

71 Above n 70, at 7.

72 At 13.

73 At 9.

J Extension of FATCA/CRS to Other Asset Classes

The CRS mandates the collection of information about financial accounts held by foreign tax residents, or entities under their control, and reporting to their domestic tax authorities. The tax authorities then forward that information to the tax authority where the account holder is resident, to check for tax compliance.

The rules have been applied since 2017 and are very effective at preventing and detecting tax avoidance/evasion. However, FATCA and CRS only apply in respect of "financial assets" which, broadly, includes assets such as shares, partnership interests, commodities and swaps. They do not apply in respect of other types of assets, such as real estate and art.

Recent announcements from the OECD suggest that further review is imminent because of the rapid adoption of innovative financial products that were not widely used when the original version of CRS was developed, notably virtual currencies and other crypto assets. Some countries have called for these instruments to be included in CRS and the OECD appears to be responding with enthusiasm.[74] There are likely to be some challenges to enforcement of FATCA and CRS in relation to non-financial assets. The recent announcements from the OECD clearly indicate that it is aware of the problem (ie tax evaders are shifting out of centralised financial assets and into decentralised digital assets) but so far, no countermeasures have been suggested.

As noted earlier in this paper, FATCA and CRS transfer the reporting obligation from taxpayers to the intermediaries who serve them (for example, banks, trustees, etc). Those intermediaries are then held to account by centralised competent authorities (for example, IRS, HMRC, Australian Tax Office, Inland Revenue, etc). However, that approach is less effective in a decentralised financial system because there are fewer (if any) intermediaries involved and there is no overarching competent authority. Digital assets are now being legislated for by revenue authorities and presumably crypto exchanges will be under scrutiny, but challenges remain.

K UN High-Level Panel on International Financial Accountability, Transparency and Integrity

A report in February 2021[75] from the UN High-Level Panel on International Financial Accountability, Transparency and Integrity (the FACTI Panel) provides

74 <www.step.org/industry-news/oecd-review-crs-light-financial-innovations>.

75 High-Level Panel on International Financial Accountability "Transparency and Integrity for Achieving the 2030 Agenda FINANCIAL INTEGRITY FOR SUSTAINABLE DEVELOPMENT Report of the High Level Panel on International Financial Accountability, Transparency and

some insights into future developments in this area.[76] The report is very significant as it includes recommendations that could eventually lead to harmonised global tax rates, public registers of BO, unitary taxation, and a global tax authority. This was once considered to be a utopian pipe dream of tax justice campaigners and it has implications for privacy rights and the sovereignty of nation states.

The FACTI Panel was launched in March 2020 to study the impact of tax abuse, money laundering and illicit financial flows on the ability of states to meet the UN's Sustainable Development Goals by 2030. Its final report calls for powerful, specific policies to be implemented, in respect of both tax transparency and international tax rules and for reforms to tax authority architecture.

Specifically, the report endorses:

(a) the AEOI to ensure that tax authorities are aware of their tax residents' offshore financial accounts. This has been happening for several years through FATCA and CRS but has a few gaps for which the report recommends corrective measures;
(b) the creation of public BO registers of the people who ultimately own companies, trusts and foundations. Around 80 countries now have registers for companies, and it seems that other countries will mandate such registers, and possibly expand the scope to other types of entities (such as trusts); and
(c) country by country reporting, to show the extent and nature of profit shifting by multinational companies. This is intended to prevent entities within the same multinational group shifting profits to where tax will be low or zero regardless of where the real economic activity takes place.

However, the report goes further and calls for:

(a) unitary taxation, which is the taxation of multinational companies on the basis of their global group profits, apportioned between the countries where their real economic activity (sales and employment) takes place. Currently, tax authorities typically apply the "arm's length principle" in corporate taxation and use comparable market prices to "correctly" assess the value of trade and income of multinationals. However, there are perceived flaws in this approach as highlighted by recent media stories about some Big Tech firms offshoring profits;

Integrity for Achieving the 2030 Agenda" (High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda, February 2021) <www.factipanel.org/explore-the-report>.

76 Ibid.

(b) global minimum tax rates to end the provision of low and zero effective tax rates which provide the incentive for profit shifting by multinational companies. This harmonisation is intended to prevent arbitrage between the corporate tax rates of different countries by members of the same corporate group or related entities. However, this would also remove one of the levers that countries (particularly developing nations) use to attract capital; and
(c) a set of reforms to the global architecture and the creation of a Global Tax Authority to oversee the setting and enforcement of international tax rules. This could be perceived as a direct challenge to the sovereignty of national parliaments to legislate for their own residents (although some might say that the EU, OECD and FATF have been doing that for years).

The report is significant and warrants public debate, particularly given the implications for privacy rights and the sovereignty of nation states. However, if the history of FATCA and CRS is anything to go by, it is quite possible that discussion amongst lawmakers will be minimal, mainly because the issues and rules are so complex very few people can understand them.

Following the FACTI Panel report, on 1 July 2021 it was announced that a number of member jurisdictions had had joined an OECD statement,[77] setting out "a two-pillar solution to address the tax challenges arising from the digitalisation of the economy", including by:

(a) reallocating some taxing rights in relation to certain multi-national enterprises from home countries to countries where they actually operate; and
(b) by implementing a global minimum corporate tax rate of 15 per cent.

Further member jurisdictions joined the statement after the announcement, with 133, including the Cook Islands, having joined as of 12 August 2021.

The OECD intends to conclude the remaining technical work on the proposals by October 2021, and for them to be implemented in 2023.[78]

L A Global Standard on Beneficial Ownership

Previously a niche concept, in recent years BO transparency has advanced to the top of the global anti-corruption and AML/CFT agenda. However, despite

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77 OECD "OECD/G20 Base Erosion and Profit Shifting Project Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" (1 July 2021) OECD <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf>.

78 On 8 October 2021 the OECD/G20 Inclusive Framework on BEPS made a "Statement on a Two-Pillar Solution to Address the Tax Challenges Arises from the Digitalisation of the Economy". One hundred and thirty-seven member jurisdictions had agreed to it as of 4 November 2021.

significant progress, not all key financial centres have taken the steps to tackle BO secrecy.

Transparency International's analysis of the issue, first released in 2019, suggests that there are significant weaknesses in terms of ensuring BO transparency across the global network of FATF countries.

FATF sets global AML/CFT standards through its 40 recommendations. Failure to adhere to these 40 recommendations can have serious consequences for countries. Countries that are black- or grey-listed by FATF may have challenges in accessing the global financial system.

In particular, FATF's Recommendation 24 requires countries to ensure that competent authorities – such as law enforcement, financial intelligence units and tax authorities – have access to adequate, accurate and current information on the true owners of companies operating in the relevant country.

However, the FATF standard does not prescribe how access to BO information should be ensured. Each country's government decides which mechanism this objective will be achieved through.

This leads to a great variety of mechanisms used, and, as a result, variation in terms of impact. It also risks making the highly influential FATF evaluations inconsistent, given the high degree of flexibility in the measures adopted.

Transparency International has called on FATF to impose the following five key requirements on its member countries to ensure that the new global standard on BO transparency is effective:[79]

(a) Make BO registers a requirement:

  (i) Centralised beneficial ownership registers help ensure that BO information is accurate, and the authorities can access it in a timely manner.
  (ii) The current standard acknowledges the need for competent authorities to access BO records, but Transparency International argues for making this data accessible to the public. Public registers would allow journalists and civil society to scrutinise the information, analyse irregularities and point out concerning patterns.
  (iii) It is also argued that public registers allow for better international cooperation against money laundering – a crime that often escapes

79 <https://www.transparency.org/en/news/fatf-consultation-global-standard-company-beneficial-ownership-transparency-key-fixes>.

national borders. When BO registers are public, investigating authorities can easily find and cross-check information on companies, without having to go through lengthy international cooperation processes that might result in a tip-off of suspects.

(b) Clearly define "beneficial ownership":

(i) Transparency International argues that a vague legal definition of a beneficial owner creates loopholes that can be exploited by criminals. A strong and clear definition would make it easier for competent authorities and entities with reporting obligations to understand and apply their legal responsibilities and obligations. They say that there should be one single BO definition in a given jurisdiction that applies to company registration, customer due diligence and any other sectoral disclosure requirements.

(ii) An adequate definition of BO in national legislation might focus on the natural persons who actually own and take advantage of the capital or assets of the legal entity, rather than just the persons who are entitled to do so on paper. It would also cover those who exercise de facto control, whether or not they occupy formal positions or are listed in the corporate register as holding controlling positions.

(iii) In practice, BO has often been defined by the percentage of shareholding, which does not always correspond with the reality of control and ownership of a legal entity, especially in sectors or for types of legal entities that pose high money-laundering risks. On this basis, Transparency International argues that the 25 per cent threshold for BO that appears in FATF guidance documents should not be automatically adopted by countries, and money laundering risks should be assessed for each sector and entity type, before committing to an ownership threshold.

(c) Require independent verification of BO:

(i) Transparency International argues that recording and promptly updating key information about a beneficial owner and legal entity, such as name of the beneficial owner, date of birth, address, place of residence, nationality, and information on shareholders and directors, is only a first step.

(ii) Registers should also be given a mandate, as well as sufficient powers and resources, to independently verify the information, by checking it against original documents (such as passports), and further cross-checking, for instance against existing government databases and registers such as tax or citizenship registers.

(iii) When the verified information shows discrepancies or raises suspicions, registers should be able to request documents and more information from companies as well as to sanction non-compliance.

(iv) Identifying red flags, such as a legal entity address that matches several other entities or a beneficial owner who is a political figure or appears on a sanctions list, would help assess high-risk situations. These should then be investigated further, and suspicions should be reported to the country's financial intelligence unit.

(v) Financial institutions and professions that play a gatekeeping role, such as real estate agents, would be required to report discrepancies between the information available on the BO register and that collected during due diligence or investigation processes.

(d) Close loopholes that allow anonymity:

(i) Bearer shares and nominee shareholders are some of the instruments used by the corrupt and other criminals to move, hide and launder illicitly acquired assets.

(ii) Bearer shares are company shares that exist in a certificate form. Whoever is in the physical possession of the bearer shares is deemed to be the owner. As the transfer of shares requires only the delivery of the certificate from one person to another, they allow for anonymous transfers of control and pose serious challenges for financial crime investigations.

(iii) To prevent the misuse of bearer shares, Transparency International argues that countries should prohibit it or, at the very least, adopt measures that allow for the identification of the beneficiary of the shares, such as requiring bearer shares to be converted into registered shares or held with a regulated financial institution or professional intermediary.

(iv) Nominees act as the manager, owner or shareholder of limited companies or assets on behalf of the real owner of these entities and often are the only names indicated in paperwork. These nominees are often used when the beneficial owners do not wish to disclose their identity or role in the company.

(v) Appointing a nominee shareholder or director is legal in many countries, provided they do not engage in criminal activities. However, Transparency International argues that nominee services help individuals to hide corrupt or criminal assets or evade taxes.

(vi) In countries where nominee shareholders and/or directors are permitted, only licensed professionals should be allowed to provide such services, and they should be required to keep records of their clients for a certain period. Moreover, nominee shareholders and directors should be obliged to disclose the identity of the beneficial owner who nominated them to the company and to the company register.

(e) Increase ownership transparency of foreign companies:

(i) A foreign company may make investments in a country, such as accessing government contracts, purchasing real estate, opening bank accounts, or even participating in art auctions, without having to register with the country's company register nor disclose its beneficial owners to any authority or obliged entity.

(ii) As part of a robust BO global standard, Transparency International argues that countries should require foreign companies to follow the same rules on BO disclosure that apply to domestic companies in order to invest in the country, including when opening a bank account or purchasing real estate.

FATF opened up the debate for consultation (with public submissions closed on 20 August 2021).[80] Whilst FATF considers the extension set out above to be necessary because of the use of cross-border ownership structures to conceal BO, it acknowledges there are practical issues regarding the identification and risk assessment of foreign-created legal persons. FATF is therefore seeking a risk-based approach that limits the measure's scope to foreign-registered legal persons who have "sufficient" links with the countries. The consultation asks for comments on what should be considered a "sufficient" link.

Another of FATF's proposed amendments relates to "multi-pronged" approaches to the collection of BO information. FATF is considering what elements should be included in a multi-pronged approach and what supplementary measures should be considered for inclusion, based on the experiences of countries that have BO registries. FATF accepts that centralised registries are not the only solution and is asking for comments on the key benefits and disadvantages of alternative approaches, such as requiring companies, financial institutions and non-financial professionals to hold the BO information.

Other aspects of FATF's consultation include:

(a) improving the adequacy, accuracy, and timeliness of the information;

(b) ensuring that competent authorities have easy access to the information while protecting confidentiality of the data subjects; and

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80 <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/white-paper-r24.html>.

(c) implementing stronger controls on the use of bearer shares and nominee directors and shareholders.

Meanwhile the Society of Trust and Estate Practitioners has agreed with FATF's aim to increase transparency and encourage rigorous safeguards, which will help combat financial crime, including tax evasion, but has stated that transparency should have appropriate and legitimate boundaries, and that rigorous safeguards and robust mechanisms must be in place, mainly when trust information is accessible to anyone other than the competent authority.[81]

M Tax Authorities Trawling Transaction Flows

Tax authorities such as HMRC have long had access to information from bank accounts, pension savings, and foreign tax offices. However, what is less well known is that they also access data from credit card transactions, travel records, passports, and the driving license authority. Some experts say they also monitor social media and loyalty programmes.[82]

With the growing power of digital communications and computing, together with new regulatory powers, tax authorities can now mine financial data deeper and faster than ever imagined before. The COVID-19 pandemic has hastened this trend as the volume of electronic (as opposed to cash) transactions has increased. For taxpayers this could make dealing with tax authorities more efficient as tax reporting processes are made more automatic. However, it could also increase tax officials' scrutiny into the lives of citizens.

This has some privacy advocates, such as Filippo Noseda from Mischon, concerned. He says that tax authorities are interested in gathering more data and holding on to it for as long as possible, as this helps them in profiling people and will expose law abiding and taxpaying citizens to the risk of data hacks. The problem, he says, is there is no "counterbalance" to the acceptance of more data gathering and sharing and nobody has been willing to question whether it is proportionate and appropriate in all circumstances.[83]

IX CONCLUSION

Privacy is a fundamental human right, one that is recognised in both international and domestic law. It is accepted that there are some important exceptions to this right, particularly in order to combat money laundering, financing terrorism, and tax

81 <https://www.step.org/industry-news/fatf-prepares-tightening-beneficial-ownership-rules>.

82 Emma Agyemand "HMRC digs deep into your data" *Financial Times* (20 August 2021).

83 Ibid.

evasion. Concern about these crimes has particularly increased in the last two or three decades, and privacy is increasingly being eroded by information disclosure regimes that are aimed at preventing them. This paper has traversed the tension between privacy on the one hand, and transparency on the other.

The transparency agenda, as it applies to private wealth, has become an important consideration for clients and advisers. The authors submit that not only are transparency requirements here to stay but set to strengthen, broaden, and deepen as data gathering and sharing becomes more sophisticated and immediate than ever before. The default setting is becoming automatic disclosure rather than "on request" and authorities are investing in technology to enhance data gathering, reporting and exchange, and enable international cooperation and collaboration in relation to enforcement.

The disclosure of information is becoming increasingly sophisticated and thorough. Governments – and potentially others – now have access to a significant volume of information about citizens.

It is likely that governments will continue to seek to maximise tax revenues to repay debt incurred as a result of the COVID-19 pandemic and will rely on both existing, and potentially new, information disclosure regimes to ensure that all tax payable is in fact paid. In particular it is likely that we will see the introduction of comprehensive BO registers. It is unlikely that we are yet at the peak of transparency, at least in relation to tax matters.

However, arguably the point is being reached at which requirements to disclose additional information could be unduly onerous and potentially counter-productive. Only a small proportion of the population is guilty of the crimes that current disclosure regimes seek to uncover, yet we are all subject to them. In addition to the incursions into privacy that these measures represent, there are risks of identity fraud or to the physical safety of individuals if information is accessed by unauthorised users. Examples of unauthorised access to information have been provided earlier in this paper.

This is not to say that preventing these crimes does not justify the imposition of information disclosure regimes, but it is important that transparency is balanced against the right to privacy. The importance placed on privacy can be seen both in recent privacy protection measures such as the GDPR, as well as general public concern about privacy.

It will be interesting to see what impact these measures and trends have on future transparency mechanisms. It will also be interesting to follow the progress and outcomes of the litigation concerning some of the information disclosure regimes discussed earlier in this paper. It is unlikely that existing information disclosure mechanisms, particularly core regimes such as AML/CFT, FATCA and the CRS, will be reduced in scope at all. However, privacy may well take on more importance when governments are considering introducing new transparency measures.