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CORPORATE AT-TAX ON AFRICA: WHAT AFRICAN STATES CAN LEARN FROM THE OECD'S REGIME FOR COMBATTING AGGRESSIVE TAX PRACTICES

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ABSTRACT
Aggressive tax practices are significantly detrimental to developing countries in Africa not just to their economies or the strengths of their legal frameworks, but also to the organizational structures needed for the operation of society and good quality of life in these countries. However, it is possible to reduce and reverse the detrimental effects of aggressive tax practices by employing an effective regime that tackles the issue. This article evaluates whether the Organization for Economic Cooperation and Development (OECD), successfully combats aggressive tax practices carried out by multinational enterprises (MNEs) and how the African Union may learn from the OECD's efforts when forming its own regime for combatting such practices. Since the OECD lacks African representation in its core membership, the aim of this article is to offer the African Union an appropriate and Afrocentric solution to the econo-socio-legal problems that aggressive tax practices pose in the continent.

INTRODUCTION
How often is credit given to the tri-disciplinary leverage that taxation policies wield? The average person may view tax policies through economic, social or legal lenses, sometimes simultaneously through two of these. But it is less often the case that the role of tax is considered in what Amanda Perry-Kessaris terms the 'econo-socio-legal'. The econo-socio-legal perspective is an amalgamation of the economic—which consists of 'production, distribution trade and consumption of goods and services' and the actors, who are meant to be 'rational utility maximisers'—the legal (i.e. laws and legal ideas) and social life as 'mutually constitutive' and inextricably linked (Perry-Kessaris, 2015; Bentham, 1987).

When one considers how multinational enterprises (MNEs) engage in aggressive tax practices in African states, it becomes more apparent how mutually constitutive the economic, social and legal are in life. The reality is that aggressive tax practices are significantly detrimental to developing countries in Africa—not just to their economies or the strengths of their legal frameworks, but also to the organizational structures needed for the operation of society and good quality of life in these countries. However, it is possible to reduce and perhaps reverse the detrimental effects of aggressive tax practices by employing an effective regime that tackles the issue.

This article will evaluate whether the Organization for Economic Cooperation and Development (OECD) successfully combats aggressive tax practices carried out by MNEs and how the African Union may learn from the OECD's efforts when forming its own regime for combatting such practices. Given that the subjects affected by aggressive tax practices in this article are African states, it is necessary to approach this discourse by considering how the generally unjust nature of international law, which is inherently oppressive to former colonized states given its origin in colonialism, can be transformed to one that embraces the interests of developing states in order to forward global justice (Tams, Schill & Hofmann, 2015). Especially since the OECD lacks African representation in its core membership, the aim of this article is to offer the African Union an appropriate and Afrocentric solution to the econo-socio-legal problems that aggressive tax practices pose in the continent as a whole.

MNES AND AGGRESSIVE TAX PRACTICES
Not all tax practices are debilitating. It is not uncommon for MNEs to carry out normal tax planning, which involves using legally established procedures to cut the burden of tax wherever possible (Panayi, 2015).

However, tax planning becomes aggressive when such plans abuse the law (Panayi, 2015). Aggressive tax planning (e.g. tax avoidance) may sometimes lead to tax evasion, which exists in many forms and can broadly be defined as any tax-related criminal activity that intends to defraud a government (OECD, 2017). However, aggressive tax planning is not always criminal, even though it may form the basis of a predicate offence that is component for a more serious crime like money laundering or financing terrorism (Panayi, 2015). In fact, the problems to be addressed in this article are not only tax crimes but also the wholly legal, aggressive tax practices that seriously destabilize states.

There are a number of licit strategies MNEs use to avoid paying taxes. Of these numerous strategies, three are most commonly used. The first is transfer pricing, a strategy that is conducive to the multinational nature of MNEs given that they are able to trade between several operating units (e.g. subsidiaries or shell companies). In several countries, an MNE can quite easily reduce its tax payments by trading between its operating units in different jurisdictions at pre-determined artificial prices (War on Want, 2015). If done correctly, the corporation will be able to distort its taxable income and thus minimize taxes (War on Want, 2015). Secondly, an MNE may choose to under-report its production values, which entails reporting to the host country's tax authority that the company's production is less than its market value (War on Want, 2015). The third strategy involves deducing interest payments on debts from profits when determining taxable income. That way, parent companies are incentivized to lend money to their subsidiaries at a higher interest rate than that of the market so that the subsidiary can then inflate costs and reduce its taxable profits (War on Want, 2015).

While many argue that tax evasion is morally wrong, tax avoidance is sometimes written off as a relatively harmless, even strategic, corporate activity (Worstall, 2015). Disregarding the incredible magnitude of damage that aggressive tax avoidance practices and crimes can effect in a developing country is a dangerous habit that ought to be broken. When an MNE practices aggressive tax planning or commits a tax crime, it does not just undermine the government; it robs the victim country of money that it could use to build its infrastructure as well as fund necessary public services and anti-poverty programs (War on Want, 2015). Ultimately, it is the public of the victim country who are affected.

Thus, what ought to be the focus in seriously strong-arming badly behaved MNEs is changing the approach with which the issue of aggressive tax practices is handled. It is necessary to consider how the AU may build a regime for combatting aggressive tax practices, including tax crimes, in order to deal with the perpetual tax-dodging problem that African countries continue to face.

EVALUATING THE OECD

If ever an institution has embodied the econo-socio-legal, it is the OECD. Vis-a-vis its contribution to combatting harmful tax competition, the OECD sets the international standard for tax, to enthuse equitable tax policies and to improve people's economic and social well-being (OECD, 2018-19). In order to accomplish this mission, it has established several bodies to address the numerous initiatives it offers for combatting aggressive tax planning and tax crimes. Because the OECD offers too many initiatives to adequately examine, only the initiatives that the AU can learn the most from, either from their strengths or flaws, shall be discussed.

The Initiatives

A decade ago, the OECD partnered with the G20 on aggressive tax practices and immediately agreed upon four pillars on which to base its tax mission, two of which are of utmost scrutiny: 'enhancing tax transparency' and 'addressing tax avoidance' (OECD, 2018-19, p.7).

A. Tax Transparency

Following the G20's announcement that it ended bank secrecy in its member states, the OECD established the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) in April 2009 to extend its campaign against harmful tax competition to non-OECD economies by including (now 99)

non-member states to join and contribute to the forum (OECD, 2018). Though the forum is generally inclusive, it does not represent a majority of African countries. The Global Forum started its work by building a platform for exchange of information on request (EOIR) via Article 26 of the OECD Model Tax Convention (MTC) to allow member countries to disclose tax audits among one another in 2009; then continued by creating a single, international Common Reporting Standard (CRS) in 2013, the cornerstone of which became the automatic exchange of financial account information (AEOI) in 2014 (OECD, 2018-19).

The OECD made a progressive step in the fight against harmful tax practice by creating a body that specifically aims to forward tax transparency, as MNEs are less likely to commit tax fraud or engage in shady business activities that seriously undermine the tax architecture of a country if they know that countries will have access to audits with records of their transactions. If MNEs wanted to be held accountable for their tax-dodging or tax crimes, they would not choose to funnel money into tax havens with secrecy codes. Further, the Global Forum offers technical assistance that focuses on countries' legal and regulatory frameworks for EOIR as well as practical matters like “the process of making and receiving requests, the organization of an Exchange of Information Unit, or the role of tax auditors in exchange of information” (OECD, 2016). The Global Forum provides assistance through a three-tier peer review process that allows representatives of all member states to review tax-related legislation and policies that a peer country aims to introduce so that they can edit out provisions that would negatively affect the community. It also provides seminars for tax auditors to familiarize them with EOIR and its advantages for domestic tax purposes (OECD, 2018). The aim is to “sensitize tax auditors to [EOIR] and to help them make effective use of [EOIR] mechanisms for addressing cross border tax evasion by increasing the volume and quality of outgoing requests” (OECD, 2016).

A major flaw with the Global Forum is that it has failed to hold states accountable for their failure to fulfil transparency commitments. In July 2018, Tax Justice Network reported that the Global Forum was obligated to identify countries that had unsatisfactorily implemented the Common Reporting Standard yet had published what was essentially a blank blacklist that only listed Trinidad & Tobago (Knobel, 2018). In Annex 2 of the report in which it published this blacklist, the OECD included updated criteria that strikingly resemble its old criteria (OECD, “Secretary-General”, 2018). To avoid the blacklist, countries need only ensure that they meet two of the three requirements: EOIR, AEOI based on Corporate Social Responsibility, and “treaty network to exchange information” through both aforementioned methods; these requirements were in the old criteria (Knobel, 2018).

Further, the report stipulates that the one trigger great enough to render a country blacklisted is receiving an overall rating of 'non-compliant' by the Global Forum (OECD, “Secretary-General”, 2018). This trigger poses a major problem. The best performing countries score just under 60% in the 'transparency test' and worst performing just over 10% (OECD, “Secretary-General”, 2018). Yet out of 154 members, all achieving roughly between 10% and 60% transparency, only one country (Trinidad & Tobago) performed badly enough to invoke the trigger and end up on the blacklist. Certainly, Trinidad & Tobago is not the only source of tax secrecy in the world, and it may not even be the worst. It is counterproductive for the Global Forum to set such high standards and strong platforms if it will not strictly enforce them. Given that blacklisting is not a particularly strong punishment to begin with, the Global Forum ought to maintain its authority by holding countries accountable for their poor performances (i.e. those with scores of 50% and under). Otherwise, it will make the OECD seem like a rich-state club that allows for rich members—like Switzerland, the US, and Cayman Islands, which are the top three worst offenders in the Tax Justice Network's Financial Secrecy Index—to continue to be a cesspool for aggressive tax practices without being censured (Tax Justice Network, 2018). If African countries in the Global Forum see that stronger economies are able to avoid the blacklist without making much of an effort to adhere to the Global Forum's requirements, they will certainly act just as lackadaisically.

Another problem with the Global Forum's work, highlighted in its Tax Transparency in Africa report, is that while it has succeeded in establishing its proposed standards and platforms, countries have yet to utilize them

(Global Forum, 2018). Despite all of the assistance the Global Forum offers, many African countries face challenges in following standards and utilizing platforms. These challenges relate to obtaining relevant information from taxpayers who administer MNEs, as well as other information that they need to follow international tax agendas (Global Forum, 2019, pp. 15). While the intentions of the Global Forum are to boost positive tax practices globally, it needs more initiatives that are tailored to helping its member developing states improve their tax systems and, by extension, economies so that they can finance their own education and health programs without depending on foreign aid (Global Forum, 2018). Notably, it has made significant efforts in 2020 to introduce such tailored initiatives, as reported in its report titled, “Tax Transparency in Africa in 2020” (Global Forum, 2019, p. 55). However, the Global Forum's efforts might be better appreciated if it led them with education or awareness-based campaigns. These points—stronger enforcement and pre-action education—ought to be considered by the African Union.

B. Tax Avoidance

In 2013, the OECD and G20 launched a 'Base Erosion and Profit Shifting' (BEPS) project with a package of fifteen actions to create a uniform set of international tax rules and curtail uncoordinated unilateral tax processes (OECD, 2018-19). The project's fifteen actions can be summed up by four BEPS minimum standards:

- “[T]o address harmful tax practices”;
- “[T]o prevent tax treaty shopping, clarifying the purpose of tax conventions”;
- “[T]o ensure country-by-country reporting of key data on the operations of [MNEs] to allow for more effective risk assessment by tax administrations”; and
- “[T]o improve the effectiveness of cross-border tax dispute resolution” (OECD, 2018-19, pp. 10).

It seems that the OECD reflected on the issue of underrepresenting developing states that certain multinational agencies often overlook in this project, as it established the Inclusive Framework on BEPS (the Inclusive Framework), which allows non-OECD members to work equally alongside OECD and G20 members to complete the BEPS project and essentially reform international tax rules (OECD, 2018-19, pp. 11). The BEPS project is also responsible for regularly updating two tax instruments that set standards for the OECD's international tax rules: MTC and the OECD Transfer Pricing Guidelines for MNEs and Tax Administrations (TPG) (OECD, 2018-19, pp. 14).

MTC has changed considerably since 1963 from a benchmark for establishing and applying treaties to the basis on which around 3,000 tax treaties around the world are set (OECD, 2018-19). Members of the Inclusive Framework regularly meet to update MTC in order to ensure that it continues to “minimise double taxation on those cross-border movements without creating opportunities for unintended non-taxation,” (OECD, 2018-19, pp. 14) as well as close loopholes that may open as new developments arise, such as the process of digitalization. MTC is just about infallible, as it has continued to help countries promote sustainable growth and investment through bilateral and multilateral agreements for the past six decades without public criticism, not even by the Tax Justice Network (OECD, 2018-19). In fact, over 65 countries have borrowed provisions from the MTC (OECD, 2018-19). If the African Union where to create its own convention or continental agreement for tax rules, it ought to not only get inspiration from the provisions in the MTC but also follow the Inclusive Framework's routine of regularly updating its convention so as to allow its convention to adapt as new developments and issues surface.

TPG is another major initiative that BEPS manages. TPG guides countries on valuing an MNE's cross-border transactions between its operating units. Companies that are not in a corporate group do 'arm's length' trading, which simply means that they generate a market price for the transaction after genuine negotiations (Tax Justice Network, 2019). The 'arm's length' price is deemed acceptable for tax purposes. When related companies within an MNE's group trade with each other, it is called transfer pricing, which as previously mentioned, allows for the companies to create artificial prices that can be used to avoid taxes in a low tax jurisdiction while still profiting highly (Tax Justice Network, 2019). Thus, TPG requires that countries that are members of the Inclusive Framework adhere to the 'arm's length principle' because it curtails non-arm's

length trading between operating units of an MNE by "ensuring that the prices are recorded as if the trades were conducted at 'arm's length'" (Tax Justice Network, 2019).

TPG is particularly important for tackling the econo-socio-legal damage aggressive tax practices cause victim countries given that intra-enterprise trade via transfer pricing accounts for about 50% of global transactions (OECD, 2018-19). As important as it is to have a guideline of that nature, TPG is hard to implement and easy to abuse. It is particularly difficult to implement when companies are trading special goods that cannot be valued at an 'arm's length' price because no market comparison exists (Tax Justice Network, 2019). TPG is also facilely abused, as the scope for deliberately mispricing goods may greaten where it comes to valuing intellectual property. Companies with more valuable brands can get away with pricing their goods or services higher than companies with less popular brands because it is impossible to place a 'market price' when the exact monetary value of that brand is not known. For example, Royal Dutch Shell may charge higher prices than a less reputable oil provider (Tax Justice Network, 2019).

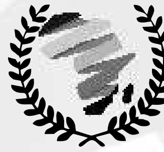
In addition, it is important to note that the OECD has the capability, expertise and resources to come up with the arm's length price of any given good or service and thus implement the arm's length principle (OECD, 2018-19). Until 2020 when the African Union announced its collaboration with the African Tax Administration Forum in their joint report of "Tax Transparency in Africa in 2020" (Global Forum, 2019, 55), the African Union did not have a tax authority. Therefore, it needed to prioritize building the capability, expertise and resources to be able to value arm's length prices in order to curtail (or at least reduce) non-arm's length, intra-enterprise trading. With its new collaboration with the African Tax Administration Forum, the African Union has planned future capacity building trainings on several focus areas of tax policy, such as EOIR and AEOI implementation, as well as upholding best tax practices (Global Forum, 2019, pp. 55).

Even with improved capacity to fashion arm's length prices to properly implement the arm's length principle, TPG is simpler to follow for countries that have already established transfer pricing legislation (OECD, 2018-19). Since some African countries do not have such legislation, the African Union ought also to help African countries develop appropriate legislation before attempting to adopt a guideline similar to TPG.

CONCLUSION: LESSONS FOR THE AFRICAN UNION

In terms of combatting aggressive tax practices through initiatives that fall under the two discussed pillars, the OECD has not conclusively succeeded. Although, the OECD has succeeded in addressing the two major issues of tax secrecy and avoidance, and has done so suitably by welcoming non-OECD and G20 members to join its efforts to combat aggressive tax practices. MTC is by far the most successful by-product of the OECD's tax efforts. Therefore, the African Union should consider implementing some of its provisions while drafting its own tax rules and agreements. However, the African Union ought to better implement tax transparency rules, educate its members on the importance of compliance, and help countries develop legislation on transfer pricing so that it can work on building a strong framework on transfer pricing that is more effective than TPG, as the OECD's failure to achieve these points has contributed to its partial failure.

One problem with having a strict anti-aggressive tax practice regime is that it is bound to affect trade and investment culture in African states. Many MNEs are attracted to certain African countries because of their comparatively relaxed tax policies (Robertson, 2012). Stricter policies may seriously disadvantage African countries economically, as it may drive MNEs away. This fear is probably what motivates countries to offer generous tax incentives in the first place. However, if the price to pay is finally setting a high standard for trade and investment as well as deciding to not allow MNEs to continue to take advantage of African countries, then it is best that the African Union employ a stricter anti-aggressive tax regime. Even if some MNEs decide to withdraw trading and investing in the continent at first, they will surely return to Africa ready to play by its rules by the time Africa has endured its economic and development revolution (Robertson, 2012).



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