

# Tax Amnesties as an Aid to Peace Deals and Political Settlements: An IFIT Discussion Paper

Political amnesty for atrocity crimes is a common expectation in negotiations with warlords, dictators, military commanders, paramilitary chiefs, rebel leaders and others, because it offers desirable legal security at the national level. Yet, political amnesty only goes so far. Among other things, it does not provide the legal protection these figures often need and want for illicit assets or businesses they may control. This lack of protection can easily deter them from reaching peace deals or political settlements, or indeed, entertaining talks in the first place. The status quo will clearly be preferable.

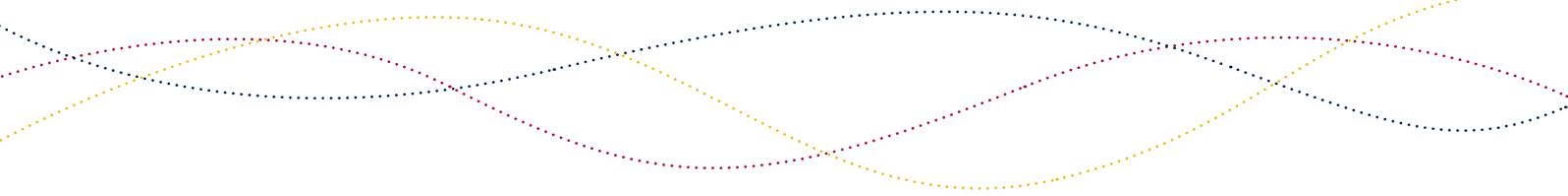
The lack of legal protection for such assets is not merely a disincentive for one or more of the presumptive negotiating parties. It is also one for the outer network or web of financiers and professional enablers that both feeds and depends upon the chief offenders' continuation in power in order for all to continue self-enriching.

There are at least three specific fears that state and non-state wrongdoers have in relation to their dirty money. First, they dread exposure and humiliation. This is especially so for any actor whose public narrative is one of patriotism, social justice or both. The disclosure of fraud, corruption and self-dealing would destroy their heroic narrative entirely. Second, wrongdoers fear losing the money itself and what that money buys for them politically and institutionally – namely loyalty, silence or both – not to mention the lifestyle that the illegal wealth brings to their families. Third, there is the fear of prosecution – whether for possession of illegally acquired assets, failure to have declared legal or illegal assets to tax authorities, or both.

As such, the prospect of talks that could engender losing power portends exposing themselves to a discouraging combination of personal disgrace, wealth destruction, jail time and an adverse impact on the lives of family members. And this is merely in relation to

their economic crimes, never mind the risks of exposure and liability for any blood crimes they may have committed or authorised.

Thus, if negotiation emerges as a preferred pathway for ending a dictatorship or armed conflict in any particular country, there needs to be a plan or a policy that takes account of these fears. This IFIT discussion paper explores the novel prospect of doing so through the application of techniques and lessons derived from the global use of conditional tax amnesties. It examines: 1) the basic concept of tax amnesties; 2) relevant trends and data from their global use; and 3) key considerations in applying tax amnesty techniques to generate better conditions for inducing, reaching, and implementing negotiated peace deals and political settlements.



# Tax Amnesties – General

This paper uses the following definition of amnesty:

*Amnesty is an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal (and sometimes civil) liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law.<sup>1</sup>*

Although amnesties have historically been agreed between sovereign states, today they are overwhelmingly adopted by national authorities. Provided there is a negotiated or constitutional bar on extradition, and provided the amnesty beneficiary does not travel abroad, the legal protection amnesty provides is considerable.

Amnesties are used by states in a wide range of situations and with a wide range of objectives. For example: 1) some are given to correct previous injustices and others to entrench impunity; 2) some are given in post-conflict contexts, others mid-conflict, and others in times of peace; 3) some are democratically adopted as laws, others imposed unilaterally by heads of state, and others negotiated in peace accords; 4) some apply only to state agents, others only to non-state actors, and others to both; and 5) some are unconditional and others heavily conditioned.

Tax amnesties operate as a subcategory of amnesty. Most countries in the world have adopted them at some point in time, with some imprudently making habitual use of them.

Ordinarily, the minimal goal of a tax amnesty is to help a government raise tax revenue by adding beneficiaries who have not previously declared all or part of their assets or income. The amnesty allows these tax offenders to file a comprehensive declaration; pay a one-time tax (or penalty) on the previously undeclared assets or income; hold onto the assets; and escape prosecution. The benefits for the state are that it raises money for the public that would otherwise be unavailable and generates a more accurate list of the tax offender's assets, so that going forward there are more declared assets to be taxed in every year.

Under the broadest type of tax amnesty, the distinction between licit and illicit assets at the domestic level all but disappears for the beneficiary. The tax amnesty legitimises the illicit assets, allowing the declarant to keep them – a productive but uncomfortable quid pro quo for the new tax revenue the state acquires in perpetuity. The amnesty also cleans the failure to have paid past taxes on licit and illicit assets alike, forgiving not only the financial liability from previous tax periods (including interest and penalties) but also the liability for having omitted the assets or income in past declarations.

Whether negotiated or unilaterally decreed, the design of a tax amnesty has to set a level of ambition. This can range from inclusion of every kind of previously undeclared asset (licit and illicit, in-country and abroad) to exclusion of every kind of asset except licit in-country ones. From a public finance perspective, the former option evidently seems preferable as it would absorb tax income from the greatest scope of possible assets. Yet, an overly broad scope could alarm the parties meant to be enticed in the first place. Likewise, a broad-scope amnesty would be the most complex to operationalise inasmuch as the assets that are located outside the jurisdiction and subject to foreign and international criminal law and sanctions would require their own separate negotiation with the many authorities concerned – bearing in mind that eligibility for development aid can be affected by the way a state deals with illicit assets. Nevertheless, the right level of ambition is primarily a function of the constraints and possibilities of the context in question.

#### **BASIC ASSET TYPES:**

<b>1. In-country &amp; licit origin</b>	<b>2. In-country &amp; illicit origin</b>
<b>3. Abroad &amp; licit origin</b>	<b>4. Abroad &amp; illicit origin</b>

Tax amnesty techniques apparently have never been applied to negotiation contexts, yet it is common for political amnesties to refer to associated economic crimes. The tendency in these cases, however, is to exclude such crimes from coverage: the very opposite function of a tax amnesty.<sup>ii</sup> This approach reflects the reality that atrocities are often rhetorically defended as unavoidable actions in the fight against a great enemy, whereas no similar justification is available for venal acts of corruption and self-dealing.

For exactly this reason, the justification and design of any tax amnesty adopted in the context of a political or peace negotiation would require great care. Key normative and strategic questions will include the following:

- Do the potential benefits of the prospective amnesty – including practical ones such as increased public revenue and transformative ones such as facilitating peace and democratic restoration – outweigh the foreseeable risks?
- Has there been due consideration of less extreme legal options to obtain the desired result?
- Does the proposed amnesty reasonably restrict the scope of financial and legal leniency offered to the intended beneficiaries?
- Does it impose the maximum conditions possible on the beneficiaries, both in terms of front-end eligibility and post-conferral retention?
- Is the amnesty's implementation viable?

If negotiated in conjunction with a peace or political settlement, the amnesty can be contained within, or alternatively drafted separately from, a larger political amnesty; it could be offered or adopted in advance of the talks, during the talks, or after the deal is reached; it could be open to all citizens or limited to the principals in the negotiation; and so on. As with other elements of amnesty design (discussed in more detail in section 3), form will follow function.

# Tax Amnesties – Lessons

Although types of tax amnesties differ greatly depending, in part, on the nature of the assets subject to the amnesty, the common component is a temporary reprieve from penalties and prosecution (and sometimes underlying tax liability) for any eligible taxpayer who participates in the amnesty programme. Central objectives include increased revenue in the short term and taxpayer compliance in the long term. Governments also use tax amnesties for broader macroeconomic objectives such as repatriating foreign assets; but these types of amnesties create additional hurdles in terms of anti-money laundering obligations, particularly when the assets included are illicit. Tax amnesties have also been aimed at easing the transition to stiffer penalties and enforcement of tax evasion, as was the case with the Irish amnesty programmes in the 1980s.

According to a 2008 IMF study,<sup>iii</sup> the motivation to avoid paying tax is directly correlated to the trade-off between the benefits of tax evasion and the cost or likelihood of detection. An amnesty on its own does nothing to alter the risk versus benefit trade-off. On the contrary, in the absence of enhanced enforcement, amnesties actually decrease the risk element and are therefore likely to have a negative impact on overall taxpayer compliance. Furthermore, regular taxpayers may feel unfairly penalised if the amnesty offers better returns on assets to those who have evaded taxes. This risks an overall longer-term increase in non-compliance. Tax amnesties are therefore unlikely to be successful tools to increase compliance, unless combined with other measures which address the specific weaknesses in the legal framework. Accordingly, it is essential that any negotiated tax amnesty is coupled with enhanced enforcement mechanisms which will impact the risk versus benefit trade-off. These might include:

- Increased criminal and civil penalties for future non-compliance subsequent to the amnesty application window;
- Augmented statutory powers for the relevant tax, prosecution or enforcement authorities;
- Increased international information flows between tax authorities in different jurisdictions;
- Incentives to provide information on wrongdoing, including in respect of third parties acting unlawfully; and
- The credible threat of reputational consequences for non-compliance.

It is also important that amnesties be presented as an exceptional action available for a defined period of time. Repeated use of amnesties generally has an adverse effect on overall success and long-term compliance.<sup>iv</sup> It is, however, of note that despite repeat amnesty programmes, Argentina's 2016/17 tax amnesty is overall considered successful.

This is largely attributed to the government enhancing its enforcement mechanisms, which included granting special powers to the Financial Intelligence Unit; and ahead of the programme, signing agreements with countries such as Switzerland and the US in order to boost its tax evasion and anti-money laundering efforts.

In assessing the viability of an amnesty, and setting objectives in terms of revenue generation, it is important to institute credible accounting policies. This should include consideration of all the costs associated with administering the amnesty, lost revenue from penalties and accounts receivable, which can be significant. The IMF 2008 study points to numerous amnesty programmes having reported significant gross revenue but where the net revenue is often limited. Examples include India, which ultimately generated negative revenue; and amnesties in Italy and the US states of Michigan and Kentucky, which ultimately generated negligible revenue.

Tax amnesties usually generate an influx of taxpayers and information and it is important to ensure that adequate domestic resources and appropriate infrastructure are in place to cope with that influx, and to process relevant information effectively. This includes instituting appropriate information-sharing systems between relevant authorities that hold different information about taxpayers.

According to a 2015 OECD survey, 13 out of the 47 countries which implemented different kinds of tax amnesties also implemented special programmes for offshore tax disclosure, and some of these included incentives or the possibility to repatriate assets. The data on assets recovered from offshore tax amnesty programmes indicate that these initiatives have been very beneficial to state budgets, although the long term impacts remain unclear.

International cooperation agreements with other countries can be an effective tool in deterring tax evaders who have concealed their wealth offshore and can also act as an additional inducement to participate in an amnesty. These types of agreements are essential where an amnesty involves repatriation or disclosure of foreign assets – not least because information concerning the funds or assets will be held by foreign authorities, making it difficult for domestic financial institutions and authorities to verify the legitimacy and source of the funds. Such agreements might include:

- Mutual legal assistance (MLA) treaties;
- Exchange of information agreements; and
- Agreements governing prosecutions and related proceedings (such as extradition).

The OECD Standard for Automatic Exchange of Financial Account Information encourages governments to obtain detailed account information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis to enable the discovery of formerly undetected tax evasion. To that end, many countries have already ratified and implemented various types of cooperation agreements. For example, in 2015, Italy signed an agreement with Switzerland which established an automated exchange of information process between the two countries in respect of tax fraud. This led to Italy removing Switzerland from its blacklist. Agreements such as this could form the basis of widening measures and agreements which deal with cross-border economic crime more generally, although any such agreements would require careful consideration and negotiation in order to comply with anti-money laundering obligations.

The nature of a tax amnesty is often inconsistent with anti-money laundering provisions, because amnesties grant the taxpayer immunity from investigation or prosecution for tax or money-laundering offences in relation to declared or repatriated funds and other assets. As such, the Financial Action Task Force (“**FATF**”) – the global money laundering watchdog – has developed four basic principles applicable to tax amnesties:

- Repatriated assets should be deposited with a financial institution that is subject to anti-money laundering and counter-terrorist financing measures;
- Assets coming from countries that do not adequately apply FATF standards should be given particular attention;
- Authorities should raise awareness among financial institutions of the potential for abuse and inherent money laundering risks;
- To benefit from the amnesty, any documents or statements regarding the repatriated assets should endorse the legitimacy of their origin.<sup>v</sup>

The FATF also notes that it is best practice that an amnesty does not provide for a full or partial exemption to the state from its anti-money laundering requirements. As such, domestic financial institutions are expected to conduct due diligence on taxpayers who are repatriating assets under the programme as well as identify the beneficial owner of the account into which assets are repatriated. Financial institutions should also seek to ascertain the origin of those assets to ensure they are not the proceeds of crime.

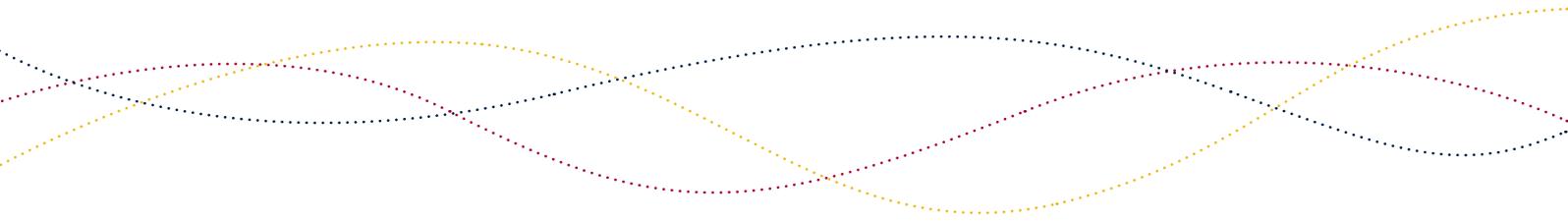
Any tax amnesty involving repatriation of illicit assets (ie, assets that are themselves the proceeds of crime) is likely to be inconsistent with FATF insofar as the amnesty provides that those assets could be retained by the individual. Where an amnesty applies to such assets, this is likely to be a complicating factor in negotiating international cooperation agreements and may ultimately mean agreements dealing with repatriation of foreign illicit assets may not be achievable. Indeed, one of the reasons attributed to the success of the 2016/17 Argentina amnesty programme was that it did not apply to assets originating from money laundering, drug trafficking or terrorist activities and also denied amnesty for assets held in “High Risk” or “Non-Cooperative” jurisdictions, as classified by the FATF.<sup>vi</sup>

The FATF principles also provide that:

- Tax authorities must be able to conduct their own investigations into the origin of assets or refer such investigations to other appropriate authorities;
- Information sharing between competent authorities should be provided for;
- Countries from which assets are being repatriated should provide the widest degree of cooperation to the authorities implementing the amnesty;
- Countries should not invoke laws that require financial institutions to maintain secrecy or confidentially as a ground for refusing cooperation.<sup>vii</sup>

With the exception of Turkey, most recent amnesty programmes have largely complied with the FATF principles. Not only does compliance with these principles mitigate against money laundering risks, but case studies indicate that adherence to these principles is more likely to result in the amnesty being successful. For example, a 2000 Italian amnesty programme generated significant revenue, but the IMF concluded that it was disappointing after taking

account of the overall costs and the fact that participants were anonymous, meaning tax authorities could not access information that could be used to reduce tax evasion in the future and improve audits. By contrast, Italy's 2014 tax amnesty provided that participants had to declare their name, bank information and intermediaries in order that authorities could verify the origin of the assets. The amnesty was also implemented in conjunction with the government strengthening criminalisation of money laundering and was ultimately seen as more successful, despite generating less revenue than the 2000 amnesty. Studies in Switzerland indicate that seeking broad public endorsement on whether an amnesty should be implemented can also increase success, in part by encouraging greater participation.<sup>viii</sup>



# Negotiated Tax Amnesties – Design Checklist

In order to consider whether it makes sense to negotiate the conditional legal forgiveness of economic crimes through a tax amnesty, there are several threshold issues to consider in order to be sure that such an amnesty is a sensible option as part of a larger peace or political settlement process. If the threshold issues are positively met, a next step is to consider what principles should guide the design and negotiation of any such amnesty. Only thereafter is it appropriate to consider the range of practical design choices for the amnesty itself.

Each of these steps is considered below – taking account on the one hand of the public interest, and on the other hand of the private interests of the wrongdoers who are targeted by the amnesty and whose fears of personal disgrace, wealth destruction, jail time and familial impact must be borne in mind as part of any realistic solution.

## Threshold Questions

- What is the potential for an amnesty to lead to improvements in:
  - the future behaviour of actors within the state and of relevant non-state armed actors?
  - the fiscal position of the state?
  - wider relations with other states, including on the provision of inward investment?
- Is there potential for a significant impact on the state's ability to fund the overall political or post-conflict transition brought about by negotiation, or any urgent social or humanitarian needs related to it?
- Is there evidence or a credible allegation of widespread tax evasion, particularly by senior and/or wealthy members of the regime or non-state armed group concerned?
- What is the likely level of recovery versus the foreseen costs of implementation?

## Design Principles

The following principles should guide the design of an amnesty, following an affirmative assessment of the threshold questions:

- Legitimate process.
- Constitutional and legislative underpinning.
- Minimum leniency for maximum recovery.

- Imposition of maximum conditions on amnesty applicants.
- Rule of revocation of immunity for any proven violation of amnesty conditions.
- Commitment by the government to ensure legal powers and technical capacity, supported by financial resources, for enforcement agencies to:
  - Set up and administer the amnesty process;
  - Determine amnesty applications within a reasonable timeframe; and
  - Enforce proactively against those who do not avail themselves of the amnesty.
- The use of international agreements and arrangements where significant assets are held outside the jurisdiction and meant to be covered under the terms of the amnesty.

## Design Choices

The specific choices made in the negotiation and design of a tax amnesty meant to facilitate a political or post-conflict transition cannot be determined in the abstract. However, the below items constitute an organised checklist of what to consider and what to aim for, subject to what the specific circumstances allow. (See also Annex 1 for a hypothetical modelling of tax amnesty implementation.)

### Legislative underpinning

- Fashion any amendments to the existing legal framework to make the amnesty operative, in particular relating to:
  - Any underlying criminality; and
  - Third party professional enablers.
- Assure compliance of the proposed amnesty with domestic and international standards on anti-money laundering and counter-terrorist financing.
- Ensure reasonable compatibility with the FATF principles for tax amnesties and asset repatriation programmes – if necessary by including international participation or observation.
- Consider the potential for restriction on use of funds recovered for reparations to be paid to victims of the regime or conflict.

### Minimum leniency

- Analyse the forms of taxation to be covered by the amnesty (eg, individual or corporate taxes) and consider whether materiality thresholds (eg, as to tax owed) might be needed.
- Establish the historical timeframe of non-payment of tax which the amnesty is to cover.
- Ensure the limitation of amnesty to non-payment of tax on legitimately-earned revenue.
- Expressly exclude other crimes from amnesty (eg, offences of fraud and other predicate offences leading to illicitly obtained assets, money laundering or terrorist financing) unless gains made from those crimes are declared, repatriated and surrendered.
- Consider which parties may benefit from or be excluded from all or part of the amnesty:

- Individuals (including seniority and/or wealth of individuals concerned);
- Family members;
- Corporations; and/or
- Professional enablers.
- Establish the legal consequences of the grant of amnesty, which may include:
  - Immunity from prosecution for failure to pay tax;
  - No further investigation of the historic non-payment of the tax paid under the amnesty;
  - Effect of the amnesty on ongoing legal processes (eg, investigations, subpoenas, warrants, trials), prior legal findings (eg, judgements) and personal records (eg, criminal records, data held by the tax authorities); and/or
  - Possible introduction of US-style deferred prosecution agreements where an applicant voluntarily discloses wrongdoing connected to illicit assets.
  - Ensure a rule of confidentiality of applications for amnesty and decisions made on applications, backed up by international guarantors if necessary.

### Imposition of maximum conditions on applicants for an amnesty

- Ensure that the tax amnesty application is required to be submitted by eligible individuals within a short but reasonable time period set by legislation.
- Establish a duty of full, frank and accurate disclosure of the amnesty-eligible assets.
- Require delivery up at the time of application of all evidence required for the authorities to make an informed decision.
- Create a criminal offence of deliberately or recklessly misleading (or attempting to mislead) the authorities during the amnesty process.
- Allow the implementing agency, as part of any amnesty decision, to impose legally-binding conditions as to future conduct of the applicant.
- Ensure the amnesty is to be granted only when authorities are satisfied that the application is complete, and only following payment of tax assessed by the authorities as owed by the taxpayer.
- For professional enablers, make the amnesty conditional on providing information on the activities of their principals.
- Establish provisions allowing for the denial of amnesty if the taxpayer comes forward after the tax or other authorities have opened an audit or investigation into the taxpayer's affairs.
- Depending on the scope of the amnesty, establish a requirement either to repatriate assets held outside the jurisdiction so that they become taxable domestically, or to pay domestic tax on them as if they were held in the jurisdiction.

## Revocability of amnesty

- Create an explicit provision for the amnesty to be revocable on:
  - Subsequent discovery of failure to provide complete or truthful information in an amnesty application;
  - Any serious non-compliance with a legislated or applied term or condition of the amnesty; and
  - Recidivism on the part of the applicant (for the future commission of any named offences).
- Stipulate the consequences of breach of amnesty:
  - Potential for prosecution of criminal offences related to taxation; and
  - Potential for prosecution of other linked offences.

## Capacity and legal powers of the authorities

- Ensure sufficiency of resources and expertise on the part of the authorities, if necessary with a period of international accompaniment, to enforce against:
  - Persons who fail to enter the amnesty process;
  - Failures to co-operate with the process;
  - Dishonest or reckless failure to provide complete and accurate information during the process;
  - Failures to comply with conditions of the amnesty; and
  - Recidivism on the part of the applicant.
- Establish adequate investigative and legal powers on the part of the authorities to:
  - Obtain information from applicants for amnesty and from connected persons (eg, family members, professional enablers); and
  - Force co-operation by applicants and connected persons.
- Assure organised interaction between the authorities and the domestic financial sector, including establishing duties specifically applicable to the financial sector requiring firms to:
  - Report unexplained wealth on the part of clients;
  - Provide information to the authorities on request to support analysis of any amnesty application;
  - Report on any suspicious activity arising during the amnesty period; and
  - Interdict any attempt by an applicant or a connected person to transfer assets out of the jurisdiction.
- Create a cross-party or cross-departmental working group to ensure co-ordination across all domestic authorities, if necessary reinforced by a period of international accompaniment.
- Establish the right on the part of the amnesty applicant to challenge decisions on the grant and revocation of amnesty through the courts.

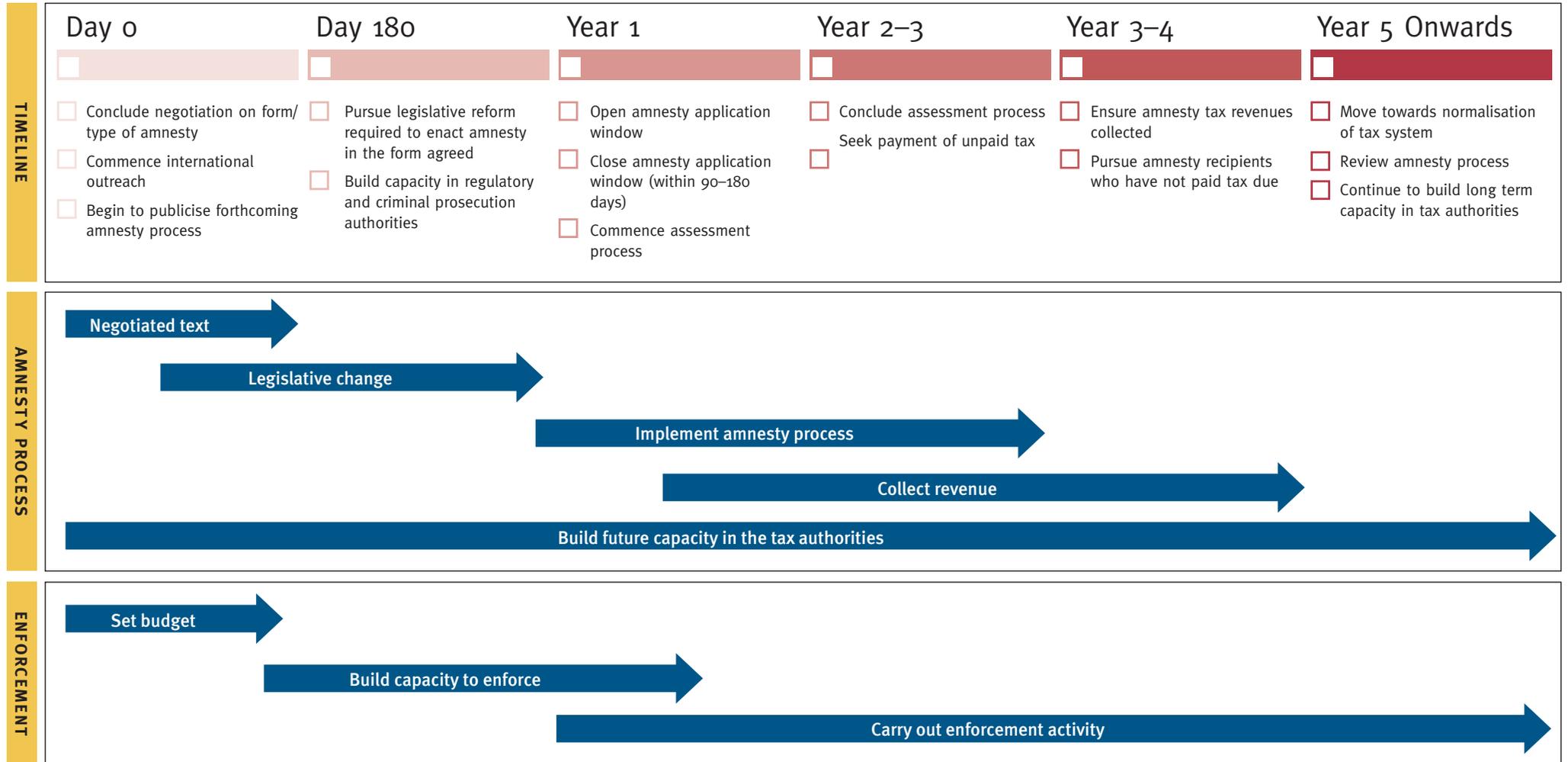
- Have a plan for communicating the amnesty to key stakeholders, domestically and internationally.
- Consider the potential longer-term need for increased tax audit capacity on the part of the authorities following the grant of amnesty.

### International considerations (where the amnesty targets assets held outside the jurisdiction)

- Carry out key stakeholder engagement at the international level to contextualise the amnesty in humanitarian terms, including with:
  - The government of the states concerned;
  - International standard-setting bodies;
  - Key donors; and
  - Relevant third sector organisations.
- Assess the extent of foreign legal systems' provision for:
  - Freezing funds; and
  - Releasing frozen funds (if any).
- Evaluate and take robust steps to reduce the risk of information leaks concerning taxpayers during any international co-operation.
- Establish processes for international exchanges of information, including:
  - Existing MLA processes;
  - Bespoke agreements with the state concerned (including the possibility of US-style deferred prosecution agreements); and
  - Requirement for a specific process for amnesty-related information requests.
- Where applicants may be subject to economic sanctions, undertake diplomatic outreach to:
  - Key sanctioning entities (eg, UN Security Council, US, EU, UK) to discuss application of sanctions for the purposes of the amnesty; and
  - Individual governments to seek licences allowing transfers for the purposes of the amnesty.
- Make early contact with foreign regulators and prosecutors to discuss:
  - The impact of the amnesty on any public interest decision on prosecuting an applicant; and
  - The extent of, and approach to, any extradition arrangements with the state concerned.

*Robert Dedman, Lisa McKinnon-Lower and Mark Freeman are the principal authors of this paper. They gratefully acknowledge colleagues and experts at IFIT and King & Spalding LLP for their helpful feedback on an initial draft of the paper. For tailored advice on drafting the kinds of amnesties outlined in this publication, please contact IFIT directly.*

## Annex 1: Hypothetical Modelling of Tax Amnesty Implementation



## Endnotes

<sup>i</sup> Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009), at 13.

<sup>ii</sup> Examples include the amnesties of *Argentina 1983, Tunisia 1989, Burundi 1990, Romania 1990, El Salvador 1993, Jordan 1999, Philippines 2000, and Zimbabwe 2000*. *Ibid*, at 150.

<sup>iii</sup> IMF 2008

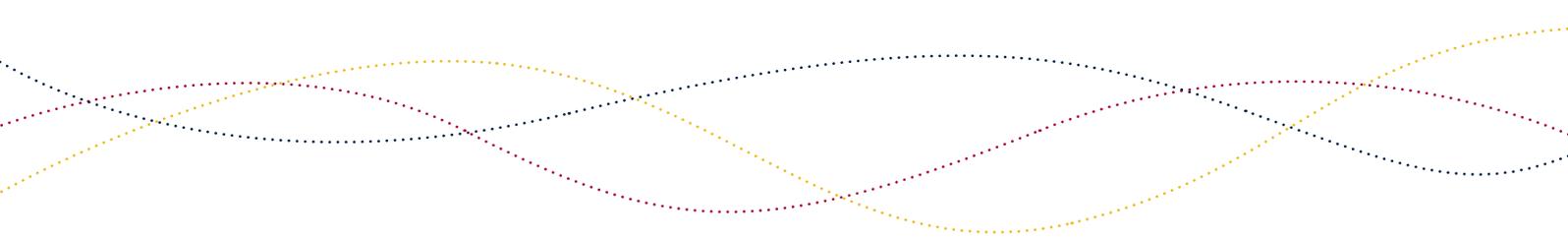
<sup>iv</sup> See, for example, amnesty programmes in India, the Philippines, Turkey and Argentina (between 1977 and 1987 the government held almost yearly amnesty programmes).

<sup>v</sup> <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>

<sup>vi</sup> Interestingly it was reported that an official in Belgium recently put forward the idea of introducing a form of tax amnesty for economic crimes aimed at bringing billions of euros back into the legal economy. If it is implemented in some form, the outcome (and in particular how the Belgian government deals with anti-money laundering issues) will be particularly pertinent.

<sup>vii</sup> <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/call-for-action-june-2020.html>

<sup>viii</sup> <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>



**Institute for Integrated Transitions**

[www.ifit-transitions.org](http://www.ifit-transitions.org)



INSTITUTE FOR INTEGRATED TRANSITIONS