A Critical and Comparative Analysis of the Prevention of Tax Evasion through the Application of Law and Enforcement Policies in the United Kingdom and United States of America

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Abstract

Following the global financial crisis, and a number of tax evasion scandals, there has been an increased public demand for countries to tackle tax evasion. In response, the past two decades have seen the diffusion of international cooperation in tax matters of a nature and on a scale that was previously unthinkable, facilitating the near eradication of offshore tax evasion. Additionally, throughout this time, both the UK and US have paid greater attention to this financial crime, amending relevant laws and enforcement policies, as well as empowering and supporting tax authorities to enhance investigations. In the UK, there has not only been a stronger public appetite to combat tax evasion, but also, a desire to combat tax evasion using the procedures and penalties of the criminal justice system. In light of these contemporary national and international developments, this thesis provides a unique contribution to knowledge by comparing and evaluating the laws and enforcement policies pertaining to tax evasion in the UK and US. This thesis argues that the laws and enforcement policy pertaining to tax evasion in the UK are neither internally, nor externally, effective in combatting tax evasion and a comprehensive reform of the UK's approach is long overdue. Significant insights can be gained from the US in improving both the internal and external effectiveness of the UK legal framework.

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Chapter 1 - Introduction

1.1 Introduction

A tax is a 'compulsory, non-punitive exaction of money from a private person or entity by a public authority for public purposes.'[1] In both the United Kingdom (UK) and United States of America (US), the power to raise revenue was conferred on democratically elected representatives by the highest legal authority, the constitution.[2] This power enables the State to confiscate property legitimately, to use for the essential purposes of funding public infrastructure and services.[3] However, since the inception of taxes individuals, regardless of their level of income, have sought to illegally escape their tax liabilities.[4] This behaviour causes substantial losses to government revenues, posing a serious risk to public infrastructure, public services and/or honest taxpayers through their increased burden.[5] It is unsurprising that the dramatic events of the last twenty years, including both a global financial crisis and a global pandemic, have given rise to a stronger impetus to combat tax evasion at both the international and national levels. Indeed, the past two decades have seen the diffusion of international cooperation in tax matters of a nature and on a scale that was previously unthinkable, facilitating the near eradication of offshore tax evasion. Additionally, throughout this time, both the UK and US have paid greater attention to this financial crime, amending relevant laws and enforcement policies, as well as empowering and supporting tax authorities to enhance investigations.

Consequently, the aim of this thesis is to identify how the law responds to tax evasion in the UK and US, and to evaluate whether it does so effectively, in light of contemporary national and international developments. This thesis investigates the legislative frameworks designed to combat tax evasion in the UK and US, and examines how the law is enforced, critically considering its applicability, consistency and effectiveness. To this end, this chapter begins by defining tax evasion, distinguishing it from other tax-saving activities, and identifies the

[1] SP Green, 'What Is Wrong with Tax Evasion?' (2009) 9 Hous Bus & Tax LJ 220, 221.
[2] The Bill of Rights Act 1689, Article 4; U.S. Const. art. I, § 8; U.S. Const. amend. XVI.
[3] J Freedman, J Vella, 'HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion' in C Evans, J Freedman, R Krever (eds), *The Delicate Balance – Tax, Discretion and the Rule of Law* (IBFD, 2011) 79.
[4] M Pickhardt, A Prinz, 'The Nature of Tax Evasion and the Shadow Economy' in M Prickhardt, A Prinz, *Tax Evasion and the Shadow Economy* (Edward Elgar, 2012) 3.
[5] M Orviskaa, J Hudson, 'Tax Evasion, Civic Duty and the Law Abiding Citizen' (2003) 19(1) EJPE 83, 83.

primary and subsidiary research questions answered by this thesis. The chapter also outlines the contemporary research context, highlighting the value of this study.

1.2 Tax Evasion

Conduct that illegally reduces a liability to tax constitutes the financial crime of tax evasion. The Organisation for Economic Co-operation and Development (OECD), describe tax evasion as,

> A term that is difficult to define but which is generally used to mean illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities.[6]

Individuals and companies conceal their tax obligations by failing to file a required tax return, or by underreporting their income or profits to tax authorities, including by claiming deductions, exemptions or credits to which they are not entitled.[7] Hiding the true level of income, wealth or profits may take a number of different forms, such as, retaining cash earnings, directly purchasing foreign investments, depositing money in foreign bank accounts and/or using legal structures, such as shell companies and trusts.[8] These activities are often facilitated by financial globalisation and increased access to secretive offshore jurisdictions.[9]

A distinction must be drawn between the term tax evasion, which describes illegal tax reduction activities and tax avoidance, where the reduction is obtained legally. The intention held, and methods used, in reducing a liability to tax are pivotal in characterising the behaviour.[10] For instance, as individuals engaged in tax evasion do not seek to comply with their legal obligations, tax evasion involves the omission, concealment or misrepresentation of information.[11] This behaviour is a determinative feature of tax evasion; tax evasion is not simply a failure to pay a recognised debt, it is omitting or concealing relevant information with

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[6] OECD, 'Glossary of Tax Terms' <http://www.oecd.org/ctp/glossaryoftaxterms.htm> accessed 2 April 2021.
[7] J Alm, 'Designing Alternative Strategies to Reduce Tax Evasion' in M Prickhardt, A Prinz, *Tax Evasion and the Shadow Economy* (Edward Elgar, 2012) 13.
[8] JG Gravelle, *Tax havens: International Tax Avoidance and Evasion* (2015, Washington DC: Congressional Research Service) 24.
[9] Ibid.
[10] RF Van Brederode, 'A Normative Evaluation of Tax Law Enforcement: Legislative and Political Responses to Tax Avoidance and Evasion' (2014) 42 Intertax 764, 768.
[11] HM Revenue & Customs define tax evasion as an "illegal activity, where registered individuals or businesses deliberately omit, conceal or misrepresent information in order to reduce their tax liabilities" - HM Revenue & Customs, *Measuring Tax Gaps 2015 Edition: Tax Gap Estimates for 2013-14* (22 October 2015) p20.

the intention of 'persuading the tax inspector to charge you less than you ought to pay.'[12] In contrast, those engaged in tax avoidance seek to comply with their legal obligations. At one end of the scale, tax avoidance involves taking advantage of fiscal incentives provided by legislation; at the other, it involves structuring one's affairs to take advantage of loopholes in, or unforeseen consequences of, legislation.[13] As those engaging in tax avoidance seek to structure their affairs within the boundaries of the law, the activities involved are usually fully disclosed to the authority.[14]

The focus of this thesis is on the law pertaining to tax evasion in the UK and the US and tax avoidance has not been subsumed within the ambit of this research. This is because, despite similar consequences, the activities are of a fundamentally different nature and should be treated accordingly. As Alldridge notes, 'elementary respect for the Rule of Law should dictate that we do not treat tax avoiders (who do set out to act lawfully) as tax evaders (who do not).'[15] However, the distinction between these two activities is not set out with sufficient clarity. For instance, purported tax avoidance, which takes an incorrect interpretation of tax legislation, may be considered evasion in certain circumstances.[16] The precise boundaries of the concept of tax evasion in the UK and US will be identified later in this thesis.[17]

A further clarification between tax evasion in its widest sense, covering all cases of non-compliance with tax law, and criminal tax evasion, is necessary. Whilst all tax evasion involves omission or concealment, resulting in a reassessment to tax, not all tax evasion warrants criminal penalties.[18] In both the UK and the US, tax evasion may give rise to civil penalties under tax legislation or to criminal prosecution, or even both. In each jurisdiction, to incur criminal penalties the evader must have possessed the requisite *mens rea* or guilty state of mind. Thus, to obtain a criminal prosecution of a tax evader in the UK, it must be proved that the

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[12] *Director of Public Prosecutions v Ray* [1974] AC 370 (HL) at 378.
[13] *Hamilton v Hamilton* [2016] EWHC 1132 per Henderson J at [37].
[14] J Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' (2004) 4 BTR 332, 335.
[15] P Alldridge, 'Tax Avoidance, Tax Evasion, Money Laundering and the Problem of 'Offshore'' in S Rose-Ackerman, P Lagunes (eds), *Greed, Corruption and the Modern State* (Essays in Political Economy, Edward Elgar, 2015) 332.
[16] For example *R v Charlton* [1996] STC 1418 (CA) discussed in D Ormerod, 'Cheating the Public Revenue' (1998) Sep Crim LR 627. See recently, *Anthony Ashbolt and Simon Arundell v Her Majesty's Revenue & Customs* [2020] EWHC 1588 (Admin) at para 5, where the defence argued, 'the evidence before the judge demonstrated only that the claimants had engaged in lawful tax avoidance, and not evasion, and there were no reasonable grounds for believing they had acted dishonestly.' However, in this case, the use of false documents supported the allegations of evasion.
[17] See Chapter 6.
[18] J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) Tax Journal 1, 3.

defendant acted 'dishonestly.'[19] Dishonesty is not defined, but is to be determined by reference to the ordinary standards of reasonable and honest people.[20] In contrast, in the US, the defendant must have attempted to evade a tax 'wilfully,'[21] defined as the 'voluntary, intentional violation of a known legal duty.'[22] In both jurisdictions, evidence of the defendant's state of mind, ascertained through their actions or omissions, is an important consideration for authorities in deciding whether to pursue a criminal prosecution or civil penalties.

1.3 Research Context and Purpose

As with all illegal activities, it is difficult to measure the true extent of tax evasion. However, estimates suggest that tax evasion presents a high cost to worldwide revenues, at approximately 5.1% of world Gross Domestic Product (GDP).[23] Offshore tax evasion alone results in global tax losses of $190bn, of which $75bn is lost in Europe and $36bn is lost in the US.[24] The European Union (EU) similarly estimated that Member States' revenue losses attributable to international tax evasion amounted to €46bn in 2016.[25] Domestically, the UK's tax authority, Her Majesty's Revenue and Customs (HMRC), estimates that the UK tax gap amounts to £31bn, with £4.6bn of these revenue losses attributable to tax evasion.[26] The Internal Revenue Service (IRS) estimate of the US tax gap is substantially higher at $441bn, or $381bn after enforcement efforts.[27] However, whilst the significant cost of tax evasion may provide a

[19] Fraud Act 2006, s.1, s.2; Theft Act 1968, s.17; Taxes Management Act 1970, s106A; conspiracy to defraud preserved by section 5(2) of the Criminal Law Act 1977; cheating the public revenue preserved by section 32(1)(a) Theft Act 1968, see *R v Hudson* [1956] 1 All ER 814; indirect tax offences include Value Added Tax Act 1994, s72(1), 72(3), 72(8); Customs and Excise Management Act 1979, s.170, s.170B. This is with the exception of Customs and Excise Management Act 1979, s.167(3), s.170A; Taxes Management Act 1970, s106B, s.106C, s.106D.

[20] Following the test set out in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, confirmed in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7. Ivey removed the subjective limb of the test originally set out in *R v Ghosh* [1982] 1 QB 1053 (CA).

[21] 26 USC §§ 7201-7215, with the exception of 26 USC §7212.

[22] *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Trevino*, 419 F.3d 896, 901 (9th Cir. 2005)

[23] Tax Justice Network, *The Cost of Tax Abuse: A Briefing Paper on the Cost of Tax Evasion Worldwide* (Briefing Paper, November 2011).

[24] G Zucman, 'Taxing Across Borders: Tracking Personal Wealth and Corporate Profits' (2014) 28 Journal of Economic Perspectives 121, 140.

[25] European Commission, 'Estimating International Tax Evasion by Individuals' (September 2019) <https://ec.europa.eu/taxation_customs/sites/taxation/files/2019-taxation-papers-76.pdf> accessed 30 September 2020.

[26] HM Revenue & Customs, 'Measuring Tax Gaps 2020 Edition: Tax Gap Estimates from 2018 to 2019' (9 July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907122/Measuring_tax_gaps_2020_edition.pdf> accessed 1st April 2021.

[27] Internal Revenue Service, 'Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011-2013' (September 2019) <https://www.irs.gov/pub/irs-pdf/p1415.pdf> accessed 1st April 2021.

justification for further research in and of itself, the importance of this research lies in its contemporary research context.

Tax evasion is widely considered a white-collar crime, a term first coined by Sutherland who defined it as, 'a crime committed by a person of respectability and high social status in the course of his occupation.'[28] Notwithstanding its importance,[29] this definition is problematic in that white-collar crime is defined solely by reference to the occupation and social status of offenders, excluding some activities that are usually included within its ambit.[30] This includes tax evasion; a crime committed by individuals in a plethora of occupations and regardless of their level of income, or social status.[31] In consequence, researchers have dealt with this problem by studying violations of particular laws,[32] or by differentiating certain varieties of white-collar crime, with one type being financial crime.[33] The latter term is hard to define with the International Monetary Fund (IMF) noting, 'no internationally accepted definition of financial crime exists.'[34] The US Federal Bureau of Investigation (FBI) states that, 'the motivation behind these crimes is financial,' they are often 'characterized by deceit, concealment, or violation of trust' and are 'not dependent on the application or threat of physical force or violence.'[35] In the UK, the term has been described within legislation as, 'any offence involving fraud or dishonesty; misconduct in, or misuse of information relating to, a financial market; or handling the proceeds of crime.'[36] As such, tax evasion is most appropriately categorised as a financial crime.

White-collar crimes, particularly financial crimes, are often viewed as more 'morally ambiguous' than other types of crime,[37] and it is perhaps this ambiguity that causes them to

[28] E Sutherland, 'The White Collar Criminal' (1940) 5(1) Am Sociol Rev 1, 1.
[29] K Harrison, N Ryder, *The Law Relating to Financial Crime in the United Kingdom* (2nd edn, Routledge, 2017) 2.
[30] For instance see S Shapiro, 'Collaring the Crime, not the Criminal: Reconsidering the Concept of White-Collar Crime' (1990) 55(3) Ann Sociol Rev 346.
[31] M Pickhardt, A Prinz, 'The Nature of Tax Evasion and the Shadow Economy' in M Prickhardt, A Prinz, *Tax Evasion and the Shadow Economy* (Edward Elgar, 2012) 3.
[32] J Braithwaite, 'White Collar Crime' (1985) 11 Am Rev Sociol 1, 3.
[33] H Croall, *Understanding White Collar Crime* (Open University Press, 2001) 11.
[34] However, the IMF continues to define financial crime broadly, as encompassing 'any non-violent crime resulting in a financial loss', International Monetary Fund, *Financial System Abuse, Financial Crime and Money Laundering – Background Paper* (International Monetary Fund, February 2001) 5.
[35] Federal Bureau of Investigation, 'What We Investigate: White Collar Crime' <https://www.fbi.gov/investigate/white-collar-crime> accessed 10 September 2016.
[36] Financial Services and Markets Act 2000, s.6(3).
[37] See SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2007).

present greater difficulties for legal systems.[38] In comparison to other financial crimes, the criminalisation of tax evasion once raised perhaps even greater moral uncertainty, with many doubting whether such behaviour should be worthy of criminal sanction.[39] This ambiguity arose from the doubts surrounding how harmful these activities are, relative to other crimes. Alldridge explains that while some would argue that tax evasion is worse than other crimes because the victim is the State, i.e. everyone, others would counter that it is less significant because there is no clearly identifiable victim.[40] For many, this moral ambiguity coupled with other factors, such as the widespread resentment of paying taxes and dissatisfaction with the purposes for which they were used, meant that tax evasion was often considered a culturally acceptable crime,[41] or simply, one of the 'everyday crimes of ordinary people.'[42]

Recently, perceptions of tax evasion have altered, with the evasion of tax liabilities widely considered to pose a significant harm to public infrastructure, public services, and/or honest taxpayers through their increased burden.[43] The high public deficits caused by the recent financial crisis have increased this trend, with governments attempting to recoup lost revenue by heightening their efforts in combatting tax evasion.[44] Additionally, this change has been accelerated by public awareness of, and reactions to, the extent of tax evasion uncovered by a plethora of recent exposés, including the HSBC scandal and revelations surrounding the Panama Papers leak. In February 2015, it was revealed that HSBC Private Bank (Suisse) had assisted many wealthy clients in evading millions of pounds in tax.[45] The whistle blower, Herve Falciani, reported that not only had HSBC set up these accounts, but also reassured its international clients that details of accounts held would not be disclosed to national authorities,

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[38] Ibid at 27; see also N Ryder, *The Financial Crisis and White Collar Crime: The Perfect Storm?* (Edward Elgar, 2014) 1.
[39] SP Green, 'What Is Wrong with Tax Evasion?' (2009) 9 Hous Bus & Tax LJ 220, 222.
[40] P Alldridge, 'Tax Avoidance, Tax Evasion, Money Laundering and the Problem of 'Offshore'' in S Rose-Ackerman, P Lagunes (eds), *Greed, Corruption and the Modern State* (Essays in Political Economy, Edward Elgar, 2015) 324.
[41] R Bosworth-Davies, 'Money Laundering – Chapter Five: The Implications of Global Money Laundering Laws' (2007) 10(2) JMLC 189, 202.
[42] S Karstedt, 'Middle-Class Crime: Moral Economies Between Crime in the Streets and Crime in the Suites' in SR Van Slyke, ML Benson, FT Cullen, *The Oxford Handbook of White-Collar Crime* (Oxford Handbooks in Criminology and Criminal Justice, Oxford University Press, 2016) 169.
[43] As opposed to a "victimless crime" unworthy of criminal sanction – Keir Starmer QC, 'Prosecuting Tax Evasion' (The Crown Prosecution Service, January 2013) <http://www.cps.gov.uk/news/articles/prosecuting_tax_evasion/> accessed 28th August 2016.
[44] P Hardouin, 'The Aftermath of the Financial Crisis' (2011) 18(2) JFC 148, 149.
[45] The International Consortium for Investigative Journalists, 'Banking Giant HSBC Sheltered Murky Cash Linked to Dictators and Arms Dealers' (8 February 2015) <http://www.icij.org/project/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers> accessed 15th March 2016.

regardless of indications of undeclared assets.[46] In 2016, a leak of documents from the Panamanian law firm Mossack Fonseca revealed how clients of the firm utilised legal structures and banking secrecy in offshore jurisdictions, to launder money, avoid sanctions and engage in tax minimising activities, including tax evasion.[47] In one example, the files show how Mossack Fonseca offered to provide an American Millionaire with false ownership records to hide her wealth from the tax authorities.[48] In both the UK and the US, the enforcement action taken by the relevant authorities in response to the scandals received prompt public criticism,[49] evidencing a heightened public desire to combat tax evasion.

The current public and governmental unwillingness to tolerate tax evasion is also reflected in international initiatives, developed to provide a system for the AEOI for tax purposes. These initiatives include the US Foreign Account Tax Compliance Act (FATCA),[50] and the Common Reporting Standard (CRS), developed by the OECD and implemented by a plethora of jurisdictions,[51] including those within the EU.[52] These initiatives provide for the transmission of information from a tax authority in one jurisdiction, where an account is held, to a tax authority in another, where the taxpayer is resident, facilitating the discovery of offshore tax evasion. These measures are designed to combat the inefficient and time-consuming nature of bilateral agreements and aim to bring the compliance level associated with foreign income or accounts to that of domestic compliance.[53] Within the last ten years, the global anti-money laundering (AML) framework has also been extended to include tax evasion as a predicate offence to laundering, providing access to the tools contained in this framework for the

[46] Ibid.
[47] The International Consortium for Investigative Journalists, 'Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption' (3 April 2016) <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html> accessed 28th August 2016.
[48] R Bilton, 'Panama Papers: Mossack Fonseca Leak Reveals Elite's Tax Havens' (The BBC, April 2016) <http://www.bbc.co.uk/news/world-35918844> accessed 28th August 2016.
[49] For instance, see J Steinberg, 'Will HSBC Scandal Sink Wall Street's Obama Presidency?' (2015) Feb EIR 11; and criticism of HM Revenue & Customs in Public Accounts Committee, *Oral Evidence: Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 974-I).
[50] These provisions are named after the act they were originally introduced by - Foreign Account Tax Compliance Act of 2009 (H.R. 3933). They were subsequently enacted by the Hiring Incentives to Restore Employment Act of 2010, Public Law 111-147 (the HIRE Act), which added 26 USC §§1471-1474.
[51] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, (July 2014, OECD Publishing); OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (2nd edn, OECD Publishing 2017).
[52] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2014] OJ L359/1.
[53] R F Van Brederode, 'A Normative Evaluation of Tax Law Enforcement: Legislative and Political Responses to Tax Avoidance and Evasion' (2014) 42(12) *Intertax* 764, 773.

purposes of combatting tax crimes.[54] Taken together, the near global acceptance of the CRS and the AML framework has revolutionised attempts to combat offshore tax evasion.

In the UK, increased public awareness of the extent and harmful effects of tax evasion, has not only led to an increased desire to combat tax evasion, but also, a desire to combat tax evasion using criminal penalties. This is illustrated by the aforementioned negative public reaction to the response taken to tax evasion scandals,[55] the introduction of new criminal offences to combat tax evasion,[56] and the introduction of prosecution targets to be met by HMRC.[57] These targets were introduced by the Volume Crime Initiative, which required HMRC to submit sufficient individuals to the Crown Prosecution Service (CPS), to enable it to raise its prosecutions for tax evasion offences from 165 individuals in 2010/11, to 1165 individuals in 2014/15.[58] This is in sharp contrast to previous practice, as HMRC rarely instituted criminal investigations for tax evasion offences, opting instead to settle liabilities by way of cost-effective civil settlement procedures.[59] This change in practice has been taken in response to public opinion and little consideration has been paid to determining whether this is a more effective response.

In effect, tax evasion has become an increased priority for governments, both nationally and internationally; a priority underscored by a current public desire to combat this offence. This represents a significant change to previous practice and it is thus an appropriate and essential time to re-examine existing legal frameworks in national jurisdictions designed to tackle this financial crime. This is a pressing concern, as countries must utilise the new compliance information generated by the aforementioned international initiatives to tackle all incidences of non-compliance effectively. As such, a fundamental aim of this thesis is to assess the legislation pertaining to tax evasion in the UK and the US to determine its efficacy. This is particularly essential in the UK, where there is not only an increased desire to combat tax evasion, but also a desire to combat tax evasion using criminal penalties. This changing public

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[54] FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (Updated October 2020). <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 1st April 2020.

[55] For instance see criticism of HM Revenue & Customs in Public Accounts Committee, *Oral Evidence: Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 974-I).

[56] HM Revenue & Customs, *Tackling Offshore Tax Evasion: A New Corporate Criminal Offence of Failure to Prevent the Facilitation of Evasion* (Consultation Document, July 2015); HM Revenue & Customs, *Tackling Offshore Tax Evasion: A New Criminal Offence for Offshore Evaders* (Consultation Document, July 2015).

[57] HM Treasury, *Spending Review 2010* (Cmd 7942, 2010) p71.

[58] HM Treasury, *Summer Budget 2015,* (HC 2015-16, 264) p43.

[59] D Ormerod, 'Cheating the Public Revenue' (1998) Sep *Criminal Law Review* 627, 645.

demand for criminal prosecutions instead of civil settlement procedures additionally necessitates the reconsideration of strategic decisions made by HMRC, to determine whether this is an appropriate response. Consequently, the complementary aim of this thesis is to assess the enforcement of tax evasion legislation in the UK and the US, determining the purpose and application of enforcement policies.

It is this uncertainty as to the correct legal response to tax evasion in the UK, which causes this thesis to focus on the law and enforcement policies pertaining to tax evasion in this jurisdiction. This thesis utilises a comparative method, drawing on insights gained from the US experience to provide suggestions for optimal legislation and enforcement practice in the UK. The US has been chosen to provide an appropriate comparison for a multitude of reasons, including the unique interaction of the development of taxation law between these jurisdictions,[60] and the US' perceived reputation as leading global efforts in this area.[61] Indeed the US has taken sustained criminal action against some of Switzerland's largest banks, leading to the downfall of Switzerland's oldest bank,[62] and the near eradication of Swiss bank secrecy for US clients.[63] In addition, the US has indicted professionals involved in the facilitation of tax evasion at the centre of high-profile tax scandals, demonstrating its strong stance.[64] Moreover, this jurisdiction has ultimately been chosen because of the thoughtful treatment its academics and practitioners have given to the question of the differential impact of criminal and civil penalties for tax evasion,[65] and this research's positive influence on US legislation and enforcement practice. In effect, comparing the UK's approach to combatting tax evasion, with that employed in the US, is likely to generate beneficial insights into optimal law and enforcement practice.

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[60] A Mumford, *Taxing Culture: Towards A Theory of Tax Collection* (Socio-Legal Studies Series, Ashgate, 2002) 7.

[61] For instance, see The Whitehouse, 'Fact Sheet: Obama Administration Announces Steps to Strengthen Financial Transparency, and Combat Money Laundering, Corruption, and Tax Evasion' (May 2016) < https://www.whitehouse.gov/the-press-office/2016/05/05/fact-sheet-obama-administration-announces-steps-strengthen-financial> accessed 16th June 2016.

[62] Department of Justice, 'Swiss Bank Pleads Guilty in Manhattan Federal Court to Conspiracy to Evade Taxes' (3 January 2013) <https://www.justice.gov/usao-sdny/pr/swiss-bank-pleads-guilty-manhattan-federal-court-conspiracy-evade-taxes> accessed 19th March 2021.

[63] P Emmenegger, 'Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters: A Nut Too Hard to Crack?' (2017) 11 Regulation & Governance 24, 26; Y Lengwiler, A Saljihaj, 'The US Tax Program for Swiss Banks: What Determined the Penalties?' (2018) 154(23) Swiss Journal of Economics and Statistics 1, 2.

[64] See for instance, the prosecution of professionals involved in tax crimes revealed by the Panama Papers, *United States v. Ramses Owens, Dirk Brauer, Richard Gaffey, Harald Joachim Von Der Goltz*, Southern District of New York, 2018, 18 Crim 693. <https://www.justice.gov/usao-sdny/press-release/file/1117201/download> accessed 12 August 2020.

[65] For a contemporary review see M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 293.

1.4 Research Questions

Inspired by this contemporary research context and in furtherance of the aforementioned aims, the remainder of this thesis addresses the following primary research question:

> What are the laws and enforcement policies pertaining to tax evasion in the UK and US and are they effective in its prevention?

In order to answer the primary research question, this thesis will also answer the following subsidiary research questions:

- What international legal measures have been developed to combat tax evasion? Have these measures been implemented by the UK and US, and do they help these countries to detect and address this financial crime?
- What is the relationship between tax evasion and money laundering? Do the UK and US utilise AML legislation to tackle tax crimes, and is it appropriate to combat both crimes using the same legal framework?
- What are the legislative responses to tax evasion in the UK and US and are they effective in its prevention?
- What enforcement policies are employed by enforcement authorities in these jurisdictions, which may negate the use of these legislative instruments? What are the reasons behind them and do they achieve effective outcomes?
- What are the similarities and differences in the laws and enforcement policies pertaining to tax evasion in the UK and US?
- In light of the answers to these questions, what would be a consistent and successful legal framework and enforcement policy to combat tax evasion in the UK?

In evaluating effectiveness, this thesis will undertake an evaluation of the internal effectiveness of tax evasion legislation using doctrinal analysis and its standards of criticism. In addition, the research undertakes an evaluation of external effectiveness or the extent to which the legislation and enforcement policies achieve their aims in practice. The nature and scope of the evaluation, as well as the methodological approach employed, will be set out in detail in chapter two.

1.5 Research Value and Contribution

In 1996, Roording criticised legal researchers for investigating tax evasion as an issue of administrative or practical concern, rather than through the analysis of appropriate legal rules and principles, lamenting 'academics have never shown much interest in the way(s) tax fraud is punished in the UK.'[66] Roording attributed this apathy to the revenue collection authority's preference for seeking the civil settlement of tax evasion noting, 'systems of punishment outside the criminal law hardly get any attention, whether from the courts or from academics.'[67] In this respect, the role of the criminal justice system in addressing tax crimes has been neglected not only by legal researchers, but also, the key stakeholders involved in its design and enforcement. Historically, the then revenue collection authority, the Inland Revenue,[68] rarely sought criminal penalties for tax evasion, preferring to seek the civil settlement of tax liabilities. This was because its primary objective was to collect revenue,[69] and it closely adhered to the view that 'prosecution is not an efficient way of recovering evaded tax.'[70] Accordingly, the Inland Revenue only brought an average of 240 prosecutions annually for this offence, between the years 1991-96.[71] This trend continued into the new millennium, where a lack of public and governmental enthusiasm to increase these numbers caused depletion in the number of prosecutions mounted by the revenue.[72] As such, during the entire period from 1998-2002, only 263 defendants were prosecuted for serious tax fraud[73] with, at its lowest point in 2001/2, a mere 30 individuals prosecuted for this offence.[74] By 2007, only two in a thousand cases of detected tax evasion were prosecuted in the UK.[75]

Given this context, it is perhaps unsurprising that insufficient attention has been paid to the punishment of tax evasion, particularly the punishment of tax evasion through the rules and principles of the criminal law, reserved for only the most egregious of cases.[76] The fact that this practice was different to the practice employed for other frauds, which were routinely

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[66] J Roording, 'The Punishment of Tax Fraud' (1996) Apr Crim LR 240, 240.
[67] Ibid at 248.
[68] The Inland Revenue was responsible for direct taxes and Customs and Excise were responsible for indirect taxes until their merger in 2005, forming HM Revenue & Customs.
[69] This objective influenced HMRC's response to the HSBC scandal see J Fisher, 'HSBC, Tax Evasion and Criminal Prosecution' (2015) 1253 Tax Journal 6.
[70] National Audit Office, *Tackling Fraud Against the Inland Revenue* (HC 2002-03, 429-I) para 2.46.
[71] D Cook, *Poverty, Crime and Punishment* (Child Poverty Action Group, 1997) 102.
[72] D Cook, *Criminal and Social Justice* (Sage Publications, 2006) 49.
[73] National Audit Office, *Tackling Fraud Against the Inland Revenue* (HC 2002-03, 429-I) p40.
[74] Inland Revenue, *Report of the Commissioners of Her Majesty's Inland Revenue for the Year Ending 31st March 2002, One-Hundred and Forty-Fourth Report* (Cmd 5706, 2002).
[75] Public Accounts Committee, *HMRC: Tackling the Hidden Economy* (HC 2007-08, 712-I) p6.
[76] D Ormerod, 'Cheating the Public Revenue' (1998) Sep Crim LR 627, 645.

prosecuted,[77] may thus explain the relative neglect of this topic within financial crime literature. However, this does not excuse the lack of contemporary research into tax evasion offences considering the sharp increase in the number of prosecutions,[78] nor the lack of research into the enforcement policy itself, which has not been reviewed independently, judicially or academically, for over twenty years, despite significant changes.[79] The Grabiner report lamented the institutional focus on prosecuting a low number of predominantly high-value cases.[80] The National Audit Office (NAO) and Public Accounts Committee (PAC) of the UK Parliament have persistently reviewed HMRC's performance in addressing tax evasion, frequently criticising the low number of cases referred for criminal prosecution.[81] In 2015, the NAO highlighted a transformation in HMRC's approach from criminally investigating the highest-value cases, to referring the lowest-value cases for prosecution in order to meet the targets set by the Volume Crime Initiative.[82] In turn, these revelations led to the imposition of additional targets, focusing on the prosecution of the wealthiest individuals and companies in the UK.[83] However, despite this volte-face in the enforcement of tax evasion offences, HMRC's Criminal Investigation Policy has still not been subject to a fundamental review or evaluation by the UK Government. Additionally, very few researchers have investigated the punishment of tax evasion and the direct issues caused by the implementation of prosecutorial policies,[84] particularly since the introduction of prosecutorial targets.[85] This is unfortunate, for the inconsistent and unprincipled approach to the application of tax evasion offences must be

[77] H Travers, 'Current Issues in HMRC Criminal Investigations & Prosecutions' (IBC Tax Investigations Conference, May 2010) 1.
[78] The only comprehensive study is provided by P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017).
[79] *R v Inland Revenue Commissioners, ex p Mead* [1993] 1 All ER 772; Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983, Vols 1 and 2) (Cmnd 9120, 1984, Vol 3) (Cmnd 9440, 1985, Vol 4).
[80] Lord Grabiner QC, *The Informal Economy* (HM Treasury 2000).
[81] National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21, 372-I); Committee of Public Accounts, *HM Revenue & Customs Performance in 2015-16*, (HC 2016-17, 712-I); National Audit Office, *Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 1029-I).
[82] National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) para 16.
[83] HMRC committed to 'tripling the number of criminal investigations that HMRC can undertake into serious and complex tax crime, focusing particularly on wealthy individuals and corporates, with the aim of increasing prosecutions in this area to 100 a year by the end of the Parliament.' HM Treasury, *Summer Budget 2015*, (HC 2015-16, 264) p43.
[84] Notable exceptions include Cook, who compared the prosecution of tax evasion offences to those for benefit fraud - D Cook, *Rich Law, Poor Law: Different Responses to Tax & Supplementary Benefit Fraud* (Oxford University Press, 1989); and Deane, who analysed the prosecutorial policy and decisions made by the Board of Inland Revenue - KD Deane, 'Tax Evasion, Criminality and Sentencing the Tax Offender' (1981) 21(1) British Journal of Criminology 47.
[85] N Ryder, S Bourton, 'The Prosecution of White Collar Criminals, and the Legacy of the Coalition Government: HSBC and Tax Evasion a Case Study' (2015) 226 Crim Law 3.

investigated thoroughly in order to restore public confidence in the system - a paramount factor in voluntary tax compliance.[86] Accordingly, this thesis provides a valuable benefit in considering both the content of enforcement policies and the use of discretion in their implementation.[87]

A lack of interest in the punishment of tax evasion by governments, policy makers, and academics was not just confined to the UK, with experts in many countries being influenced by the treatment of this crime at an international level. Here, tax was perceived 'as an instant of international competitiveness, as a feature of trade or business law, and not as a matter for international crime strategies.'[88] This perspective, along with the sovereign nature of tax matters, meant that international inter-governmental organisations, tasked with devising and promoting international measures to tackle financial crime, rarely attempted to tackle the problem of tax evasion. For instance, whilst international bodies such as the United Nations, the EU, and the Financial Action Task Force, have all attempted to criminalise and combat the problem of money laundering, an equivalent emphasis is noticeably absent in the field of tax crimes.[89] Indeed, tax evasion was initially excluded from the scope of the AML framework, owing to concerns its inclusion would generate 'negative reactions'.[90] The OECD is one exception, leading efforts to improve international cooperation in tax matters, with the aim of tackling issues of tax noncompliance.[91] However, until recently,[92] the OECD prioritised efforts to combat aggressive corporate tax avoidance, attempting to remedy problems caused by the old, unsatisfactory system used to allocate income and expense between jurisdictions for

[86] K Murphy, 'Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance' (2005) 32(4) *Journal of Law and Society* 562, 563; *cf* R Mason, L Calvin, 'Public Confidence and Admitted Tax Evasion' (1984) 37(4) *National Tax Journal* 489.
[87] For a broader analysis of the discretion afforded to the UK's revenue collection authority see J Freedman, J Vella, 'HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion' in C Evans, J Freedman, R Krever (eds), *The Delicate Balance – Tax, Discretion and the Rule of Law* (IBFD, 2011) p79-11.9
[88] M Gallant, 'Money Laundering Consequences: Recovering Wealth, Piercing Secrecy, Disrupting Tax Havens and Distorting International Law' (2014) 17(3) JMLC 296, 300.
[89] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Vienna Convention); United Nations Convention against Transnational Organized Crime (2001) (Palermo Convention) and the United Nations Convention against Corruption (2003); The Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Financial Action Task Force, February 2012 (Updated June 2016)) – the original FATF recommendations directive were drawn up in1990; Council Directive 2015/849 of 20 May 2015 On the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing [2015] OJ L141/73 - the first European money laundering directive was adopted in 1991.
[90] M Menkes, 'The Divine Comedy of Governance in Tax Matters. Or Not?' (2015) 30(6) JIBLR 325, 327.
[91] The OECD claims it is "at the forefront of efforts to improve international tax co-operation between governments to counter international tax avoidance and evasion" Organisation for Economic Cooperation and Development, 'Aggressive Tax Planning' <http://www.oecd.org/tax/aggressive/> accessed 21 August 2016.
[92] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (2nd edn, OECD Publishing 2017).

taxation purposes.[93] As such, the lack of attention given to the crime of tax evasion by international bodies influenced the priority given to the punishment of tax evasion in academic literature.

In effect, the treatment of tax evasion has been neglected by policy-makers both nationally and internationally, in turn hindering the development of legal research providing an understanding of this financial crime and the measures developed to combat it. This absence is particularly striking when compared to the academic attention devoted to other financial crimes, such as money laundering,[94] counter-terrorist financing,[95] fraud,[96] bribery and corruption,[97] for which comprehensive accounts of law and enforcement policies are available. Indeed, it is the extensive discussion of other types of financial crime regulation, which has unintentionally brought tax evasion into the remit of financial crime prevention debates, itself furthering the recent prominence of tax evasion in international discourse.[98] For instance, tax evasion has been explored extensively within the scope of money laundering,[99] in part resulting from attempts made by international organisations to encourage governments to include tax evasion as a predicate offence for money laundering purposes,[100] and to use information generated by

[93] J Mirrlees, S Adam, *The Mirrlees Review: Tax By Design* (Institute for Fiscal Studies, Oxford University Press, 2011) 429.
[94] For instance, K Benson, *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and its Control* (Taylor & Francis 2020); N Ryder, *Money Laundering - An Endless Cycle?: A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge, 2013); B Unger, *The Scale and Impacts of Money Laundering* (Edward Elgar, 2007).
[95] For instance, C King, C Walker, J Gurulé. (Eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave MacMillan, London, 2018); N Passas, *Controlling Terrorist Financing: Towards Evidence-Based Mechanisms of Control* (Springer, 2016); N Ryder, *The Financial War on Terrorism: A Review of Counter-Terrorist Financing Strategies Since 2001* (The Law of Financial Crime, Routledge, 2015).
[96] For instance, C Monaghan, N Monaghan (Eds.), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (The Law of Financial Crime Series, Routledge 2018); A Cronin, *Corporate Criminality and Liability for Fraud* (Taylor & Francis 2018); A Doig, *Fraud: The Counter Fraud Practitioner's Handbook* (Gower, 2012).
[97] For example, L Campbell, N Lord (Eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (Taylor & Francis 2018); M Raphael QC, *Bribery: Law and Practice* (OUP 2016); C Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (OUP 2015).
[98] M Gallant, 'Money Laundering Consequences: Recovering Wealth, Piercing Secrecy, Disrupting Tax Havens and Distorting International Law' (2014) 17(3) JMLC 296, 300.
[99] For example, ME Beare, 'Searching for Wayward Dollars: Money Laundering or Tax Evasion – Which Dollars are We Really After?' (2002) 9(3) JMLC 259; M Menkes, 'The Divine Comedy of Governance in Tax Evasion matters. Or Not?' (2015) 30(6) JIBLR 325; P Alldridge, 'Are Tax Evasion Offences Predicate Offenses for Money Laundering?' (2001) 4(4) JMLC 350; J Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' (2010) 3 BTR 235; A Barry, 'Examining Tax Evasion and Money Laundering' (1999) 2(4) JMLC 326.
[100] The Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Financial Action Task Force, February 2012 (Updated June 2016)) Recommendation 3.

AML measures to combat the offence.[101] However, within this literature tax evasion is necessarily a secondary concern.[102]

The current priority given to combatting tax evasion requires an explicit consideration of how the law should tackle tax evasion as a financial crime in its own right, rather than as a secondary consideration of AML legislation. This seems to have recently been recognised at an executive level, where international measures and national reforms have focused solely on the problem of tax evasion. However, tax evasion does not currently assert a prominent place within financial crime literature, particularly in the UK. This situation is no longer tenable, for the increased priority given to combatting tax evasion necessitates the thoughtful reassessment of existing legal frameworks and enforcement methods to determine their efficacy in tackling this financial crime. As such, this thesis make a contribution to knowledge by offering a comprehensive account of the law and enforcement policies pertaining to tax evasion in the UK and the US, furthering a currently limited understanding of this financial crime and the measures taken to combat it.

The value of this research lies not only in its holistic consideration of the problems inherent in the law and enforcement policies designed to combat tax evasion in the UK, but in its use of a comparative method, drawing on insights gained from the US experience to provide suggestions for optimal legislation and enforcement practice in the UK. As will be seen in chapter six, this thesis' unique comparison of the criminal offences pertaining to tax evasion in the UK and US demonstrates the benefits that would be engendered from reconsidering the UK's approach to the criminalisation of tax evasion. Specifically, the US illustrates the value of enacting a more doctrinally coherent set of offences based on the underlying conduct, rather than retaining a patchwork of duplicitous offences for each type of tax evaded, as in the UK. The US comparison also demonstrates that fair and consistent liability for tax evasion offences in the UK can be more appropriately realised through an alternative form of *mens rea* to the current dishonesty test. Specifically, this thesis demonstrates that the US approach to defining willfulness through decades of judicial decisions, provides greater coherence with the Rule of

[101] OECD, *Improving Co-operation Between Tax and Anti-Money Laundering Authorities: Access by Tax Administrations to Information Held by Financial Intelligence Units for Criminal and Civil Purposes* (OECD, September 2015).
[102] This is with the exception of more recent studies, such as, B Unger, L Rossel, J Ferwada (Eds), *Combatting Fiscal Fraud and Empowering Regulators: Bringing Money Back into the COFFERS* (OUP 2021); U Turksen, *Countering Tax Crime in the European Union: Benchmarking the OECD's Ten Global Principles* (Bloomsbury Publishing 2021).

Law than the judicial failure to define dishonesty in the UK.[103] In this respect, this thesis not only identifies the issues this criterion causes in the tax evasion context,[104] but through its comparative approach, provides potential solutions.

1.6 Structure of the Thesis

The following chapter provides a description and defence of the research methodology employed to obtain and analyse data for this thesis. This will include a thorough justification of the decision to compare the law and enforcement policies pertaining to tax evasion in the UK with those in the US. Additionally, this chapter provides a detailed review of the literature on the law and enforcement policies pertaining to tax evasion in the UK and the US. The review will identify gaps within this literature and will highlight the benefits of this study. Chapter three will define tax evasion and will explain how tax is evaded, particularly highlighting the use of offshore secrecy jurisdictions to evade taxation. This chapter will also provide an analysis of the historical global reluctance to provide international cooperation in tax matters. Chapter four will examine recent international efforts to facilitate international cooperation in tax matters, which have transformed the UK and US's attempts to combat offshore tax evasion.

Chapters five and six investigate the legislative frameworks used to combat tax evasion in the UK and the US, critically evaluating their ability to combat this financial crime. While chapter five focuses on the application of the AML framework to tax offences, chapter six evaluates specific and general criminal offences applying to tax evasion in each jurisdiction. Chapter seven analyses the investigation and enforcement policies utilised by the revenue collection authorities in the UK and US, critically considering their applicability, consistency and effectiveness. Chapter eight summarises the findings of this research in relation to the research questions, and concludes by making recommendations to reform current legislation and enforcement practice in the UK.

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[103] Stemming from *R v. Feely* [1973] QB 530 (CA).

[104] These difficulties have been discussed by J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) Tax J 1; D Salter, 'Some Thoughts on Fraudulent Evasion of Income Tax' (2002) 6 British Tax Review 489; A Ashworth, *Principles of Criminal Law* (3rd edn, Oxford University Press, 1999) 396; D Ormerod, 'Cheating the Public Revenue' (1998) Sep Crim Law Rev 627. The problems posed by the dishonesty test were recognised with the enactment of a criminal offence for offshore tax evaders, which does not require mens rea, in the Finance Act 2016, s.166 amending Taxes Management Act 1970, s.106; Brought into force following The Finance Act 2016, Section 166 (Appointed Day) Regulations 2017, SI 2017/970.

1.7 Central Argument

This thesis demonstrates that both the US, through unilateral action, and the UK, through international organisations and multilateral agreements, have made significant advances in their ability to detect offshore tax evasion. In addition, both countries have made use of recent developments in the international AML framework to combat this financial crime, to varying extents. However, although the UK has improved its ability to prevent and detect this financial crime, it has not systematically evaluated the criminal offences and enforcement policies used to address tax evasion. This is a significant oversight considering the patchwork nature of UK tax evasion offences, which creates doctrinal incoherence, and the inconsistent use of discretion in the application of enforcement policy, contrary to the Rule of Law. Indeed, the dramatic increase in the utilisation of these offences in this jurisdiction means that this issue can no longer be ignored.

In contrast, the criminal offences pertaining to tax evasion in the US are part of a coherent and comprehensive framework, criminalising specific behaviours pertaining to tax evasion and providing differential sanctions according to the egregiousness of the underlying behaviour. In addition, the US has carefully considered the use of the criminal justice system to address tax crimes, including the use of money laundering and other white-collar crimes to address tax evasion. Accordingly, this thesis argues that the UK legal framework and enforcement policy is neither internally nor externally effective in combatting tax evasion and a comprehensive reform of the UK's approach is long overdue. Significant insights can be gained from the US in improving both the internal and external effectiveness of the UK legal framework.

Chapter 2 – Analytical Framework: Literature Review and Methodology

Literature Review

2.1 Introduction

Since the inception of taxes, revenue collection authorities around the world have attempted to address the perennial problem of individuals evading their tax liabilities.[105] Despite the prevalence and longstanding nature of this offence, academic attention to the law pertaining to this financial crime in the UK has largely been a relatively new phenomenon. Some commentators attributed this apathy to the Inland Revenue's preference for seeking to address the evasion of tax liabilities by way of civil settlement procedures,[106] leaving academics to treat the problem of tax evasion as one of administrative or practical concern, rather than as a true concern of the criminal law.[107] In recent times, the public clamour to prosecute tax evasion offences, brought about by the revelations contained in recent tax evasion scandals,[108] and the need to address high public deficits stemming from the financial crisis,[109] manifested itself in the form of the Volume Crime Initiative, which required the Revenue to prosecute increasing numbers of tax evaders.[110] The change of approach exemplified by this initiative necessitates a consideration of the criminal offences pertaining to tax evasion in the UK and their use. However, in spite of this fundamental change to previous enforcement practice, academic studies have not kept up with the developments in this area.

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[105] M Pickhardt, A Prinz, 'The Nature of Tax Evasion and the Shadow Economy' in M Prickhardt, A Prinz (eds), *Tax Evasion and the Shadow Economy* (Edward Elgar, 2012) 3.

[106] During the entire period from 1998-2002, only 263 defendants were prosecuted for serious tax fraud National Audit Office, *Tackling Fraud Against the Inland Revenue* (HC 2002-03, 429-I) p40; At its lowest point in 2001/2, a mere 30 individuals were prosecuted for this offence Inland Revenue, *Report of the Commissioners of Her Majesty's Inland Revenue for the Year Ending 31st March 2002, One-Hundred and Forty-Fourth Report* (Cmd 5706, 2002).

[107] J Roording, 'The Punishment of Tax Fraud' (1996) Apr Crim LR 240, 240.

[108] Including, 'Offshore leaks', 'Lux leaks', 'Swiss leaks', 'Panama Papers' and 'Bahamas Leaks' A Scherrer, 'Money Laundering, Tax Avoidance and Tax Evasion: Research Papers' (European Parliamentary Research Service Blog, 27 April 2017) <https://epthinktank.eu/2017/04/27/money-laundering-tax-avoidance-and-tax-evasion-research-papers-and-a-video/> accessed 18th September 2017.

[109] Several commentators have observed a marked acceleration in efforts taken to combat tax crimes since the 2007-08 financial crisis, including; H Christensen III, JM Tirard, 'The Amazing Development of Exchange of Information in Tax Matters: From Double Tax Treaties to FATCA and the CRS' (2016) 22(8) T&T 898, 900; P Hardouin, 'The Aftermath of the Financial Crisis' (2011) 18(2) JFC 148, 149.

[110] HM Treasury, *Spending Review 2010* (Cmd 7942, 2010) p71; HM Treasury, *Summer Budget 2015*, (HC 2015-16, 264) p43.

The impact of the systemic banking crisis and recent tax exposés was not confined to the UK.[111] Thus, governments in many jurisdictions have, with increasing vigour, attempted to recover national revenues by taking further action to combat tax evasion.[112] A shared interest in combatting this financial crime has precipitated an unprecedented willingness on behalf of states to cooperate and assist each other, generating a wave of new international measures designed to combat tax evasion.[113] These measures address the asymmetries between the information received on nationally held income, assets or activities, and those held offshore, potentially providing much needed evidence for detecting and addressing tax crimes.[114] While the scope and potential effect of these measures have been discussed in an emerging body of literature,[115] there has been little attempt to assess these measures in respect of their contribution to the success, or otherwise, of UK efforts to combat this financial crime.[116]

The US has largely forgone the opportunity to participate fully in the aforementioned international initiatives, preferring instead to develop and utilise pervasive unilateral methods.[117] Indeed, US authorities' attempts to address offshore tax evasion predate those of many of its European counterparts[118] and have often influenced the development of international law and enforcement measures.[119] This is reflective of the US' longstanding

[111] For instance, the HSBC Scandal revealed that HSBC Private Bank (Suisse) held accounts for 106,000 clients in 203 countries, many of whom were evading tax BBC News, 'HSBC Bank 'Helped Clients Dodge Millions in Tax' (BBC News, February 2015) <http://www.bbc.co.uk/news/business-31248913> accessed 1st October 2016.
[112] K Weidenfeld, A Spire, 'Punishing Tax Offenders in France and Great Britain: Two Criminal Policies' (2017) 24 JFC 574, 575.
[113] For an overview see UN Inter-Agency Task Force on Financing for Development, 'International Efforts to Combat Tax Avoidance and Evasion' (2017) <https://developmentfinance.un.org/international-efforts-combat-tax-avoidance-and-evasion> accessed 2 November 2017.
[114] N Johannesen, G Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal 65, 68.
[115] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015); RK McGill, CA Haye, S Lipo, *G.A.T.C.A: A Practical Guide to Global Anti-Tax Evasion Frameworks* (Palgrave Macmillan 2017).
[116] Kerzner and Chodikoff provide an evaluative study of exchange of information provisions in respect of their contribution to US and Canadian efforts to combat tax evasion DS Kerzner, DW Chodikoff, *International Tax Evasion in the Global Information Age* (Palgrave Macmillan 2016).
[117] For an example of their use in practice see US action against Swiss Banks detailed in Chapter 6. See also, K Eggenberger, P Emmenegger, 'Economic Viability and Political Responses to International Pressure: Liechtenstein, Switzerland and the Struggle for Banking Secrecy' (2015) 21 Swiss Political Science Review 491.
[118] RA Gordon, *Tax Havens and Their Use By United States Taxpayers – An Overview: A Report to the Comissioner of Internal Revenue the Assistant Attorney General (Tax Division) and the Assistant Secretary of the Treasury (Tax Policy)* (Publication 1150, 12 January 1981).
[119] US FATCA influenced the development of the OECD's Common Reporting Standard. FATCA provisions are named after the act they were originally introduced by - Foreign Account Tax Compliance Act of 2009 (H.R. 3933). They were subsequently enacted by the Hiring Incentives to Restore Employment Act of 2010, Public Law 111-147 (the HIRE Act), which added 26 USC §§1471-1474; OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (July 2014, OECD Publishing).

approach to rigorously combatting tax evasion, particularly using criminal penalties.[120] It is the action taken by the US in this area, which makes this jurisdiction's law and enforcement policies particularly suitable for comparison. In addition, giving credence to Roording's view,[121] US literature examining the law and enforcement policies governing tax evasion has long been 'rich and well-developed.'[122] However, very few academic studies have drawn on the extensive experience of the US in attempting to evaluate the efficacy of tax evasion law and enforcement policies in the UK.[123]

The first part of this chapter will comprehensively review and synthesise the existing body of literature on tax evasion law, both international and domestic, and its enforcement by UK and US authorities. The current move in the UK to situate tax evasion firmly within the purview of the criminal law requires this literature review to start by examining tax evasion's current place within financial crime literature, specifically identifying research on the nature and scope of the offence, along with its relationship to other financial crimes. This section will contrast the academic attention dedicated to tax evasion, with that currently afforded to other types of financial crime. The second section is dedicated to reviewing the current state of knowledge regarding the international measures taken to combat tax evasion. This section will focus on the commentary surrounding the application of money laundering legislation to tax evasion offences and the more recent international measures designed to facilitate the cooperation of states in the investigation and enforcement of tax offences. The final section of this review will explore the small body of research investigating the history, scope, operation and utility of tax evasion offences in the UK, alongside research analysing the content and use of enforcement policies and procedures.

Accordingly, this review identifies three emerging themes in legal tax evasion literature; literature exploring the concept of tax evasion as a financial crime; research analysing international measures to combat tax evasion; and commentaries on domestic measures to

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[120] The US enforcement policy requires investigators to transfer all cases in which 'firm indications of fraud' are present to the Criminal Investigation Division of the IRS - DL Perez, NJ Hochman, 'How the IRS Distinguishes Civil and Criminal Tax Fraud' (2003) Oct Los Angeles Lawyer 12, 15; see also prosecution statistics in IRS, 'SOI Tax Stats – Criminal Investigation Program, by Status or Disposition – IRS Data Book Table 24' (Last Updated 29 June 2020) <https://www.irs.gov/statistics/soi-tax-stats-criminal-investigation-program-by-status-or-disposition-irs-data-book-table-24> accessed 18th April 2021

[121] J Roording, 'The Punishment of Tax Fraud' (1996) Apr Crim LR 240, 240.

[122] J Freedman, 'Taxation Research as Legal Research' in M Lamb, A Lymer, J Freedman, S James, *Taxation an Interdisciplinary Approach to Research*, (1st edn, Oxford University Press, 2005) 25.

[123] Mumford provides a comparative study, yet it is largely explanatory in nature. A Mumford, *Taxing Culture: Towards A Theory of Tax Collection* (Socio-Legal Studies Series, Ashgate, 2002). See also, A Storm, K Coetzee, 'Towards Improving South Africa's Legislation on Tax Evasion: A Comparison of Legislation on Tax Evasion of the USA, UK Australia and South Africa' (2018) 34(1) Journal of Applied Business Research 151

combat tax evasion, including their enforcement. Throughout this review, the researcher will draw attention to the extensive consideration these issues have received in US literature, compared to the UK. In addition, this review will identify the key weakness of this literature; namely, the lack of comprehensive and comparative studies pertaining to tax evasion law and enforcement policies in the UK.

2.2 The Financial Crime of Tax Evasion

Preliminary Concepts: The Nature of the Offence

Tax evasion, tax avoidance, and tax planning or mitigation are all tax saving activities, which have the potential to cause vast losses to national tax revenues. However, the nature of these activities must be distinguished. Tax evasion concerns the failure to declare, or the under declaration, of income, assets or activities, despite being taxable under the tax laws of the relevant jurisdiction.[124] Broadly, the term may encompass any non-compliance with tax law, regardless of the intention of the taxpayer and without reference to the penalties imposed for non-compliance.[125] Tax evasion will always result in a reassessment of the taxpayer's liabilities and an obligation to pay what is owed.[126] However, not all tax evasion is criminal in nature; the tax evader must possess the requisite intention to evade their tax liabilities.[127] Some jurisdictions have further attempted to differentiate between the terms tax evasion and tax fraud, with the latter denoting criminality.[128] Yet in the UK and the US, these terms both reflect criminal conduct.[129] In both countries, offences of fraud extend to dishonest acts and omissions that are intended to evade taxation,[130] yet, if a distinction is made, the term 'tax fraud' is used to represent a calculated attempt to secure an unlawful advantage, as opposed to simply an attempt to escape liability.[131]

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[124] C Remeur, 'Tax Policy in the EU: Issues and Challenges' (European Parliamentary Research Service, February 2015) <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549001/EPRS_IDA(2015)549001_EN.pdf > accessed 9th November 2017 at p.20

[125] GS Cooper, 'Analyzing Corporate Tax Evasion' (1994) 50 Tax L Rev 35, 35-36

[126] J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) Tax Journal 1, 3

[127] Ibid; see also J Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] BTR 332, 348 citing Lord Templeman in *Challenge v IRC* [1986] STC 548 at 554

[128] Tax fraud is a criminal offence in Switzerland, but tax evasion is not O Dunant, M Wassmer, 'Swiss Bank Secrecy: Its Limits under Swiss International Laws' (1988) 20 Case W Res J Int'l LV 541, 551;

[129] See HMRC's description of behaviours in HM Revenue & Customs, *Measuring Tax Gaps 2017 Edition: Tax Gap Estimates for 2015-16* (26 October 2017) p.20; IRS, 'Related Statutes and Penalties – General Fraud' (October 2017) <https://www.irs.gov/compliance/criminal-investigation/related-statutes-and-penalties-general-fraud> accessed 22nd November 2017

[130] See Chapter 6

[131] R de la Feria, 'Tax Fraud and Selective Law Enforcement' (2020) 47(2) Journal of Law and Society 240, 245

In each jurisdiction, a plethora of criminal offences has been enacted to combat tax evasion,[132] yet almost all of these offences require the evader to have possessed the requisite *mens rea* or guilty state of mind.[133] Thus, to obtain a criminal prosecution of a tax evader in the UK, it must be proved that the defendant acted 'dishonestly.'[134] Dishonesty is not defined, but is to be determined by reference to the ordinary standards of reasonable and honest people.[135] In contrast, in the US, the defendant must have attempted to evade a tax 'wilfully,' defined as the 'voluntary, intentional violation of a known legal duty.'[136] In both jurisdictions, evidence of the defendant's state of mind, ascertained through their actions or omissions, is an important consideration for authorities in deciding whether to pursue a criminal prosecution or civil penalties. Nevertheless, not all instances of criminal tax evasion, where the requisite intention is present, are brought for criminal prosecution in the UK and US, rather, cases are selected based on an articulated enforcement policy.[137]

The term tax avoidance is notoriously hard to define, as the term has no clear meaning and can encompass a wide range of activities.[138] However, conventionally, the term tax avoidance comprises all attempts made by a taxpayer to structure his affairs within the boundaries of the law to reduce, eliminate, or defer a liability to tax.[139] The legal nature of tax avoidance stems from important judicial decisions, which asserted that a taxpayer had no obligation to pay the revenue more than what was owed, as construed under the relevant taxing statute, even if this

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[132] UK- Value Added Tax Act 1994, s72(1), 72(3), 72(8); Taxes Management Act 1970, s106A; Customs and Excise Management Act 1979 section 50(1)(a) and (2), s170, s170A and B; Finance Act 2000, s144; Common law offences of cheating the public revenue, preserved by section 32(1)(a) Theft Act 1968, see *R v Hudson* [1956] 1 All ER 814, and conspiracy to defraud preserved by section 5(2) of the Criminal Law Act 1977. US - 26 USC §§ 7201-7215; 18 USC § 1001; 18 USC § 287; 18 USC § 2(a)&(b); 18 USC §371; 18 USC §§ 1341 and 1343

[133] Ibid; one exception in the UK is the new strict liability offence for offshore tax evaders contained in Finance Act 2016, s166 amending Taxes Management Act 1970, s106

[134] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, confirmed in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7, modifying the test set out in *R v Ghosh* [1982] 1 QB 1053 (CA)

[135] Ibid

[136] *Cheek v. United States,* 498 U.S. 192, 201 (1991); *United States v. Trevino,* 419 F.3d 896, 901 (9th Cir. 2005)

[137] HMRC 'Guidance: HMRC's Criminal Investigation Policy' (13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 20th October 2020.

[138] MP Devereux, J Freedman, J Vella, 'Tax Avoidance' (Paper No 1, Oxford University Centre for Business Taxation, 3 December 2012) <https://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 20 October 2017 at p.2.

[139] G Loomer, G Maffini, 'Tax Havens and the Financial Crisis' (Policy Article 09/03, Oxford University Centre for Business Taxation, April 2009) <https://core.ac.uk/download/pdf/288286539.pdf> accessed 24th April 2021 at p.2

may be considered by some to be contrary to Parliament's or Congress' original intention.[140] Several judicial and academic attempts have been made to differentiate tax avoidance from tax mitigation or tax planning.[141] Tax planning involves considering the tax implications of a particular enterprise or activity, ensuring tax is applied as intended by the legislature.[142] Thus, in a crude sense, the distinction may be regarded as follows; 'tax evasion--illegal and criminal; tax avoidance--legal but unacceptable; tax mitigation--legal and acceptable.'[143] Nevertheless, some commentators have deplored this further subdivision, as the terms tax avoidance and tax planning essentially refer to non-criminal activities, regardless of the perceived acceptability of the practice.[144]

Ultimately, the individual's intention in reducing his liability to tax is pivotal in characterising the nature and legality of the behaviour.[145] Nevertheless, there remains a 'shadowy line' between tax avoidance and tax evasion,[146] as tax evasion has developed a number of 'frayed edges'.[147] For instance, ineffective tax avoidance may be characterised as tax evasion in certain circumstances, specifically, where the arrangements are hidden from the revenue collection authority and there cannot be said to have been a 'respectable technical case' for the failed avoidance scheme.[148]

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[140] The classic statement of this principle in the UK is *IRC v Duke of Westminster* [1936] AC 1 (HL) at [19]; see also *Commissioner of Stamp Duties v Byrnes* [1911] AC 386 at 392; In the US see *Commissioner v. Newman*, 159 F2d 848, 850–851 (2d Cir.) (L Hand, J, dissenting), cert. denied, 331 US 859 (1947); see also *United States v. Isham*, 84 US (17 Wall) 496 (1874); *Bullen v. Wisconsin*, 240 US 625, 630 (1916); *Helvering v. Gregory*, 69 F2d 809, 810 (2d Cir. 1934) (L Hand, J), aff'd 293 US 465 (1935)

[141] This distinction was created by the judiciary to distinguish transactions that would not be caught by a statutory provision, which disallowed deductions if the arrangement constituted tax avoidance – see *Commissioner of Inland Revenue v Challenge Corporation [1987] AC 115 (PC); Lord Templeman, 'Tax and the Taxpayer' (2001) 117 LQR 575; see also Z Prebble, J Prebble, 'The Morality of Tax Avoidance' (2010) 43 Creighton L Rev 693, 705*

[142] C Tailby, 'Some Reflections on Tax Avoidance' (2011) 1 PCB 43, 43

[143] Lord Walker of Gestingthorpe, 'Ramsay 25 Years On: Some Reflections on Tax Avoidance' (2004) 120 LQR 412, 412

[144] MP Devereux, J Freedman, J Vella, 'Tax Avoidance' (Paper No 1, Oxford University Centre for Business Taxation, 3 December 2012) <https://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 20 October 2017 p.3 citing Lord Hoffmann in *MacNiven v Westmoreland Investments* [2001] UKHL 6, [2001] STC 237 at p. 257

[145] RF Van Brederode, 'A Normative Evaluation of Tax Law Enforcement: Legislative and Political Responses to Tax Avoidance and Evasion' (2014) 42 Intertax 764, 768

[146] *United States v. Sclafani*, 265 F2d 408, 415 (2d Cir.), cert. denied, 360 US 918 (1959).

[147] J Tiley, G Loutzenhiser, *Revenue Law: Introduction to UK Tax Law; Income Tax; Capital Gains Tax; Inheritance Tax* (7th edn, Hart 2012) p.97

[148] HC Debs, Standing Committee H, June 29 2000, cols. 1012-3; Inland Revenue Tax Bulletin 2000 p.782; both cited in D Salter, 'Some Thoughts on Fraudulent Evasion of Income Tax' (2002) 6 BTR 489; see also J Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] BTR 332, 348; Internal Revenue Service, 'Internal Revenue Manual Part 25. Special Topics, Chapter 1. Fraud Handbook, Section 1. Overview/Definitions 25.1.1, Fraud Handbook, Overview/Definitions' (22 April 2021)

Many commentators in each jurisdiction have examined the judiciary's approach to tax avoidance, specifically, judicial doctrines aiming to counter tax avoidance.[149] In both the UK and US, the doctrine of 'sham' has been applied to tax avoidance transactions,[150] along with other distinctively national approaches, including the 'economic substance' doctrine in the US,[151] and the purposive approach to interpreting tax statutes in the UK;[152] all of which have the aim of restricting attempts to avoid taxation. The effectiveness of these doctrines has been the subject of much debate,[153] and even comparison,[154] with many viewing the US doctrines as broader, and thus, more successful.[155] The perceived limits of the UK doctrines,[156] have led to the introduction of a statutory General Anti-Abuse Rule (GAAR),[157] to supplement case law

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<https://www.irs.gov/irm/part25/irm_25-001-001> accessed 24th April 2021; I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2021) at 1.05

[149] In the UK see for example J Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament' (2007) 123 LQR 53; Lord Leonard Hoffman, 'Tax Avoidance' (2005) 2 BTR 197; Lord Walker of Gestingthorpe, 'Ramsay 25 Years on: Some Reflections on Tax avoidance' (2004) 4 PCB 249; Lord Templeman, 'Tax and the Taxpayer' (2001) 117 LQR 575; J VanderWolk, 'Purposive Interpretation of Tax Statutes: Recent UK Decisions on Tax Avoidance Transactions' (2001) 56 BIFD 70; In the US see for example B Bittker, M McMahon, Zelenak, *Federal Income Taxation of Individuals* (Third edn, Thomson Reuters 2020) at 1.03 'Pervasive Judicial Doctrines'; SC Morse, R Deutsch, 'Tax Anti-Avoidance Law in Australia and the United States' (2015) 49 Int'l law 111; LD Jellum, 'Codifying and "Miscodifying" Judicial Anti-Abuse Doctrines' (2013) 33 Va Tax Rev 579; O Sulami, 'Tax Abuse – Lessons from Abroad' (2012) 65 SMU L Rev 551; on their application to states see JC Glickman, CR Calhoun, 'The "States" of the Federal Common Law Tax Doctrines' (2008) 61 Tax Law 1181

[150] It is considered to have a much broader, and more successful, application in the US than the UK see the comparison by M Stewart, 'Sham Transactions and Tax Avoidance' in N Hashimzade, Y Epifantseva (eds) *The Routledge Companion to Tax Avoidance Research* (Routledge 2017); The US uses a two part test *Rice's Toyota World, Inc. v. Comm'r,* 752 F.2d 89, 91 (4th Cir. 1985); However, only one part needs to be met *IES Indus. Inc. v. U.S.,* 253 F.3d 350 (8th Cir. 2001). In the UK a narrow definition of sham transaction prevails *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655, 681 (HL); *Hitch v Stone* [2001] EWCA Civ 63; [2001] STC 214

[151] There are several other doctrines, including the substance over form, step transaction, and sham transaction doctrines, but they are largely subsumed by the economic substance doctrine see J Bankman, 'The Economic Substance Doctrine' (2000) 74 S Cal L Rev 5, 12

[152] See case law following *W T Ramsay Ltd v IRC* [1981] STC 174 (HL); *Furniss v Dawson* [1984] AC 474 (HL); *Craven v White* [1989] AC 398 (HL); *IRC v McGuckian* [1997] 1 WLR 991 (HL); *MacNiven v Westmoreland Investments Ltd* [2001] UKHL 6, [2003] 1 AC 311; *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684; *Tower MCashback LLP 1 and another v Revenue & Customs Commissioners* [2011] UKSC 19; [2011] STC 1143

[153] AJ Kolarik II, SNJ Wlodychak, 'The Economic Substance Doctrine in Federal and State Taxation' (2014) 67 Tax Law 715; KN Moore, 'The Sham Transaction Doctrine: An Outmoded and Unnecessary Approach to Combating Tax Avoidance' (1989) 41 Fla L Rev 659

[154] J Tiley, 'Judicial Anti-Avoidance Doctrines: The US Alternatives – Part 1' (1987) 5 BTR 180; J Tiley, 'Judicial Anti-Avoidance Doctrines: The US Alternatives – Part 2' (1987) 6 BTR 220; J Tiley, 'Judicial Anti-Avoidance Doctrines: Part 3 - Corporations and Conclusions' (1988) 4 BTR 108; WD Popkin, 'Judicial Anti-Tax Avoidance Doctrine in England: A United States Perspective' (1991) 8 BTR 283

[155] See M Stewart, 'Sham Transactions and Tax Avoidance' in N Hashimzade, Y Epifantseva (eds) *The Routledge Companion to Tax Avoidance Research* (Routledge 2017)

[156] In terms of the judiciary's constitutional role Justice Graham Hill, 'The Judiciary and Its Role in the Tax Reform Process' (1999) 2 Australian Law Journal 344, 251; D Bloom, 'Tax Avoidance – A View from the Dark Side' (2015) 39 Melb U L Rev 950, 970; see generally, J Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] BTR 332; GS Cooper, *Tax Avoidance and the Rule of Law* (IBFD Publications, Australian Tax Research Foundation, 1997)

[157] Contained in Finance Act 2013, Part 5, Sch 43; National Insurance Contributions Act 2014, s10; the introduction of the GAAR followed an extensive period of debate and consultation Tax Law Review

and pre-existing targeted statutory anti-avoidance provisions. The suitability and efficacy of a GAAR generally,[158] the UK GAAR,[159] and its less expansive US equivalent,[160] have also been the focus of many commentators. Ultimately, the extensive consideration of tax avoidance in legal literature has resulted in comprehensive and contemporary accounts of anti-tax avoidance measures in the UK.[161]

The increasingly complex relationship between ineffective tax avoidance and tax evasion has often been examined by the courts in the UK,[162] and some attention has been paid to this issue by commentators. Many have outlined the distinction between the two offences, often with the aim of assisting advisors in ensuring legal tax savings for clients,[163] while a few have expressed concern over tax evasion prosecutions for unsuccessful avoidance schemes, including prosecutions of tax advisers.[164] However, these concerns are rarely expressed as part of a

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Committee, 'Tax Avoidance' (Institute for Fiscal Studies Report C064, 1 November 1997) <https://www.ifs.org.uk/publications/1908> accessed 12 November 2017; HM Revenue & Customs, *A General Anti-Avoidance Rule for Direct Taxes* (Consultation Document, 1998); G Aaronson QC, 'GAAR Study' (11 November 2011) < http://webarchive.nationalarchives.gov.uk/20130402163458/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf> accessed 12th November 2017; HM Revenue & Customs, *A General Anti-Abuse Rule (GAAR)* (Consultation Document, June 2012)

[158] See for example P Olson, 'Some Thoughts on Anti-Abuse Rules' (1995) 48 Tax Law 217; D Halperin, 'Are Anti-Abuse Rules Appropriate?' (1995) 48 Tax Law 807; J Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] BTR 332

[159] See for example J Freedman, 'Tackling fiscal "abuse of law" in the UK: Different Routes to a Single Destination' (2018) 4 Revue Européenne et Internationale de Droit Fiscal 467; J Freedman, 'Designing a General Anti-Abuse Rule: Striking a Balance' (2014) 20 Asia-Pacific Tax Bulletin 167; M Gammie, 'Moral Taxation, Immoral Avoidance – What Role for the Law?' (2013) 4 BTR 577

[160] IRC §7701(o); Treasury Regulation 1.701-2; The US do not have a GAAR as such. §7701(o) has been described as a 'minor statutory gloss' SC Morse, R Deutsch, 'Tax Anti-Avoidance Law in Australia and the United States' (2015) 49 Int'l law 111, 111; see also O Sulami, 'Tax Abuse – Lessons from Abroad' (2012) 65 SMU L Rev 551

[161] For example see R Murray, *Tax Avoidance* (3rd edn, Sweet & Maxwell 2016); J Vita, *General Theory of Anti-Avoidance Rules: Classification and (Re)definition* (LAP Lambert 2010); J Freedman (ed), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford University Centre for Business Taxation, 2008); RA Tooma, *Legislating Against Tax Avoidance* (IBFD 2008); AJ Shipwright, *Tax Avoidance and the Law – Sham, Fraud or Mitigation* (Key Haven Publications 1997) C Masters, *Tax Avoidance* (British Tax Library, Sweet & Maxwell 1992)

[162] The classic example is *R v Charlton* [1996] STC 1418 (CA); discussed in I Ferrier, 'Case Comment: Cheating the Public Revenue' (1997) 16 CTP 97

[163] D Hurwich, 'Tax "Avoision"' (1991) Sep Tax P 371; M Gunn, 'Tax Planner's Charter' (1987) 118 Tax 485; R Greenfield, 'Tax Avoidance or Tax Mitigation?' (1987) 7(21) CT News & Reps 245; N Jacob, 'The Legitimacy of Tax Planning' (2010) 16(10) T&T 808; J Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] BTR 332

[164] J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) Tax J 1; D Salter, 'Some Thoughts on Fraudulent Evasion of Income Tax' (2002) 6 British Tax Review 489; D Ormerod, 'Cheating the Public Revenue' [1998] Crim Law Rev 627; D Hartnett, W Norris, 'From Tax Adviser to Co-Conspirator: A Short, Painful Journey' (1995) 3 PCB 243

comprehensive review of the nature of tax evasion and the law designed to combat this practice in the UK.[165]

The Relationship between Tax Evasion and other Financial Crimes

The current political trend in the UK to situate tax evasion firmly within the purview of the criminal law requires a reconsideration of tax evasion as a white-collar, or financial, crime and a reassessment of its current place within this body of literature. Since Sutherland proffered his seminal definition of white-collar crime in the 1940s,[166] commentators have refined the nature and extent of this concept,[167] the crimes falling within its ambit and the legal measures taken to combat them.[168] One prominent feature of this scholarship is the consideration of the position of white-collar crimes relative to other types of crime, specifically, the distinctive moral ambiguity raised by these offences and its impact on their prosecution.[169] Typically identified as a form of white-collar crime,[170] tax evasion formerly raised even greater moral uncertainty, with many viewing tax evasion as a culturally acceptable crime,[171] or simply, one of the 'everyday crimes of ordinary people.'[172] Research has attempted to explain the differential

[165] The exception is P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) Ch.3

[166] E Sutherland, 'The White Collar Criminal' (1940) 5(1) Am Sociol Rev 1, 1; Sutherland's definition was subject to sustained criticism, for an overview of these critiques see G Geis, *White-Collar and Corporate Crime* (Keynotes in Criminology and Criminal Justice Series, OUP 2015); see also S Van Slyke, M Benson, FT Cullen (eds) *The Oxford Handbook of White-Collar Crime* (Oxford Handbooks in Criminology and Criminal Justice, OUP 2016) Part 1

[167] H Edelhertz, *Nature, Impact and Prosecution of White-Collar Crime* (National Institute of Law Enforcement and Criminal Justice, US Department of Justice Law Enforcement Assistance Administration 1970); S Wheeler, D Weisburd, E Waring, N Bode, 'White Collar Crimes and Criminals' (1988) 25 Am Crim L Rev 331; G Geis, 'White-Collar Crime – What Is It' (1991) 3 Current Issues Crim Just 9; H Croall, *Understanding White Collar Crime* (Open University Press 2001)

[168] Many texts provide an overview of the law on white-collar crime in the UK and US. The most contemporary include A Palmer, *Countering Economic Crime: Comparative Analysis* (Routledge 2018); K Harrison, N Ryder, *The Law Relating to Financial Crime in the United Kingdom* (2nd edn, Routledge 2017); B Zagaris, *International White Collar Crime: Cases and Materials* (2nd edn, CUP 2015); JK Strader, SD Jordan, *White Collar Crime: Cases, Materials, and Problems* (3rd edn, LexisNexis 2015); ML Siegel, *White Collar Crime: Law, Procedure, Theory, Practice* (Aspen Casebook Series, Wolters Kluwer 2011)

[169] SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2007) 27; SP Green, 'Moral Ambiguity in White Collar Criminal Law' (2004) 18 Notre Dame J.L. Ethics & Pub. Pol'y 501; There is evidence that this perception has changed over time FT Cullen, 'The Seriousness of Crime Revisited: Have Attitudes Toward White-Collar Crime Changed?' (1982) 20 Criminology 83; FT Cullen, GA Clark, RA Mathers, JB Cullen, 'Public Support for Punishing White-Collar Crime: Blaming the Victim Revisited?' (1983) 11 Journal of Criminal Justice 481; PN Grabosky, JB Braithewaite, JR Wilson, 'The Myth of Community Tolerance Toward White-Collar Crime' (1987) 20 Aust & NZ Journal of Criminology 33; NL Piquero, S Carmichael, AR Piquero, 'Research Note: Assessing the Perceived Seriousness of White-Collar and Street Crimes' (2007) 54 Crime & Delinquency 291

[170] For instance see, P Gottschalk, 'Categories of Financial Crime' (2010) 17 JFC 441

[171] R Bosworth-Davies, 'Money Laundering – Chapter Five: The Implications of Global Money Laundering Laws' (2007) 10(2) JMLC 189, 202

[172] S Karstedt, 'Middle-Class Crime: Moral Economies Between Crime in the Streets and Crime in the Suites' in SR Van Slyke, ML Benson, FT Cullen, *The Oxford Handbook of White-Collar Crime* (Oxford Handbooks in

consideration of tax evasion by referring to the diffuse nature of the harm caused by this crime,[173] opinions on the uses to which revenue is put,[174] effects of the manipulation of the boundaries between tax avoidance and evasion,[175] and the consideration of tax evasion as a *mala prohibita*, as opposed to a *mala in se*, offence.[176] Of particular note is McGee, who attempted to shed light on the use of these justifications, and their interaction with individual characteristics, in explaining why individuals choose to evade their tax liabilities.[177] Others, such as Green, have attempted to demonstrate why tax evasion should not be treated any differently by tackling these common misconceptions.[178] However, although this work may be useful in explaining the evolution of current practice,[179] the adverse effects of tax evasion and the need to combat this financial crime are now widely accepted.[180]

The recognition of the harm caused by tax evasion in the UK, namely substantial losses to government revenues, public infrastructure and services,[181] has led to a renewed interest in combatting tax evasion, particularly using criminal penalties.[182] Yet, academic studies have not kept pace with the developments in this area; at the time of writing, Alldridge provides the only comprehensive study on the law pertaining to tax evasion in the UK.[183] This is in clear contrast to the extensive consideration of other financial crimes in legal literature in this jurisdiction. A plethora of studies comprehensively explores the financial crime of money laundering and the legal framework designed to combat this financial crime, at both the international and domestic

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Criminology and Criminal Justice, Oxford University Press, 2016) 169; a claim supported with empirical evidence HA Burton, SS Karlinsky, C Blanthorne, 'Perception of a White-Collar Crime: Tax Evasion' (2005) 3 ATAT Journal of Legal Tax Research 35

[173] P Alldridge, 'Tax Avoidance, Tax Evasion, Money Laundering and the Problem of 'Offshore'' in S Rose-Ackerman, P Lagunes (eds), *Greed, Corruption and the Modern State* (Essays in Political Economy, Edward Elgar, 2015) 324

[174] R McGee, 'Is it Unethical to Evade Taxes in an Evil or Corrupt State? A Look at Jewish, Christian, Muslim, Mormon and Baha'i Perspectives' (1999) 2 Journal of Accounting, Ethics & Public Policy 149

[175] D McBarnet, 'Whiter than White Collar Crime: Tax Fraud Insurance and the Management of Stigma' (1991) 42 British Journal of Sociology 323

[176] M Leighton-Daly, 'Certainty and Financial Crime Control' (2017) 4 JFC 678, 683 citing H Croall, 'Combating Financial Crime: Regulatory Versus Crime Control Approaches' (2003) 11 JFC 45

[177] R McGee (ed), *The Ethics of Tax Evasion: Perspectives in Theory and Practice* (Springer 2012)

[178] SP Green, 'What Is Wrong with Tax Evasion?' (2009) 9 Hous Bus & Tax LJ 220

[179] Croall notes that from the distinction between *mala in se* and *mala prohibita* offences 'developed a discretionary enforcement style in which enforcers used criminal prosecution only as a last resort' H Croall, 'Combating Financial Crime: Regulatory Versus Crime Control Approaches' (2003) 11 JFC 45, 45

[180] See Chapter 1 Introduction

[181] Keir Starmer QC, 'Prosecuting Tax Evasion' (The Crown Prosecution Service, January 2013) <http://www.cps.gov.uk/news/articles/prosecuting_tax_evasion/> accessed 28th August 2016

[182] HM Treasury, *Spending Review 2010* (Cmd 7942, 2010) p71; HM Treasury, *Summer Budget 2015*, (HC 2015-16, 264) p43

[183] P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017)

level.[184] Similarly, many commentators have examined national and international law pertaining to the financial crimes of terrorist financing,[185] fraud,[186] bribery and corruption.[187] Indeed, it is the extensive discussion of other types of financial crime regulation, which has recently brought tax evasion into the remit of financial crime prevention debates, itself furthering the prominence of tax evasion in international discourse.[188] For instance, international organisations, national authorities, and academics have considered the relationship between tax evasion and money laundering, and how anti-money laundering measures may be used to combat this financial crime. Nevertheless, until recently, within this literature, tax evasion has necessarily been a secondary concern.[189]

In recent times, tax evasion has begun to feature in research examining a range of financial crimes in the UK.[190] However, although these studies partially address the aforementioned gap, they necessarily provide an overview, rather than a detailed examination, of the laws enacted. Many reasons have been put forward to explain the dearth of legal literature on tax evasion in the UK. Tiley points to a 'cultural gap between the precise technical world of the tax lawyer

[184] For instance, K Benson, *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and its Control* (Taylor & Francis 2020); N Ryder, *Money Laundering - An Endless Cycle?: A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge, 2013); B Unger, *The Scale and Impacts of Money Laundering* (Edward Elgar, 2007); M Gallant, *Money Laundering and the Proceeds of Crime – Economic Crime and Civil Remedies* (Edward Elgar, 2005); P Alldridge, *Money Laundering Law* (Hart, 2003)

[185] For instance, C King, C Walker, J Gurulé. (Eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave MacMillan, London, 2018); N Passas, *Controlling Terrorist Financing: Towards Evidence-Based Mechanisms of Control* (Springer, 2016); N Ryder, *The Financial War on Terrorism: A Review of Counter-Terrorist Financing Strategies Since 2001* (The Law of Financial Crime, Routledge, 2015); LK Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge University Press, 2008); J Gurule, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Edward Elgar, 2008)

[186] For instance, C Monaghan, N Monaghan (Eds.), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (The Law of Financial Crime Series, Routledge 2018); A Cronin, *Corporate Criminality and Liability for Fraud* (Taylor & Francis 2018); A Doig, *Fraud: The Counter Fraud Practitioner's Handbook* (Gower, 2012); S Farrell, N Yeo, G Ladenburg, *Blackstone's Guide to the Fraud Act 2006* (Oxford University Press, 2007); A Doig, *Fraud* (Willan Publishing, 2006)

[187] For example, L Campbell, N Lord (Eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (Taylor & Francis 2018); M Raphael QC, *Bribery: Law and Practice* (OUP 2016); C Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (OUP 2015); SH Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (OUP 2014); J Horder, P Alldridge (eds), *Modern Bribery Law: Comparative Perspectives* (CUP 2013); RL Cassin, *Bribery Abroad: Lessons from the Foreign Corrupt Practices Act* (2nd edn, Cassin Law 2011)

[188] M Gallant, 'Money Laundering Consequences: Recovering Wealth, Piercing Secrecy, Disrupting Tax Havens and Distorting International Law' (2014) 17(3) JMLC 296, 300

[189] B Unger, L Rossel, J Ferwada (Eds), *Combatting Fiscal Fraud and Empowering Regulators: Bringing Money Back into the COFFERS* (OUP 2021); U Turksen, *Countering Tax Crime in the European Union: Benchmarking the OECD's Ten Global Principles* (Bloomsbury Publishing 2021)

[190] For instance see, K Harrison, N Ryder, *The Law Relating to Financial Crime in the United Kingdom* (2nd edn, Routledge 2017); B Rider (ed), *Research Handbook on International Financial Crime* (Research Handbooks in Financial Law, Edward Elgar 2015)

and the broad brush of the criminal lawyer',[191] which may be responsible for restricting dialogue at the intersections of these topics. Others, such as Roording attribute this shortage of research to the lack of prosecutions for tax evasion in the UK,[192] inhibiting academic interest in this topic,[193] while Minkes points to the difficulties in researching such a 'hidden crime'.[194] Regardless of the explanation offered, the lack of comprehensive studies on the law pertaining to tax evasion currently remains a significant weakness of financial crime literature.

2.3 International Measures to Combat Tax Evasion

Exchange of Information and Enforcement Assistance

The effects of globalisation, advances in technology and the increasing mobility of capital,[195] have increasingly enabled individuals to hide income or profits offshore to evade their national tax liabilities.[196] From the tax evader's perspective, concealing income offshore results in a lower probability of detection, as, in contrast to domestically held income, tax related information is not automatically accessible to the tax authority.[197] Consequently, considering the high prevalence of offshore tax evasion,[198] to answer the research questions, it is imperative to consider international measures that have been developed to facilitate the exchange of information and assistance in tax matters between states, with the aim of providing much needed evidence to combat this financial crime.

Initially, international cooperation in tax matters was severely limited owing to the interpretation and application of international law. A long line of common law jurisprudence held that one state should not enforce the tax laws of another,[199] effectively restricting the

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[191] J Tiley, G Loutzenhiser, *Revenue Law: Introduction to UK Tax Law; Income Tax; Capital Gains Tax; Inheritance Tax* (7th edn, Hart 2012) p87

[192] During the entire period from 1998-2002, only 263 defendants were prosecuted for serious tax fraud National Audit Office, *Tackling Fraud Against the Inland Revenue* (HC 2002-03, 429-I) p40; At its lowest point in 2001/2, a mere 30 individuals were prosecuted for this offence Inland Revenue, *Report of the Commissioners of Her Majesty's Inland Revenue for the Year Ending 31st March 2002, One-Hundred and Forty-Fourth Report* (Cmd 5706, 2002)

[193] J Roording, 'The Punishment of Tax Fraud' (1996) Apr Crim LR 240, 248

[194] J Minkes, *Income Tax Evasion* (Oxford Bibliographies, OUP 2015) p.1

[195] Particularly through the development of electronic commerce, see MSK McCracken 'Going, Going, Gone… Global: A Canadian Perspective on International Tax Administration Issues in the 'Exchange-of-Information Age'' (2002) 50(6) Canadian Tax Journal 1869, 1873

[196] RMB Antoine, 'The Protection of Offshore Confidentiality: Policy Implications and Legal Trends' (1999) 7 JFC 9, 16

[197] N Johannesen, G Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal 65, 68

[198] 20% of all taxes evaded may be attributed to offshore evasion A Alstadsaeter, N Johannsen, G Zucman, 'Tax Evasion and Inequality' (September 2017, National Bureau of Economic Research, Working Paper 23772) <http://www.nber.org/papers/w23772> p.28

[199] The Revenue or Mansfield rule originated in an *obiter dictum* of Lord Mansfield in *Holman v. Johnson* (1775), 1 Cowp. 341, 98 E.R. 1120; see also *Government of India, Ministry of Finance (Revenue Division) v*

ability of national governments to provide cooperation necessary to combat tax evasion.[200] After the First World War, many states began to enter into formal bilateral agreements with one another in order to exchange information and assist each other in tax matters.[201] The model agreements were first presented by the League of Nations,[202] before the Organisation for Economic Co-operation and Development (OECD) took up the task of developing the models to combat both tax avoidance and evasion.[203] First published in 1963,[204] Article 26 of the OECD Model Tax Convention on Income and on Capital still forms the primary legal basis for the international exchange of information in tax matters,[205] and Article 27 forms the basis for assistance in the collection of taxes.[206] The Model Convention was first revised in 1977,[207] and, following the decision to subject the Model to periodic reviews, has been updated several times since.[208] The United Nations (UN) has also developed an independent model, published in 1980, largely based on the OECD version,[209] while the European Union (EU) often incorporates the principles of the Model Conventions into its own instruments.[210]

Taylor [1955] AC 491 (HL); For a review of this case law see MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003) p.27-32; For its rationale see BA Silver, 'Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments' (1992) 22 Ga J Int'l & Comp L 609

[200] M Dirkis, B Bondfield, 'The Developing International Framework and Practice for the Exchange of Tax Related Information: Evolution or Change?' (2013) 11 eJournal of Tax Research 115, 122

[201] SA Dean, 'The Incomplete Global Market For Tax Information' (2008) 49 Bos Col L Rev 605, 639; The first exchange of information rules featured in double taxation treaties between Belgium and France in 1843 and Belgium and the Netherlands in 1845 X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.4 citing B Gangemi, 'General Report' in International Fiscal Association, *International Mutual Assistance through Exchange of Information* (Cahiers de Droit Fiscal International vol 75 b Stockholm Congress 1990) p.19

[202] League of Nations, Reports Presented by the Commission of Technical Experts on Double Taxation and Tax Evasion (12 April 1927) League of Nations Doc. C.216M.85 1921 II at 22-23

[203] DR Whittaker, 'An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy' (1982) 8 NC J Int'l L & Com Reg 39, 39

[204] OECD, *Draft Double Taxation Convention on Income and Capital* (OECD Publishing 1963)

[205] OECD, *Model Tax Convention on Income and on Capital 2017* (OECD Publishing 2017) Art 26; see also OECD and Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD Publishing 2011) Arts 5,6&7

[206] Only introduced in 2003. However, provided for in 1988 by OECD and Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (OECD Publishing 1988); Assistance was originally provided for in 1981, but proved unsuccessful OECD, *OECD Convention Between (State A) and (State B) for Mutual Administrative Assistance in the Recovery of Tax Claims* (OECD Publishing 1981)

[207] OECD, *Model Double Taxation Convention on Income and on Capital* (OECD Publishing 1977)

[208] In 1992, 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010, 2014 and 2017.

[209] United Nations Department of International Economic and Social Affairs, 'Model Taxation Convention between Developed and Developing Countries' (1980) ST/ESA/102; Updated in 2001, 2011 and 2017. United Nations, 'Model Double Taxation Convention between Developed and Developing Countries 2017' <https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf> accessed 1st April 2020

[210] MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003) p.126; This is with the exception of the European Savings Directive, Council Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments [2003] OJ L157/38; It has also developed innovative measures for administrative cooperation in relation to VAT, see Council Regulation No 904/2010 of 7 October 2010 on Administrative Cooperation and Combating Fraud in the Field of Value Added Tax (Recast) [2010] OJ L268/1; European Commission, 'Proposal for a Council Regulation amending Regulation (EU) No

As the Model Tax Convention focused on eliminating double taxation, it is unsurprising that research has extensively this issue. Many commentators have focused on explaining the role of the convention and subsequent tax treaties in allocating income between jurisdictions for taxation purposes.[211] Research has also examined the many problems engendered by this now outdated and unsatisfactory system,[212] particularly the problem of tax avoidance, or 'double non-taxation',[213] felt most severely when pursued by multi-national corporations.[214] Addressing these problems remains a central component of the OECD's work, in the form of the Base Erosion and Profit Shifting (BEPS) project,[215] and many commentators have assessed its efforts in this area.[216] Until recently, fewer studies were dedicated to examining the exchange of information or assistance provisions of the convention. In this respect, Gallant notes that 'tax has historically been treated more fully as an instant of international

904/2010 as regards Measures to Strengthen Administrative Cooperation in order to Combat VAT Fraud' COM(2018) 813 final

[211] For instance, A Miller, L Oats, *Principles of International Taxation* (5th edn, Bloomsbury Professional 2016); E Reimer, A Rust (eds), *Klaus Vogel on Double Taxation Conventions* (4th edn, Wolters Kluwer 2015); M Lang, *Introduction to the Law of Double Taxation Conventions* (2nd edn, IBFD, Linde Verlag GmbH 2014); K Holmes, *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application* (IBFD 2007); RS Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (CUP 2007)

[212] Including the complexity of the system itself, S Picciotto, 'Indeterminacy, Complexity, Technocracy and the Reform of International Corporate Taxation' (2015) 24 S & LS 165; V Thuronyi, 'International Tax Competition and a Multilateral Treaty' (2001) 26 Brook J Int'l L 1641; MJ Graetz, 'The David R. Tillinghast Lecture Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies' (2001) 54 Tax L Rev 261; RS Avi-Yonah, 'The Structure of International Taxation: A Proposal for Simplification' (1996) 74 Tex L Rev 1301; and its ability to engender harmful tax competition, see R Biswas (ed), *International Tax Competition: Globalisation and Fiscal Sovereignty* (Commonwealth Secretariat 2002); J Ronin, 'Competition and Evasion: Another Perspective on International Tax Competition' (2001) 89 Geo LJ 543; HD Rosenbloom. 'The David R Tillinghast Lecture: International Tax Arbitrage and the "International Tax System"' (2000) 53 Tax L Rev 137; RS Avi-Yonah, 'Globalization, Tax Competition, and The Fiscal Crisis of the Welfare State' (2000) 113 Harv L Rev 1573

[213] For example, A Ting, 'iTax- Apple's International Tax Structure and the Double Non-Taxation Issue' (2014) 1 BTR 40; JR Hines Jr, 'How Serious a Problem is Base Erosion and Profit Shifting?' (2014) 62 Canadian Tax J 443; LA Sheppard, 'Twilight of the International Consensus: How Multinationals Squandered Their Tax Privileges' (2014) 44 Wash U J L & Pol'y 61; For comprehensive studies see, L DeBroe, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties, and EC Law in Relation to Conduit and Base Companies* (IBFD Doctoral Series 2008); S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (CUP 1992)

[214] J Mirrlees, S Adam, *The Mirrlees Review: Tax By Design* (Institute for Fiscal Studies, OUP 2011) p.430

[215] OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, 2013); endorsed in Saint Petersburg G20 Leaders' Declaration (5-6 September 2013), paras. 50-52

[216] RS Avi-Yonah, H Xu, 'Evaluating BEPS' (2017) 10 Erasmus L Rev 3; CHJI Panayi, 'International Tax Law Following the OECD/G20 Base Erosion and Profit Shifting Project' [2016] Bulletin for International Taxation 628; AP Dourado, 'The Base Erosion and Profit Shifting (BEPS) Initiative under Analysis' (2015) 43 Intertax 2; Others have reviewed measures developed by the EU, including State Aid Rules, SM Colino, 'The Long Arm of State Aid Law: Crushing Corporate Tax Avoidance' (2020) 44(2) Fordham LJ 397; P Rossi-Maccanico, 'Fiscal State Aids, Tax Base Erosion and Profit Shifting' (2015) 24 EC Tax Review 63; E Traversa, A Flamini, 'The Impact of BEPS on the Fight Against Harmful Tax Practices: Risks… and Opportunities for the EU' (2015) 3 BTR 396

competitiveness, as a feature of trade or business law, and not as a matter for international crime strategies.'[217]

Within the smaller body of literature concerning cooperation, commentators have examined the problems inherent in the methods used to obtain information or assistance in tax matters without the adoption of a tax treaty based on the Model Convention. These assessments have evaluated the use of letters rogatory, or letters of request,[218] to obtain information in relation to tax matters, expressing concern over their availability for use in criminal proceedings, their interaction with bank secrecy, the admissibility of evidence generated from these requests and the delay and bureaucracy inherent in the system.[219] Above all, the key problem identified with letters rogatory was the reliance on the comity of foreign states and associated common law refusal to provide information based on the application of the Revenue Rule,[220] leading to calls for its revocation.[221] Later research attempted to evaluate the proposed solutions to these problems, namely mutual legal assistance treaties[222] and agreements for the provision of assistance in civil matters.[223] However, as before, the key problem with these methods was the

[217] M Gallant, 'Money Laundering Consequences: Recovering Wealth, Piercing Secrecy, Disrupting Tax Havens and Distorting International Law' (2014) 17 JMLC 296, 300

[218] See for instance, MR Shumaker, GJ Moscarino, 'Beating the Shell Game: Bank Secrecy Laws and Their Impact on Civil Recovery in International Fraud Actions' (1997) 18 Comp Law 177

[219] JP Springer, 'Obtaining Foreign Evidence and Other Types of Assistance for Criminal Tax Cases' (2001) 49 US Att'ys Bull 43, 48

[220] See fn103; Debates over the merits of the rule are longstanding, see E Khan, 'Enforcement of Foreign Revenue Law' (1954) SALJ 275; Albrecht, 'The Enforcement of Taxation under International Law' (1953) Brit Y B Int'l L 454; M Mann, 'Foreign Revenue Laws and English Conflict of Laws' (1954) 3 ICLQ 465; Robertson, 'Extraterritorial Enforcement of Tax Obligations' (1966) 7 Ariz L Rev 219; T Stoel, 'The Enforcement' of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States' (1967) 16 Int'l and Comp L Q 663; PB Carter, 'Transnational Recognition and Enforcement of Foreign Public Laws' (1989) 48 CLJ 417; R Smith, 'The Nonrecognition of Foreign Tax Judgments: International Tax Evasion' [1981] U Ill Law Rev 241

[221] WJ Kovatch Jr, 'Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule' (1999) 22 Hous J Int'l L 265; BA Silver, 'Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments' (1992) 22 Ga J Int'l & Comp L 609; *cf* B Mallinak, 'The Revenue Rule: A Common Law Doctrine for the Twenty-First Century' (2006) 16 Duke J Comp & Int'l L 79; P Baker, 'Mutual Assistance in the Recovery of Tax Claims - No Government of India in the European Union?' [1999] BTR 15; R Fraser, DB Oliver, 'Finance Act Notes: International Tax Enforcement Arrangements – Sections 173-175' (2006) 5 BTR 648

[222] For example, EA Nadelmann, 'Negotiations in Criminal Law Assistance Treaties' (1985) 33 Am J Comp L 467; A Ellis, RL Pisani, 'The United States Treaties On Mutual Assistance In Criminal Matters: A Comparative Analysis' (1985) 19 International Lawyer 189; J Knapp, 'Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy' (1988) 20 Case W Res J Int'l L 405

[223] The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, (Adopted 18 March 1970, entered into force 7 October 1972) 847 UNTS 241; While the UK and US considered fiscal matters as falling within the scope of Article 1 of the Convention, many civil law jurisdictions did not G Born, *International Civil Litigation in US Courts: Commentary and Materials* (3rd edn, Kluwer Law International 1996) p.896; JP Springer, 'An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases' (1988) 22 Geo Wash J Int'l L & Econ 277, 309-317; KB Reisenfeld, 'Service of United States Process Abroad: A Practical Guide to Service under the Hague Service Convention and the Federal Rules of Civil Procedure' (1990) 24(1) Int'l L 55, 66-67

exclusion of assistance for fiscal matters.[224] In addition, many commentators have evaluated the use of compulsory measures to obtain evidence for tax cases in the US, significantly utilised as the result of the inadequacies of these measures.[225] However, unilateral measures are notably absent from the UK's armoury to combat tax evasion.

Some early studies evaluated the OECD's efforts to encourage information exchange and assistance in tax matters, through either the Model Convention,[226] or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, developed jointly with the Council of Europe.[227] In addition, some researchers commentated on the implementation of these measures through national tax treaties.[228] However, research in this area proliferated after the OECD released its harmful tax competition report, which identified jurisdictions known as tax havens, in part by their refusal to cooperate in information exchange.[229] Following the publication of the report, research identified features of these jurisdictions, variously known as tax havens, offshore financial centres and secrecy jurisdictions,[230] which facilitate tax crimes in other states, including bank secrecy legislation, complex legal structures, and an unwillingness to cooperate with other states based on national economic interests.[231] It is important to note that US authorities and academics considered these issues much earlier, namely, around the time of the Bank Secrecy Act 1970 and the publication of the Gordon report

[224] The European Convention on Mutual Assistance in Criminal Matters (agreed April 1959, entered into force 12 June 1962) European TS No 30 excluded fiscal offences. Permitted after Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (March 1978) European TS No 99

[225] MK Gyandoh, 'Foreign Evidence Gathering: What Obstacles Stand in the Way of Justice' (2001) 15 Temp Int'l & Comp LJ 81; DK Pansius, 'Government Tax Investigations and Foreign Secrecy Laws' (1990) 16 Int'l Tax J 275; JT Bergin, 'Piercing the Secret Bank Account for Criminal Prosecutions: An Evaluation of United States' Extraterritorial Discovery Techniques and the Mutual Assistance Treaty' (1989) 7 Ariz J Int'l & Comp L 325; PM Pohl, 'Discovery of Swiss Bank Records: Procedural Tools for Tunneling into the Bank' (1973) 35 U Pitt L Rev 435

[226] See below at p.19

[227] OECD and Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (OECD Publishing 1988); See for instance, KB Brown, 'Allowing Tax Laws to Cross Borders to Defeat International Tax Avoidance: The Convention on Mutual Administrative Assistance in Tax Matters' (1989) 15(1) Brook J Int'l L 59; SC Nelson, 'OECD Convention on Mutual Administrative Assistance in Tax Matters' (1990) 24(3) Int'l L 872; MAG Ruiz, 'Convention on Mutual Administrative Assistance in Tax Matters and Community Rules: How to Improve Their Interaction' (2006) 15 EC Tax Rev 196

[228] EA Seemann, 'Exchange of Information under International Tax Conventions' (1983) 17 Int'l L 333; AR Johnson, L Nirenstein, SE Wells, 'Reciprocal Enforcement of Tax Claims through Tax Treaties' (1979) 33 Tax Law 469

[229] OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publications, 1998)

[230] These terms will be distinguished in Chapter 3 – International Measures to Combat Tax Evasion

[231] For comprehensive studies see for instance, MP Hampton, JP Abbott, *Offshore Finance Centres and Tax Havens: The Rise of Global Capital* (Palgrave, 1999); RM Antoine, *Confidentiality in Offshore Financial Law* (OUP, 2002); R Palan, R Murphy, C Chavagneux, *Tax Havens: How Globalisation Really Works* (Cornell University Press, 2010); MA Young, *Banking Secrecy and Offshore Financial Centers: Money Laundering and Offshore Banking* (Routledge, 2013); JG Gravelle, *Tax havens: International Tax Avoidance and Evasion* (Congressional Research Service, 2015); see also House of Commons Treasury Committee, *Offshore Financial Centres: Oral and Written Evidence* (HC 2007-08, 895-I)

in 1981.[232] Regardless of the problems posed by tax havens, many expressed their distaste with the Harmful Tax Competition Project, including the tax havens themselves, accusing the OECD of 'fiscal colonialism', bullying smaller states by condemning their sovereign tax policies.[233] Consequently, after the intervention of the US Bush Administration in 2001,[234] the OECD changed its approach to focusing on tax transparency and exchange of information.[235]

The OECD developed and refined Article 26 of the Model Tax Convention, referred to as the International Tax Standard, which requires the exchange of information on request. These reforms largely stemmed from research identifying several problems with the standard, including exceptions arising from bank secrecy, the prohibition of fishing expeditions,[236] the inability to submit group requests,[237] and the restricted application of information exchange to information concerning tax fraud only.[238] In 2000, the Global Forum on Transparency and Exchange of Information developed a model Tax Information Exchange Agreement (TIEA), which remedied some of the earlier identified problems,[239] and provided a legal basis for exchange with countries with which it was inappropriate to sign a full tax treaty.[240] Following the most recent financial crisis, in 2009, the G20 introduced blacklists featuring states that

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[232] The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970 (also known as the Bank Secrecy Act 1970) Pub. L. No. 91-508, 84 Stat. 1114-2, 31 U.S.C. 5311 et seq; RA Gordon, *Tax Havens and Their Use By United States Taxpayers – An Overview: A Report to the Comissioner of Internal Revenue the Assistant Attorney General (Tax Division) and the Assistant Secretary of the Treasury (Tax Policy)* (Publication 1150, 12 January 1981); see for instance, DJ Workman, 'The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes' (1982) 73 Journal of Criminal Law and Criminology 675; S Weiland, 'The Use of Offshore Institutions to Facilitate Criminal Activity in the United States' (1984) 16 NYU J Int'l L & Pol 1115; M Aubert, 'The Limits of Swiss Banking Secrecy under Domestic and International Law' (1984) 2 Int'l Tax & Bus Law 273; BO Field, 'Improving International Evidence-Gathering Methods: Piercing Bank Secrecy Laws from Switzerland to the Caribbean and Beyond' (1993) 15 Loy LA Int'l & Comp LJ 691

[233] R Sanders (Antigua and Barbuda's High Commissioner in London), 'The Fight Against Fiscal Colonialism: The OECD and Small Jurisdictions' (2002) 91 The Round Table 325

[234] 'I share many of the serious concerns that have been expressed recently about the direction of the OECD initiative' US Treasury Department, 'Statement from Treasury Secretary O'Neil on OECD Tax Havens' (Press Release 10 May 2001) <https://www.treasury.gov/press-center/press-releases/Pages/po366.aspx> accessed 22 November 2017

[235] Parts of the OECD's work on harmful practices have been pursued under the auspices of the BEPS project. See, J Englisch, A Yevgenyeva, 'The "Upgraded" Strategy Against Harmful Tax Practices Under the BEPS Action Plan' (2013) 5 BTR 620

[236] J McIntyre, 'How to End the Charade of Information Exchange' [2009] Tax Notes Int'l 255

[237] On which see, F Noseda, 'Article 26 of the OECD Model Tax Convention – Group Requests – The Birth of a New International Standard? Recent Developments in Switzerland and Potential Ramifications for other Jurisdictions' (2014) 1 BTR 1

[238] As in the case of Switzerland, R Heuberger, S Oesterhelt, 'Switzerland to Adopt OECD Standard on Exchange of Information' (2010) 20 European Taxation 55; X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) 20

[239] OECD, *Agreement on Exchange of Information on Tax Matters* <http://www.oecd.org/tax/exchange-of-tax-information/2082215.pdf> accessed 2 December 2017

[240] For a summary of the former problems see, X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) ch6

chose not to cooperate with information exchange.[241] Nevertheless, research found this enforcement mechanism to be largely ineffective, with many tax havens simply signing agreements with other tax havens in order to be removed from the blacklist.[242]

The US has developed its own model income tax treaty, rather than implementing the OECD version, although it largely corresponds to it.[243] In addition, the US has extensively used compulsory unilateral methods to obtain tax information, including subpoenas, summonses and compelled directives.[244] However, many commentators have expressed unease over the impact of these judicial devices on the sovereignty of other nations.[245] Similarly, the pervasive nature of the US Foreign Account Tax Compliance Act 2009 (FATCA),[246] which requires financial institutions worldwide to automatically exchange information regarding US account holders, has been the subject of much discussion.[247] In particular, research has expressed concern over the interaction of FATCA with the US' system of citizenship-based taxation and its impact on

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[241] G20 Communique, 'London Summit – Leaders' Statement' (2 April 2009) <https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf> accessed 2 December 2017; see also, OECD, 'List of Unco-operative Tax Havens' <http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm> accessed 2 December 2017. The FATF has also utilised a blacklisting approach, see FATF, 'About the Non-Cooperative Countries and Territories (NCCT) Initiative' <www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/aboutthenon-cooperativecountriesandterritoriesncctinitiative.html?hf=10&b=0&s=desc(fatf_releasedate)> accessed 4 December 2019. The IMF and World Bank required the FATF to give up its practice of blacklisting in return for their cooperation, B Unger, 'Money Laundering Regulation: From Al Capone to Al Qaeda' in B Unger, D van der Linde (Eds) *Research Handbook on Money Laundering* (Edward Elgar 2013) 27.

[242] A Van Fossen, *Tax Havens and Sovereignty in the Pacific Islands* (University of Queensland Press, 2012) p. 1958; in addition, some individuals simply moved funds to uncooperative tax havens, see N Johannesen, G Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal 65

[243] US Treasury, 'United States Model Income Tax Convention of November 15, 2006' <https://www.treasury.gov/press-center/press-releases/Documents/hp16801.pdf> accessed 2 December 2017

[244] See fn 133; More recently, commentators have assessed their impact on Swiss Bank Secrecy after US action against UBS and other Swiss Banks. S Daly, 'Secrecy in Limbo: What the Most Recent Settlement with the IRS Means for UBS and the Rest of the Swiss Banking Industry' (2011) 10 J Int'l Bus & L 133; CH Gustafson, 'The Role of International Law and Practice in Addressing International Tax Issues in the Global Era' (2011) 56 Vill L Rev 475

[245] See C Jones, 'Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy' (1992) 12 Nw J Int'l L & Bus 454; EC Auwarter, 'Compelled Waiver of Bank Secrecy in the Cayman Islands: Solution to International Tax Evasion or Threat to Sovereignty of Nations' (1985) 9 Fordham Int'l LJ 680

[246] These provisions are named after the act they were originally introduced by - Foreign Account Tax Compliance Act of 2009 (H.R. 3933). They were subsequently enacted by the Hiring Incentives to Restore Employment Act of 2010, Public Law 111-147 (the HIRE Act), which added 26 USC §§1471-1474; see generally WH Byrnes, D Kleinfeld, AG Soriano, 'Background and Current Status of FATCA' in D Byrnes, RJ Munro, *LexisNexis Guide to FATCA Compliance* (2nd edn, LexisNexis 2014)

[247] AW Smith, 'Tax Dodgers Beware: New Foreign Account Tax Compliance Act' (2010) 84 Fla BJ 52; JR Harvey Jr, 'Offshore Accounts: Insider's Summary of FATCA and its Potential Future' (2012) 57 Vill L Rev 471; U Grinberg, 'The Battle Over Taxing Offshore Accounts' (2012) 60 UCLA L Rev 304; TA Kaye, 'Innovations in the War on tax Evasion' [2014] BYU L Rev 363; PJ McCormick, 'FATCA and the New Frontier in Offshore Reporting Enforcement' (2015) 95 Prac Tax Strategies 153; R LeVine, A Schumacher, S Zhou, 'FATCA and the Common Reporting Standard: A Comparison' (2016) 27 J Int'l Tax'n 43

US citizens who have permanently relocated abroad.[248] Nonetheless, FATCA inspired the OECD to endorse automatic exchange of information (AEOI) as the new standard from 2013 onwards.[249] Research has attempted to provide an explanation of the content and scope of these measures,[250] and evaluative studies are beginning to emerge, expressing concerns over the privacy of taxpayers, and the loopholes still extant in this mechanism.[251]

In this increasing body of literature, some researchers have comprehensively documented the progress of international measures to exchange information and assistance in tax matters.[252] However, very few have attempted to assess the effectiveness of these measures in relation to national efforts to combat tax evasion, an aim perused by this thesis. One exception is Kerzner and Chodikoff, who assessed information exchange in the context of the Canadian tax evasion prevention framework, even providing a comparison with US efforts in this area.[253] Nevertheless, no comprehensive study currently evaluates the international measures in this area in respect of their contribution to UK efforts to combat this financial crime. In Alldridge's

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[248] B Schneider, 'The End of Taxation Without End: A New Regime for US Expatriates' (2012) 32 Va Tax Rev 1; R Mason, 'Citizenship Taxation' (2016) 89 S Cal L Rev 169; Z Delap, 'Too Much Collateral Damage FATCA: The Well-Intentioned, Yet Misguided and Unconstitutional, Tax Law' (2015) 35 J Nat'l Ass'n Admin L Judiciary 212; BW Bean, AL Wright, 'The US Foreign Account Tax Compliance Act: American Legal Imperialism?' (2015) 21 ILSA J Int'l & Comp L 333; Concerns have also been expressed over its impact on other states' sovereignty A Christians, 'Putting the Reign Back in Sovereign' (2013) Pepp L Rev 1373, 1402; the lack of reciprocity, SC Morse, 'Ask for Help, Uncle Sam: The Future of Global Tax Reporting' (2012) 57 Vill L Rev 529; and its economic inefficiency, JF Kelly, 'International Tax Regulation By United States Fiat: How FATCA Represents Unsound International Tax Policy' (2017) 34 Wis Int'l LJ 981; BA Mottl, 'More than Just the Numbers: The Legal Dilemmas and Economic Repercussions of the FATCA' (2016) 7 U Puerto Rico Bus LJ 260; F Behrens, 'Using A Sledgehammer to Crack a Nut: Why FATCA Will Not Stand' (2013) Wis L Rev 205

[249] OECD, *Standard for Automatic Exchange of Information in Tax Matters* (OECD Publishing, 2014); OECD, *Standard for Automatic Exchange of Information in Tax Matters* (2nd edn, OECD Publishing, 2017)

[250] A Pross *et* al, 'Turning Tax Policy into Reality - Global Tax Transparency Goes Live' [2017] IT Rev 16; H Christensen, JM Tirard, 'The Amazing Development of Exchange of Information in Tax matters: From Double Tax Treaties to FATCA and the CRS' (2016) 22 T&T 898; P Baker, 'CRS/DAC, FATCA and the GDPR' (2016) 3 BTR 249; G Godfrey *et al*, 'Bank Confidentiality – A Dying Duty but Not Dead Yet?' (2016) 17 Bus L Int'l 173; P Baker, 'Automatic Exchange of Information – The Arrival of a New International Norm of Taxation' (2013) 4 BTR 371

[251] J Jude, 'Will Corruption in Argentina Prevent the Protection of Personal Tax Information It Engages under Its FATCA and CRS Commitments' (2019) 50 U Miami Inter-Am L Rev 123; N Noked, 'Tax Evasion and Incomplete Tax Transparency' (2018) 7 Laws 31; F Noseda, 'Too Much Information: When the UK Gets It Wrong - The Constitutional Fallout of Flawed UK Decisions in the Area of Tax Transparency' (2017) 21 JGLR 182; F Noseda, 'Common Reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection of Privacy and Data Protection' (2017) 23 T&T 404; A Schwanke, 'CRS Allows Taxpayers to Avoid Detection As Loopholes Remain' [2017] IT Rev 56

[252] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015); OC Günther, N Tüchler (eds), *Exchange of Information for Tax Purposes* (Series on International Tax Law, Linde 2013)

[253] DS Kerzner, DW Chodikoff, *International Tax Evasion in the Global Information Age* (Palgrave Macmillan 2016); Ruiz provides an evaluation of older cooperation measures in the context of the European Community MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003)

aforementioned UK study, these measures are not discussed in detail nor analysed in terms of their effectiveness in the UK context.[254]

Laundering the Proceeds of Tax Evasion

The term money laundering refers to the 'process whereby criminals attempt to hide and disguise the true origin and ownership of the proceeds of their criminal activities.'[255] Many jurisdictions have enacted laws designed to eradicate money laundering,[256] believing that an effective system of regulation will make it harder for criminals to launder money, removing their profits and thus, the incentive to commit the offence.[257] The global anti-money laundering (AML) framework originated in the Vienna and Palermo Conventions,[258] and was developed by the Financial Action Task Force (FATF), which issued recommendations providing its members with a framework of legal measures to combat money laundering and terrorist financing.[259] Each version of the Recommendations has been implemented by the EU.[260] For many years, tax evasion was not recognised as a predicate offence for money laundering;[261] tax evasion was considered to be distinct from other financial crimes and thus, more

[254] P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017)
[255] Nicholas Ryder, 'The Financial Services Authority and Money Laundering: a Game of Cat and Mouse' (2008) 67(3) C.L.J. 635, 635
[256] In the UK the relevant legislation is contained in Proceeds of Crime Act 2002, Part 7; The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692; Terrorism Act 2000, s15-20; Criminal Finances Act 2017; In the US see, Title 18 USC §§1956 & 1957 (inserted by the Money Laundering Control Act of 1986 (Public Law 99-570)), §1960; §§ 982 & 981; Title 31 USC §§ 5331 & 5332; The Currency and Foreign Transactions Reporting, (Bank Secrecy Act) Act of 1970 (Public Law No. 91-508); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 (Public Law 107-56)
[257] Jackie Harvey, 'An Evaluation of Money Laundering Policies' (2005) 8(4) J.M.L.C. 339, 339; House of Commons Home Affairs Committee, 'Drugs: Breaking the Cycle, Ninth Report of Session 2012-2013' (December 2012) <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/184/184.pdf> accessed 12 November 2013, at 54
[258] Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95 (Vienna Convention); Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (Palermo Convention). See also, United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209
[259] The Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Financial Action Task Force, February 2012 (Updated June 2016))
[260] See most recently, Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law [2018] OJ L 284/22; Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43.
[261] For instance see earlier versions of the recommendations, Financial Action Task Force, 'FATF 40 Recommendations' (October 2004) < https://www.fatf-gafi.org/publications/fatfrecommendations/documents/the40recommendationspublishedoctober2004.html> accessed 24th April 2021.

appropriately tackled by different organisations and procedures.[262] However, in 2012 the FATF recommended the inclusion of tax crimes as a predicate offence, resulting in the potential use of AML measures to tackle tax evasion.[263]

The Fourth Money Laundering Directive (4MLD),[264] requires Member States of the EU to treat tax evasion as a predicate offence for money laundering purposes.[265] Since this recognition, international bodies have explored the relationship between tax evasion and money laundering,[266] and have encouraged states to use information generated from the AML framework to tackle this offence.[267] The obligations contained in 4MLD combatting both types of financial crime, including the requirements to establish registers containing beneficial ownership information relating to corporate and other legal entities in Member States,[268] have

[262] GO Teijeiro, 'Tax Evasion and Money Laundering: The "Whole of Government" OECD Approach' (Kluwer International Tax Blog, 24 September 2015) <http://kluwertaxblog.com/2015/09/24/tax-evasion-and-money-laundering-the-whole-of-government-oecd-approach/> accessed 19th November 2017

[263] The Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Financial Action Task Force, February 2012 (Updated June 2016)) Recommendation 3 and Interpretive Note; Following G7, 'Conclusions of G7 Finance Ministers' (London, 9 May 1988) <http://www.g8.utoronto.ca/finance/fm980509.htm> accessed 30 November 2017

[264] Council and Parliament Directive 2015/849 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 [2015] OJ L141/73

[265] Ibid para11; For comment see, S Bourton, 'The Relationship between Money Laundering and Reporting Entities and the Fourth Money Laundering Directive - A Critical Reflection' (2015) 18(6) FRI 7; J Fisher, 'Tax Crime, Legal Professional Privilege & the Fourth Directive: A Minefield for Suspicion'(2013) 200 Money LB 7

[266] R Tavares, 'Thematic Paper on Money Laundering: Relationship between Money Laundering, Tax Evasion and Tax Havens' (European Parliament, Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) 2012-2013) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/crim/dv/tavares_ml_/tavares_ml_en.pdf> accessed 29 November 2017

[267] OECD, *Improving Co-operation between Tax and Anti-Money Laundering Authorities: Access by Tax Administrations to Information held by Financial Intelligence Units for Criminal and Civil Purposes* (OECD Publishing September 2015); OECD, *Improving Access to Bank Information for Tax Purposes* (OECD Publishing 2000); the earlier report followed recommendations in G7, 'Conclusions of G7 Finance Ministers' (London, 9 May 1988) <http://www.g8.utoronto.ca/finance/fm980509.htm> accessed 30 November 2017

[268] Council and Parliament Directive 2015/849 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 [2015] OJ L141/73, Recital 14, Articles 30 & 31; Transposed through Small Business, Enterprise and Employment Act 2015, Part 7, amending Companies Act 2006; The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, Reg 45

been the subject of much academic commentary.[269] Experts have only just begun to comprehensively examine the impact of the AML framework on tax evasion within the EU.[270]

These developments in the international sphere had a relatively limited impact in the UK, which has long taken an 'all-crime approach' to its AML provisions.[271] Consequently, UK research has long explored the relationship between tax evasion and money laundering, initially considering whether tax evasion was a predicate offence for money laundering purposes.[272] After this was confirmed,[273] many questioned the suitability of using AML provisions to combat this financial crime, highlighting the troublesome distinction between avoidance and evasion, and its potential to increase the problem of defensive reporting,[274] including the reporting of legal activities.[275] Conversely, some have pointed to the need to close the gap in

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[269] For instance, see E Virgo, 'Trust Registers and Transparency: A Step Too Far?' (2019) 33(3) Tru LI 95; A Haynes, 'Corporate Privacy or Public Nakedness?' (2018) 39(7) Comp Law 209; T Wesel, 'EU Push for Trust Transparency - Sensible or Just Plain Snooping?' [2017] Euro TS 26; J Edmondson, 'The Proliferation of New Registers: Some Thoughts on the Drive for Transparency' (2017) 5 PCB 150; S Wong, 'Legislative Comment: The New EU Anti-Money Laundering Directive: Farewell to Transparency of UK Trusts' (2017) 31 Tru LI 137; AD Nugroho, 'Central Register as a Model Instrument to Unveil Beneficial Owners for Tax Purposes' (2017) 26 EC TR 274; F Noseda, 'For or Against the Registration of Trusts - Why It Matters: Balancing Regulatory Concerns and the Right to Privacy' (2014) 3 PCB 137

[270] B Unger, L Rossel, J Ferwada (Eds), *Combatting Fiscal Fraud and Empowering Regulators: Bringing Money Back into the COFFERS* (OUP 2021); U Turksen, *Countering Tax Crime in the European Union: Benchmarking the OECD's Ten Global Principles* (Bloomsbury Publishing 2021)

[271] Proceeds of Crime Act 2002, s327-329, s340. M Goldby, 'Anti-Money Laundering Reporting Requirements Imposed by English Law: Measuring Effectiveness and Gauging the Need for Reform' (2013) 4 JBL 367, 368

[272] M Bridges, 'Tax Evasion: A Crime In Itself – The Relationship with Money Laundering' (1996) 4 JFC 161; MJ Bridges, P Green, 'Tax Evasion and Money Laundering – An Open and Shut Case?' (1999) 3 JMLC 51; A Barry, 'Examining Tax Evasion and Money Laundering' (1999) 2(4) JMLC 326; P Burrell, 'Preventing Tax Evasion through Money-Laundering Legislation' (2000) 3 JMLC 304; T Graham, 'Money Laundering and Foreign Tax Evasion: Is Government of India v Taylor Really Dead?' (2000) 3 JMLC 377; P Alldridge, 'Are Tax Evasion Offences Predicate Offences for Money Laundering?' (2001) 4(4) JMLC 350; KE Oliver, 'International Taxation: Tax Evasion as a Predicate Offence to Money Laundering' (2002) 27 ILP 55; D Ormerod, 'Money Laundering: Whether Undeclared Takings of a Legitimate Business Capable of Amounting to "Criminal Property" Where Offence of Cheating the Revenue Alleged' [2007] Crim LR 645; R Wilkinson, T Graham, 'Money Laundering and Foreign Tax Evasion: Is Foreign Tax Evasion A Predicate Offence for the Purposes of POCA 2002?' (2008) 14 T&T 534

[273] This was confirmed several times in the late 1990s by UK Government Ministers, see G Funnel (ed), *HMRC Investigations and Inquiries 2011/12* (Bloomsbury 2011) p.146-7; see also J Rhodes, 'Legislative Comment; The Proceeds of Crime Act 2002 and Tax Evasion' (2004) 1 PCB 51, 51

[274] Indeed, the UK receives the greatest amount of SARs in Europe, with 573,085 SARs received in 2019-20, EUROPOL, 'From Suspicion to Action: Converting Financial Intelligence into Greater Operational Impact' (2017) <https://www.europol.europa.eu/publications-documents/suspicion-to-action-converting-financial-intelligence-greater-operational-impact> accessed 19 January 2020, at p.10; National Crime Agency, 'UK Financial Intelligence Unit: Suspicious Activity Reports Annual Report 2020' <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/480-sars-annual-report-2020/file> accessed 4th April 2021, p.2.

[275] J Davies, 'Using the AML Framework for Enablers of Tax Evasion: Some Practical Considerations' (2016) 37 Comp Law 372; M Menkes, 'The Divine Comedy of Governance in Tax Evasion Matters. Or Not?' (2015) 30(6) JIBLR 325; J Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' (2010) 3 BTR 235; S Crosby, 'Excise Duty Fraud, VAT Fraud and Money Laundering: Misconceived Law Enforcement Practices and Policies?' (2005) 8 ECTJ 57; P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353; L Delahunty, 'POCA 2002 and the New Anti-

the AML framework left by the exclusion of tax crimes, which can be exploited by criminals,[276] while others highlighted the success of the reporting obligations in regards to fiscal cases.[277] However, these concerns are rarely expressed as part of a comprehensive review of the UK's efforts to combat tax evasion.[278]

In contrast to the UK, tax evasion is not a Specified Unlawful Activity (SUA) for money laundering purposes in the US.[279] Here, while tax crimes prosecuted under Mail and Wire Fraud statutes may form the basis of a money laundering offence, ordinary tax evasion offences cannot do so.[280] Moreover, the US Department of Justice (DoJ) has a policy against using money laundering charges for tax offences.[281] Accordingly, debate in the US centres on whether tax evasion offences can be charged as other offences, which are SUAs for the purposes of the US AML framework.[282]

2.4 Domestic Measures to Combat Tax Evasion

Criminal Offences

Money Laundering Regime' [2003] Tax A 8; ME Beare, 'Searching for Wayward Dollars: Money Laundering or Tax Evasion – Which Dollars are We Really After?' (2002) 9(3) JMLC 259; R Bosworth-Davies, 'Tax Evasion – The New Money Laundering Crime of Our Times' [1998] Tax P 18

[276] The "tax loophole" OECD, *Improving Access to Bank Information for Tax Purposes* (OECD Publishing 2000) p.27; HM Treasury, 'G7 Initiative on Harmful Tax Competition' (09 May 1998) <http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/press_71_98.htm> accessed 23 December 2014; J Fisher, J Bewsey, 'Laundering the Proceeds of Fiscal Crime' (2000) 15(1) J.I.B.L. 11, 13

[277] Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2008) 166; Miriam Goldby, 'Anti-Money Laundering Reporting Requirements Imposed by English Law: Measuring Effectiveness and Gauging the Need for Reform' (2013) 4 J.B.L. 367, 388

[278] The exception is P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) p.170-179

[279] Under 18 U.S.C. §1956

[280] *United States v. Yusuf*, 536 F.3d 178, 189–90 (3d Cir. 2008); *Pasquantino v. United States* (03-725) 544 U.S. 349 (2005) 336 F.3d 321, affirmed; see also D Spencer, 'Cross-Border Tax Evasion and Bretton Woods II (Part 5)' (2009) 20 J Int'l Tax'n 50

[281] US Attorneys, 'US Attorneys' Manual: Tax Division Directive No.128 (supersedes Directive No. 99) Charging Mail Fraud, Wire Fraud or Bank Fraud Alone or as Predicate Offenses in Cases Involving Tax Administration' (29 October 2004) <https://www.justice.gov/usam/tax-resource-manual-14-tax-division-directive-no-128> accessed 29 November 2017

[282] IM Comisky, 'Charging Money Laundering Based Upon a Tax Offence: No Longer a Bridge Too Far' (2019) 3(1) Journal of Financial Compliance 23; K Foo, 'Does Tax Evasion Generate Criminal Proceeds' (2019) 31 SAcLJ 845; RC Alexander, '"Cost Savings" As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom' (2011) 45 Int'l Law 749; B Zagaris, 'Practitioners Discuss Defects of Criminalizing International Tax Fraud as a Separate Money Laundering Offence' (2009) 25 Int'l Enforcement L Rep 181; BS Arce, 'Taken to the Cleaners: Panama's Financial Secrecy Laws Facilitate the Laundering of Evaded US Taxes' (2009) 34 Brook J Int'l L 465, 480-486

In the UK, a patchwork of statutory offences aim to criminalise tax evasion, based on the type of tax evaded, or the behaviour concerned,[283] while in the US tax evasion offences are primarily contained in Title 26 of the Internal Revenue Code and impose liability based on the actions of the evader.[284] In the UK, tax evasion is most commonly prosecuted under common law offences,[285] due to their wide scope and harsh penalties,[286] while in the US, equivalent offences have been codified.[287] Yet, despite the multitude of offences available, in the UK, HMRC has historically rarely instituted criminal proceedings for tax evasion offences, opting instead to settle liabilities by way of cost-effective civil settlement procedures.[288] The decision as to whether to conduct a criminal or civil investigation, with a view to imposing civil penalties or instigating a criminal prosecution, is governed by an articulated enforcement policy.[289] This preference for routes of redress outside of the criminal justice system is also seen in the use of DPAs in addressing corporate economic crimes, including tax evasion, in both the UK and US.[290] Accordingly, in addressing the research objective of evaluating the effectiveness of the UK's approach to tackling this financial crime, it is imperative to consider both the criminal law and its enforcement.

Research in the UK has attempted to provide an historical explanation of the introduction and use of criminal offences for tax evasion.[291] Some commentators have also provided overviews of the scope and operation of current forms of these offences, yet these are commonly contained in chapters of practitioner texts, or discussed as a subset of other financial crimes, and are thus

[283] Value Added Tax Act 1994, s72(1), 72(3), 72(8); Taxes Management Act 1970, s106A; Customs and Excise Management Act 1979 section 50(1)(a) and (2), s170, s170A and B; see also Fraud Act 2006, s1; false accounting, Theft Act 1968, s17
[284] 26 USC §§ 7201-7215
[285] Cheating the public revenue preserved by Theft Act 1968, s32(1)(a), see *R v Hudson* [1956] 1 All ER 814; Conspiracy to defraud preserved by Criminal Law Act 1977, s5(2)
[286] D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627
[287] 18 USC § 1001; 18 USC § 287; 18 USC § 2(a)&(b); 18 USC §371; 18 USC §§ 1341 and 1343
[288] Customs and Excise had a 'much more vigorous approach to investigating offences' than the Inland Revenue, see J O'Donnell, 'Vat Investigation' (2007) 57 VAT Dig 1, 2; see also D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 645
[289] HM Revenue & Customs, 'Guidance: HMRC Policy' (December 2015) <http://www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm> accessed 15th March 2016
[290] N Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82(3) J Crim L 245; C King, N Lord, 'Deferred Prosecution Agreements in England and Wales: Castles Made of Sand?' [2020] PL 307; BL Garrett, 'Declining Corporate Prosecutions' (2020) 57 American Criminal Law Review 109.
[291] D Williams, 'Surveying Taxes, 1900-14' (2005) 2 BTR 222; R Colley, 'The Arabian Bird: A Study of Income Tax Evasion in Mid Victorian Britain' (2001) 3 BTR 207; BEV Sabine, 'The Toad Under the Harrow' (1996) 5 BTR 481; WA Ahmad, M Hingum, 'Clang of the Prison Gates – The Sentencing of Income Tax Offenders' (1995) 6 BTR 581

largely explanatory, rather than evaluative.[292] Of the few evaluative studies in this jurisdiction, research has analysed the scope and application of indirect tax offences, including the smuggling and VAT offences,[293] with particular attention given to the law pertaining to missing trader intra-community (MTIC) frauds.[294] In relation to direct taxes, unsurprisingly, many have considered the oft-used common law offence of cheating the public revenue,[295] drawing attention to the wide ambit of this offence and its attendant onerous penalties,[296] leading to human rights challenges,[297] and calls for its codification or abolition.[298] Similarly, the introduction of the first summary offence for tax evasion,[299] following the recommendations of the Grabiner report,[300] was poorly received by commentators, with Ormerod noting that it was unlikely to achieve its objectives and simply served to 'perpetuate the underlying tension between the policies and principles of tax collection and criminal justice.'[301] One of the most pressing issues in regards to almost all of these criminal offences,[302] is the problems posed by the test of *mens rea*, namely, the requirement to prove that the defendant acted dishonestly.[303]

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[292] N Ryder, *The Law Relating to Financial Crime in the United Kingdom* (2nd edn, Routledge, 2016); A Srivastava et al, *A Practitioner's Guide to the Law and Regulation of Financial Crime* (Sweet & Maxwell, 2010); M Tonry, *The Oxford Handbook of Crime and Public Policy* (Oxford University Press, 2009); C Montgomery, D Ormerod, T Shaw (eds), *Montgomery and Ormerod on Fraud: Criminal Law and Procedure* (Oxford University Press, 2016); A Arlidge, A Milne, P Sprenger, *Arlidge and Parry on Fraud* (4th edn, Sweet & Maxwell, 2014)

[293] Recent examples include B Gunacker-Slawitsch, 'The Knowing Participation in VAT Fraud: Reflections on the Content and the Limits of a Reasonable Duty of Due Diligence' (2017) 5 BTR 649; A Shaheen, 'Will EPP Successfully Tackle Terror and VAT Fraud?' [2017] IT Rev 13; M Timmerman, 'Balancing Effective Criminal Sanctions with Effective Fundamental Rights Protection in Cases of VAT Fraud: Taricco' (2016) 53 CML Rev 779; L van der Hel - van Dijk, M Griffioen, 'Tackling VAT-Fraud in Europe: A Complicated International Puzzle' (2016) 44 Intertax 290

[294] Recent examples include A Eskander, 'Recent Measures Countering MTIC Fraud' (2017) 1377 Tax J 19; A Woolnough, 'Gentrification of MTIC Fraud' (2016) 246 De Voil ITI 16; R Maas, 'Love Thy Neighbour?' (2016) 178 Tax 8; D Scorey, 'Trends in MTIC Litigation' (2014) 223 De Voil ITI 10

[295] D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627; G Virgo, 'Cheating the Public Revenue' (2000) 59 CLJ 42; D Salter, 'Some Thoughts on the Fraudulent Evasion of Income Tax' (2002) 6 BTR 489; JH Howard, 'Cheating the Public Revenue' (2010) 1037 Tax J 16; G McBain, 'Modernising the Common Law Offence of Cheating the Public Revenue' (2015) 8(1) J Pol & L 40

[296] See *R v. Less* The Times, March 30, 1993, (CA); *R v Mavji* [1987] 1 WLR 1388 (CA); Ormerod states that 'The actus reus of the offence has become so wide that the definition is almost best stated in negative terms' D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 629

[297] *R v Pattni* [2001] Crim. L.R. 570 (Crown Ct (Southwark)); DC Ormerod, T Rees, 'Human Rights: Requirement of Reasonable Certainty' [2001] Crim LR 570; G Virgo, 'Cheating the Public Revenue: Fictions and Human Rights' (2002) 61 CLJ 47

[298] 'The abolition of cheating is long over-due' D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 645; McBain calls for the offence to be codified in 'Modernising the Common Law Offence of Cheating the Public Revenue' (2015) 8(1) J Pol & L 40, 80

[299] Finance Act 2000, s144; now contained in Taxes Management Act 1970, s106A

[300] Lord Grabiner QC, *The Informal Economy* (HM Treasury 2000); RW Maas, 'The Grabiner Report – A Riposte' (2000) 5 Taxline 9; BEV Sabine, 'Grabiner and After' (2000) 145 Tax 564

[301] DC Ormerod, 'The Summary Evasion of Income Tax' [2002] Crim LR 3, 24; see also D Salter, 'Some Thoughts on the Fraudulent Evasion of Income Tax' (2002) 6 BTR 489

[302] The exception is the strict liability offence contained in Finance Act 2016, s166 amending Taxes Management Act 1970, s106

[303] See fn199 & fn211

The test for dishonesty, as laid down in *Ghosh*,[304] has been the subject of much debate in the context of other financial offences,[305] and tax evasion appears to be no exception.[306] Research has also analysed the appropriateness of a strict liability offence for tax evasion, prompted by the introduction of a new offshore tax evasion offence.[307]

Nevertheless, the main weakness of the literature in this area is the lack of comprehensive studies. This is at variance with research on tax evasion offences in the US, where literature has long been 'rich and well-developed';[308] a statement best illustrated by the multitude of texts, dedicated entirely to explaining and evaluating tax evasion legislation, currently in existence.[309] In contrast, in the UK, the criminal law pertaining to tax evasion has only recently begun to gain popularity in research.[310] Both the recent financial crisis and the public outcry following tax evasion scandals have encouraged research in the UK to provide explanations for the lack of prosecutions demanded by the public.[311] This literature highlights the problems involved in establishing evidence of tax evasion, particularly, the ability to obtain evidence and its admissibility.[312] Whereas academic debate in the UK questions the admissibility of stolen evidence[313] and the integrity of collecting evidence through recourse to tax amnesties,[314] and

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[304] *R v Ghosh* [1982] 1 QB 1053 (CA)
[305] Most notably, DW Elliott 'Dishonesty in Theft: A Dispensable Concept' (1982) Crim Law Rev 395, 399; E Griew, 'Dishonesty: Objections to Feely and Ghosh' (1985) Crim Law Rev 341; see also Law Commission, *Fraud* (Law Com No 276, 2002)
[306] J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) Tax J 1; D Salter, 'Some Thoughts on Fraudulent Evasion of Income Tax' (2002) 6 British Tax Review 489; A Ashworth, *Principles of Criminal Law* (3rd edn, Oxford University Press, 1999) 396; D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627
[307] Finance Act 2016, s166 amending Taxes Management Act 1970, s106; C Randall, 'Strictly Criminal - The New Law on Offshore Tax Evasion' (2016) 23 JITTCP 139; J Quarmby, 'Strict Liability Offences: A Worrying Trend?' (2016) 1309 Tax J 8
[308] J Freedman, 'Taxation Research as Legal Research' in M Lamb, A Lymer, J Freedman, S James, *Taxation an Interdisciplinary Approach to Research*, (1st edn, Oxford University Press, 2005) 25
[309] The most detailed is I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020); I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Money Laundering, Asset Forfeiture, Sentencing* [Vol 2] (Thomson Reuters, 2020); This is not a new development see MJ Garbis, RB Rubin, PT Morgan, *Tax Procedure and Tax Fraud: Cases and Materials* (3rd edn, American Casebook Series, West Publishing, 1992); D McGowen, DG O'Day, KE North, *Criminal and Civil Tax Fraud: Law, Practice, Procedure* (Kluwer Law Book Publishers, 1986); HG Balter, JR Guidotti, *Tax Fraud and Evasion: A Guide to Civil and Criminal Practice Under Federal Law* (5th edn, Warren, Gorham & Lamont, 1983)
[310] See fn208, for recent inclusion in financial crime monographs and chapters in practitioner texts
[311] R Stokes, 'HSBC Private Bank Helped Clients Evade Tax, Others Faced Serious Criminal Investigations, Leaked Files Show' (2015) Apr FI 4; J Fisher, 'HSBC, Tax Evasion and Criminal Prosecution' (2015) 1253 *Tax Journal* 6; M Young, 'Setting the Scene: the HSBC Banking Scandal' (2015) 36(8) *Company Lawyer* 229
[312] J Fisher, 'HSBC, Tax Evasion and Criminal Prosecution' (2015) 1253 Tax J 6, 7; A Riem, 'Tax Dodgers Be Warned' (2009) 24(4) JIBLR 224; S Uglow, 'Defrauding the Public Purse: Prosecuting in Social Security, Revenue and Excise Cases' [1984] Crim LR 128; M Levi, 'The Powers of Revenue Agencies: An Overview' [1982] BTR 36
[313] Ibid (Fisher); A Riem, 'Tax Dodgers Be Warned' (2009) 24 JIBLR 224
[314] Including the Offshore Disclosure Facility, the New Disclosure Opportunity and the Liechtenstein Disclosure Facility, F Lagerberg, P Roberts, 'Amnesty International?' (2007) 159 Tax 455; A Watt, 'Offshore Amnesty' (2007) 18 TPA & A 76; A Barry, 'All That Glisters Is Not Gold' (2007) 883 Tax J 17; R Brockwell, C Oates,

financial sector AML reporting obligations,[315] debate in the US centres on the indirect methods of proof used to circumvent these issues. These include the net worth method of establishing unreported taxable income,[316] the bank deposit,[317] and the cash expenditure theory,[318] which are considered to be effective at securing convictions.[319] However, the circumstantial nature of the evidence generated has led to debates on whether these methods provide the constitutionally required evidence.[320] Indeed, so successful are these methods of proof, that tax evasion charges are commonly used to bring prosecutions against individuals accused of other criminal

'Tax Amnesty?' (2009) 994 Tax J 6; J Cassidy, 'Tax Amnesty Fatigue?' (2010) 1015 Tax J 6; R Clarke, H Foulkes, 'Do Tax Amnesties Work?' (2010) 1045 Tax J 7; R Maas, 'Why So Many Disclosure Opportunities?' (2010) 3 Taxline 4; S Airey, 'Gift Horse or Trojan Horse?' (2010) 166 Tax 9; see generally, J Hasseldine, 'Tax Amnesties: An International Review' (1998) 52 BIFD 303; C Marchese, F Privileggi, 'Tax Amnesties and the Self-Selection of Risk-Averse Taxpayers' (2004) 18 EJL & E 319; S Rechberger *et al*, 'Tax Amnesties, Justice Perceptions, and Filing Behavior: A Simulation Study' (2010) 32 Law & Pol 214; CC Whitehill, 'United Kingdom: Survey Reveals that Accountants Support A General Tax Amnesty' (2012) 39 TPIR 26

[315] See fn189; see also whistle blowers S Camm, I Sanderson, 'Informer Nation' (2006) 156 Tax 640

[316] Developed from the decisions in *Capone v. United States* 51 F.2d 609 (7th Cir. 1931); *United States v. Johnson* 319 U.S. 503, 87 LEd 1546, 63 S Ct 1233 (1943); Approved in *Holland v. United States*, 348 US 121, 125, 75 SCt 127, 130, 99 LEd 150 (1954), rehearing denied, 348 US 932, 75 SCt 334, 99 LEd 731 (1955)

[317] For an explanation of the method, see *United States v. Hall*, 650 F.2d 994, 996 n. 4 (9th Cir.1981); For the difference between this method and the net worth method see *United States v. Boulet*, 577 F.2d 1165, 1167 n. 3 (5th Cir.1978); see generally, TS Leeper, 'Proving Tax Evasion by the Net Worth Method' (1956) 34 Tex L Rev 606

[318] 'Although courts sometimes blur the distinction between the "net worth" and "cash expenditures" methods of proof, the expenditures method is a variant of the "net worth" method', e.g. *Citron*, 783 F.2d at 310, and encompasses different elements of proof. See *Taglianetti,* 398 F.2d at 562–63' *United States v Caswell*, 825 F.2d 1228, 1232 n. 6 (8th Cir.1987) per Magill, J; for other methods see RA Knight, LG Knight, 'How the IRS Reconstructs Income Without Records' (1992) 48 Tax'n for Acct 29

[319] S Shimick, 'Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero' (2014) 50 Tulsa Law Review 43, 72

[320] Recognised in cases such as *United States v. Scrima*, 819 F.2d 996, 999 (11th Cir.1987); *United States v. Riganto*, 121 F.Supp. 158, (E.D.Va.1954) at 159; see, LS Eads, 'From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof' (1991) 79 Cal L Rev 1421; IM Comisky, 'The Likely Source: An Unexplored Weakness in the Net Worth Method of Proof' (1981) 36 U Miami L Rev 1; S Duke, 'Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid' (1966) 76 Yale LJ 1; see also DePaul College of Law, 'Net Worth and Proof of Tax Evasion' (1955) 4 DePaul L Rev 237, 'Dangers of the System' at 252-254; S Avakian, 'Net Worth Computations as Proof of Tax Evasion' (1955) 10(4) Tax L Rev 431 noting at 452, 'Realistically, even though not legally, the defendant will have the burden of proving his innocence'

offences, referred to as 'pretextual prosecutions',[321] generating research on the merits of this approach.[322]

Another contemporary aspect of legal tax evasion research in the UK is the prosecution of those who facilitate tax evasion offences,[323] prompted by the involvement of corporations and their employees in recent tax evasion scandals,[324] and wider debates in the UK concerning corporate liability generally.[325] The method of attributing liability to corporations in the UK has been considered unsuitable in relation to the large modern company,[326] leading to the introduction of a new corporate tax evasion offence.[327] Yet, corporate liability for financial crimes is well established in the US,[328] leaving commentators to question the proportionality of the broader

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[321] R Baker, 'Taxation: Potential Destroyer of Crime' (1951) 29 Chicago-Kent LR 197; BI Bittker, 'Taxing Income form Unlawful Activities' (1974) 25 Case W Res L Rev 130; PH Bucy, 'Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves' (1997) 29 Arizona State Law Journal 639; EM Rutherford, 'Taxation of Drug Traffickers' Income: What the Drug Trafficker Profiteth, The IRS Taketh Away' (1991) 33 Ariz L rev 701; A Bucci, 'Taxation of Illegal Narcotics: A Violation of the Fifth Amendment Rights of an Innovative Tool in the War against Drugs?' (2012) 11 Journal of Civil Rights and Economic Development 22; S Shimick, 'Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero' (2014) 50 Tulsa Law Review 43; C Manolakas, 'The Taxation of Thieves and their Victims: Everyone Loses But Uncle Sam' (2016) 13 Hastings Bus LJ 31; Most famously, the US prosecuted mobster Al Capone for tax evasion offences – see DC Richman, WJ Stuntz, 'Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution' (2005) 105 Colum L Rev 583; LS Eads, 'From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof' (1991) 79 Cal L Rev 1421

[322] Similar measures in the UK are the taxing powers contained in Proceeds of Crime Act 2002, Part 6, yet these are not criminal offences. See, M Gallant, 'Tax and the Proceeds of Crime: A New Approach to Tainted Finance' (2013) 16 JMLC 119; R Cory, 'Taxing the Proceeds of Crime' (2007) 4 BTR 356; AVM Leong, 'Civil Recovery and Taxation Regime: Are These New Powers under the Proceeds of Crime Act 2002 Working?' (2006) 27 Comp Law 362; A Watters, 'POCA: Assets, Tax Assessments and Civil Proceedings' (2006) 36 Fam Law 196

[323] J Davies, 'Using the AML Framework for Enablers of Tax Evasion: Some Practical Considerations' (2016) 37 Comp Law 372

[324] See for instance, BBC News, 'HSBC Bank 'Helped Clients Dodge Millions in Tax' (BBC News, February 2015) <http://www.bbc.co.uk/news/business-31248913> accessed 1st October 2016; Recent tax scandals prompted much discussion, P Baker, 'HMRC's Offshore Initiative, the Panama Papers and the Future of the British Offshore Financial Centres' (2016) 3 BTR 252; AA Sanjur R, 'The Role and Relevance of the Panamanian Corporate Lawyer in the Light of the Panama Papers' (2016) 37 Comp Law 348; N Ryder, S Bourton, 'The Prosecution of White Collar Criminals, and the Legacy of the Coalition Government: HSBC and Tax Evasion a Case Study' (2015) 226 Crim Law 3

[325] Following the problems caused by the identification doctrine, *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL); Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (Cm9370, 2017)

[326] Ibid at p.13

[327] Contained in Criminal Finances Act 2017, Part 3; A Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 LQR 606; C Lynn, N Warlow, 'The Criminal Finances Act 2017 – What Does it Mean for Directors and Officers Insurance?' (2017) 6 Comp & Risk 10; C Wells, 'Corporate Failure to Prevent Economic Crime – A Proposal' (2017) 6 Crim LR 426; A Srivastava et al, 'Financial Crime Update' (2017) 147 COB 1; K Laird, 'The Criminal Finances Act 2017 – An Introduction' (2017) 12 Crim LR 915; T Corfield, J Schaefer, 'The taxman Cometh: The Criminal Offences of Failure to Prevent Tax Evasion' [2017] T&T 1; H Buchanan, 'The Proposed Corporate Offence of Failing to Prevent Tax Evasion' (2016) 1307 Tax J 9; J Collins, 'New Corporate Criminal Offence of Failure to Prevent the Facilitation of Tax Evasion' (2015) 42(9) TPIR 31

[328] Corporate liability for criminal acts of their agents when these acts are committed within the scope of the agent's authority and are designed to benefit the corporation see *New York Central & Hudson River Railroad Co. v. United States* 212 U.S. 481, 493 (1909); PH Bucy, 'Corporate Ethos: A Standard for Imposing Corporate

US equivalent,[329] and the optimal use of deferred prosecution agreements.[330] Many have also highlighted the effectiveness of the US approach, through the recent action taken against Swiss banks accused of facilitating tax evasion on the part of US taxpayers,[331] and its effects on the erosion of Swiss bank secrecy.[332] Nevertheless, ultimately, the persistent weakness of the literature around this area is the lack of comprehensive studies.

Enforcement

Revenue Collection Authorities have two options for dealing with suspected criminal tax evasion; a criminal investigation into the individual's affairs with a view to prosecution; or, a civil investigation with the aim of coming to a financial settlement. In the UK, the criminal prosecution of tax evasion was formerly reserved for only the most egregious of cases,[333] with decisions on whether to conduct a civil or criminal investigation based on an articulated enforcement policy.[334] The decision to forgo prosecution in many cases is based on Her Majesty's Revenue and Custom's primary role as a revenue collection authority and the expensive and time-consuming nature of this enforcement mechanism.[335] In recent times, an increased public demand to combat tax evasion using criminal penalties in the UK,[336] has led

Criminal Liability' (1991) 75 *Minnesota Law Rev* 1095, 1102; HL Brown, 'Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents' (1995) 41 *Loyola Law Review* 279, 285-88

[329] See SN Vu, 'Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent' (2004) 104 Columbia Law Review 459

[330] JA Gallagher, 'Legislation is Necessary for Deferred Prosecution of Corporate Crime' (2010) 43 Suffolk UL Rev 447; P Spivack, S Raman, 'Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements' (2008) 45 Am Crim L Rev 159; see also JN Djilani, 'The British Importation of American Corporate Compliance' (2010) 76 Brook L Rev 303

[331] For instance, see US action taken against UBS, L Jucca, 'Special Report: How the US Cracked Open Secret Vaults at UBS' (Reuters, 9 April 2010) <https://www.reuters.com/article/us-banks-ubs/special-report-how-the-u-s-cracked-open-secret-vaults-at-ubs-idUSTRE6380UA20100409> accessed 29 November 2017; see also the action taken against Switzerland's oldest bank, BBC News 'Swiss Bank Wegelin to Close After US Tax Evasion Fine' (BBC News, 4 January 2013) <http://www.bbc.co.uk/news/business-20907359> accessed 20 June 2015; see generally, the US Swiss Bank Program, US Department of Justice, 'Swiss Bank Program' (Updated 6 February 2017) <https://www.justice.gov/tax/swiss-bank-program> accessed 29 November 2017

[332] K Eggenberger, P Emmenegger, 'Economic Viability and Political Responses to International Pressure: Liechtenstein, Switzerland and the Struggle for Banking Secrecy' (2015) 21 Swiss Political Science Review 491; S Daly, 'Secrecy in Limbo: What the Most Recent Settlement with the IRS Means for UBS and the Rest of the Swiss Banking Industry' (2011) 10 J Int'l Bus & L 133; CH Gustafson, 'The Role of International Law and Practice in Addressing International Tax Issues in the Global Era' (2011) 56 Vill L Rev 475

[333] D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 645

[334] HM Revenue & Customs, 'Guidance: HMRC Policy' (December 2015) <http://www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm> accessed 15th March 2016

[335] J Fisher, 'HSBC, Tax Evasion and Criminal Prosecution' (2015) 1253 Tax J 6, 6

[336] See Chapter 1 – Introduction

to increasing prosecutions of tax evaders,[337] without reconsideration of either the content or application of the aforementioned policy.

Many have reviewed the commonly used procedure governing the civil investigation of tax fraud, formerly known as the Hansard procedure.[338] The Hansard procedure enabled the Revenue to offer an individual the opportunity to confess to all irregularities, however caused, and thereby to avoid prosecution, by coming to a financial settlement.[339] This has been a popular research topic, due to the contentious development of the procedure. Initially, disclosures made as a result of Hansard were treated as involuntary confessions,[340] and were thus, inadmissible.[341] After this decision was overturned by statute,[342] concerns were expressed over the possibility of the Revenue instigating a prosecution,[343] despite the tax evader having made a full disclosure.[344] After this ambiguity was removed,[345] the case of *R v Gill and another*[346] held that, as the Revenue reserved the right to prosecute when a full disclosure had not been made, Hansard interviews should be conducted in accordance with the Police and Criminal Evidence Act 1984 (PACE),[347] prompting yet further academic commentary.[348]

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[337] HM Treasury, *Spending Review 2010* (Cmd 7942, 2010) p71; HM Treasury, *Summer Budget 2015*, (HC 2015-16, 264) p43

[338] So called as it derives from a statement made by the Chancellor of the Exchequer to the House of Commons, firstly in HC Deb 19 July 1923, vol 166, cols2514-16W

[339] D Ormerod, 'Hansard Invitations and Confessions in the Criminal Trial' (2000) 4 E&P 147, 147-8; B Brown, 'The Revenue Sleuths' (1999) 15 FI 3; Prompting advice to advisers to ensure the accuracy of a client's disclosure J Archibald, 'Hansard Not to be Scorned' (1996) 137 Tax 478

[340] *R v Cason* (1935) 14 Annot Tax Cases 471

[341] *R v Barker* [1941] 2 KB 381 (CA)

[342] Finance Act 1942, s34; Currently Taxes Management Act 1970, s105

[343] Or by the CPS without consulting the Revenue, as in *R. v Werner (Laurence Ian)* [1998] STC 550; Times, March 24, 1998 (CA (Crim Div)) I Ferrier, 'Double Jeopardy' (1998) 17 CTP 121; S Elwes, RG Clutterbuck, 'Tax and Criminal Prosecutions' [1999] Crim LR 139; N Eastaway, 'Prosecution Polemics' [1998] Tax P 26; JT Newth, 'Issue Unresolved' (1998) 141 Tax 148; J Gwyer, 'Hansard Exposed' (1998) 141 Tax 55; C Wilmot, 'Modernising Hansard' (1999) 143 Tax 469; R Rhodes, 'The Indivisibility of the Crown' (1998) 148 NLJ 747; see Inland Revenue's Response, 'Prosecutions and the "Hansard" Procedure' (1998) 35 IRTB 544

[344]This issue was deliberated in *R v Allen* [2001] UKHL 45; [2002] 1 AC 509; considering the statement provided in HC Deb, 18 October 1990, Col 882W; However, a full disclosure was not made in this case. Discussed in JT Newth, 'Out of Time and Out of Court' (1997) 140 Tax 226; J Hilliard, 'Article 6 and the Scope of the Right not to Incriminate Oneself in the Tax Field' (2002) 6 BTR 470; J Hilliard, 'The Hansard Procedure and the Right against Self-Incrimination: Recent Developments' (2003) 1 BTR 6; A Sharp, 'Hansard and Human Rights' (2002) 149 Tax 229; Misgivings were also expressed in evidence submitted to Keith Committee, *Keith Committee Report on the Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983) paras. 22.2.1-22.2.2

[345] HC Deb, 7 November 2002, Vol 392, Col784W; C Oates, 'The New Hansard Procedure: Business As Usual?' (2002) 670 Tax J 5; C Jowitt, J Kellett, 'New Look Hansard' (2003) 150 Tax 317

[346] [2003] EWCA Crim 2256; [2003] All ER 559

[347] Police and Criminal Evidence Act 1984, ss.67(9), 78; Ormerod also considered the compatibility of s76 with the Hansard procedure D Ormerod, 'Hansard Invitations and Confessions in the Criminal Trial' (2000) 4 E&P 147

[348] R Percival, 'Cheating the Revenue - Investigation by Inland Revenue Officers – "Hansard Procedure"' (2003) 8 Arch News 1 ; C Barsby, DC Ormerod, 'Evidence: Police and Criminal Evidence Act 1984 ss.67(9), 78 - Defendants Suspected of Tax Fraud' [2003] Crim LR 883; C Thomson, 'What Now for Hansard?' (2003)

Eventually, the procedure was replaced with Code of Practice 9,[349] prompting assessments,[350] and later a refinement, of the new process.[351] Recent studies outline the current investigatory powers and procedures of HMRC,[352] its duties to taxpayers,[353] and its ability to collect unpaid tax and penalties, following the resolution of a civil or criminal investigation.[354] Indeed, several comprehensive studies have been produced.[355]

Less attention has been paid to the decision itself; in other words, the content of the enforcement policy. Although, the former Inland Revenue's selective prosecution policy was previously considered and approved by both an independent inquiry and the judiciary,[356] who confirmed that the Revenue is entitled to select cases for prosecution based on an 'indicia of

706 Tax J 9; A Watters, J Levy, 'Hybrid Hansard' (2003) 152 Tax 101; J Bullock, P Harrison, 'What Now for Hansard?' (2003) 24 TPTN 169; RW Maas, 'Don't Over-React!' (2003) 152 Tax 27; D Hartnett, 'Hansard Procedure' (2003) 152 Tax 214; D Hill, S Camm, 'Hansard v 2.0: The Tape is Running' (2005) 154 Tax 346; C Oates, E Dwan, 'Hansard in Turmoil' (2003) 151 Tax 558

[349] HM Revenue & Customs, 'COP 9 - HM Revenue & Customs Investigations Where We Suspect Tax Fraud' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494808/COP9_06_14.pdf > accessed 30th June 2016 (current version)

[350] M Raphael, 'A Requiem for Hansard' (2005) 807 Tax J 11; C Oates, E Dwan, 'Hansard RIP' (2005) 155 Tax 686; H Carvill, 'Alas, Poor Hansard I Knew Him Well…' (2005) 37 Accountancy Irl 64; S Camm, K Hall, 'The Death of the Hansard Approach' [2005] Tax A 16

[351] A Wells, 'The Contractual Disclosure Facility' (2012) 33 TPTN 1; P Berwick, 'The New Contractual Disclosure Facility' (2012) 1111 Tax J 14; H Adams, J Jones, 'Tricky Business' (2015) 175 Tax 18

[352] A Craggs, C Christofi, 'Beware the Knock' (2017) 180 Tax 11; J Collins, 'HMRC Powers and Approach Part 2: Discovery' (2010) 4 PCB 254; J Quin, R Shiers, 'HMRC Powers and Approach Part 3: Enquiries and Settlements' (2010) 5 PCB 308; R McCann, M Howard, 'A Step Change in HMRC Powers' (2008) 29 TPTN 121; J O'Donnell, 'Vat Investigation' (2007) 57 VAT Dig 1; J Collins, M Piggin, 'Finance Act Notes: Criminal Investigations and HMRC Powers – Sections 82-87 and Schedule 22' (2007) 5 BTR 562; S Ramage, 'Criminal Powers and the HMRC' (2006) 167 Crim Law 6; D Dixon, 'Modernising Information Powers' (2006) 863 Tax J 5; Recently, discussion has focused on the interaction of HMRC's powers with Legal Professional Privilege, see R Mitchell, M Stockdale, 'The Crime-Fraud Exception in Anglo-American Jurisprudence: Comparative Dimensions and Optimal Reform Proposals in the Taxation Context' (2017) 1 BTR 109; D Dixon, 'Legal Professional Privilege and Advice from Non-Lawyers' (2010) 1 BTR 83

[353] Including the duty to maintain confidentiality; A Redston, S Marguilies, 'Confidentiality and Privacy in Tax Cases' (2017) 1353 Tax J 8; O Mba, 'Transparency and Accountability of Tax Administration in the UK: The Nature and Scope of Taxpayer Confidentiality' (2012) 2 BTR 187; M Italia, 'Taxpayer Privilege and the Revenue Authorities' Obligation to Maintain Secrecy of Taxpayer Information: Recent Developments in Australia, and a Comparison with New Zealand, the United Kingdom and the United States' (2011) 17 NZJTLP 151

[354] Either through the Proceeds of Crime Act, see P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353; J Rhodes, 'Proceeds of Crime Act 2002 and Tax Evasion' (2004) 1 PCB 51; Or through other debt recovery powers, see H Adams, F Goldberg, 'HMRC's Powers to Collect Tax Debts' (2015) 1251 Tax J 14; P McNeill, S McNeill, 'Upsetting the Apple Cart: HMRC and Tax Debt? Part 1' (2012) 24 QA 6; P McNeill, S McNeill, 'Upsetting the Apple Cart: HMRC and Tax Debt? Part 2' (2012) 25 QA 6; see also unexplained wealth orders contained in Criminal Finances Act 2017, s1, inserting a new s362A into Proceeds of Crime Act 2002, J Grimes, J Blunden, 'Unexplained Wealth Orders' (2017) 1355 Tax J 12; On penalties see C Herald, 'Vat Penalties' (2013) 100 VAT Dig 4; P Berwisk, R Shiers, 'HMRC Powers and Approach: Part 1: The New Penalty Regime' (2010) 3 PCB 205

[355] M McLaughlin, *HMRC Investigations Handbook 2015/16* (Bloomsbury Professional, 2016); G Rowell, J Flood, *Tax Penalties* (Sweet & Maxwell, 2016); R Maas, *Guide to Taxpayers' Rights and HMRC Powers* (4th edn, Bloomsbury Professional, 2016)

[356] Keith Committee, *Report on Enforcement of Powers of Revenue Departments*, (Cmnd 8822, 1983); *R v IRC, ex p. Mead and Cook* [1993] 1 All ER 772

heinousness', or the seriousness of the tax fraud, neither the executive nor the judiciary has reconsidered the enforcement policy for over twenty years, despite significant changes.[357] A similar pattern may be observed in legal literature, where research has rarely assessed its content or practical application.[358] The lack of legal research may be attributed to the interdisciplinary nature of this endeavor. The enforcement of tax law has long been a popular area of research in non-legal disciplines, where economic, sociological and psychological research,[359] has comprehensively attempted to measure the extent,[360] methods,[361] and factors influencing tax evasion,[362] with the aim of establishing optimal enforcement practice. This has led to research considering the impact of specific factors enforcement can influence – the probability of detection[363] and the penalties faced if caught.[364] Empirical literature has attempted to measure the differential impact of criminal prosecutions and civil penalties on noncompliance, suggesting that more prosecutions are necessary to deter tax evaders, both in

[357] H Travers, 'Current Issues in HMRC Criminal Investigations & Prosecutions' (IBC Tax Investigations Conference, May 2010) <http://www.bcl.com/downloads/HarrysTaxTalk25May2010.pdf> p.1

[358] The exceptions are, KD Deane, 'Tax Evasion, Criminality and Sentencing the Tax Offender' (1981) 21(1) Brit J Criminol 47; AK Jain, 'Income Tax Penalty and Prosecution Provisions: A Comparison of the UK and Indian Experiences' (1987) 10 BTR 353; D Cook, *Rich Law, Poor Law: Different Responses to Tax & Supplementary Benefit Fraud* (OUP 1989); J Roording, 'The Punishment of Tax Fraud' (1996) Apr Crim LR 240; H Travers, 'Current Issues in HMRC Criminal Investigations & Prosecutions' (IBC Tax Investigations Conference, May 2010) <http://www.bcl.com/downloads/HarrysTaxTalk25May2010.pdf>; K Weidenfeld, A Spire, 'Punishing Tax Offenders in France and Great Britain: Two Criminal Policies' (2017) 24 JFC 574; R de la Feria, 'Tax Fraud and Selective Law Enforcement' (2020) 47(2) Journal of Law and Society 240

[359] For a summary of their respective contributions see SB Long, JA Swingen, 'Taxpayer Compliance: Setting New Agendas for Research' (1991) 25 Law & Soc'y Rev 637, 652; for a review of economic literature see D Dharmapala (ed), *The Economics of Tax Avoidance and Evasion* (Edward Elgar 2017); J Slemrod, 'Tax Compliance and Enforcement: An Overview of New Research and Its Policy Implications' in AJ Auerbach, K Smetters, *The Economics of Tax Policy* (OUP 2017)

[360] M Pickhardt, A Prinz, *Tax Evasion and The Shadow Economy*, (Edward Elgar, 2012); EL Fiege (ed), *The Underground Economies: Tax Evasion and Information Distortion* (CUP 1989) ; DJ Pyle, *Tax Evasion and the Black Economy* (Palgrave 1989)

[361] JG Gravelle, *Tax havens: International Tax Avoidance and Evasion* (2015, Washington DC: Congressional Research Service)

[362] A Lewis (ed), *Psychology and Economic Behaviour* (Cambridge University Press, 2008); E Kirchler, *The Economic Psychology of Tax Behaviour* (Cambridge University Press, 2007); MG Allingham, A Sandmo, 'Income Tax Evasion: A Theoretical Analysis' (1972) 1 Journal of Public Economics 323; J Slemrod, S Yitzhaki, 'Tax Avoidance, Evasion, and Administration' (2002) 3 Handbook of Public Economics 1423; JA Roth, *Taxpayer Compliance, Volume 2: Social Science Perspectives* (University of Pennsylvania Press, 1989); IW Martin, M Prasad, 'Taxes and Fiscal Sociology' (2014) 40 Annual Review of Sociology 331; see generally H Khlif, I Achek, 'The Determinants of Tax Evasion: A Literature Review' (2015) 57(5) Int JLM 486

[363] B Erard, 'The Influence of Tax Audits on Reporting Behaviour' in J Slemrod, *Why People Pay Taxes: Tax Compliance and Enforcement* (University of Michigan Press 1992); Some suggest this is more important than the penalties imposed KN Varma, AN Doob, 'Deterring Economic Crimes: The Case of Tax Evasion' (1998) 40 Canadian Journal of Criminology 165

[364] K Devos, 'Do Penalties and Enforcement Measures Make Taxpayers More Compliant? – The View of Australian Tax Evaders'' (2014) 5 Journal of Business and Economics 265; M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493; K Devos, 'An Investigation Into Australian Personal Tax Evaders- Their Attitudes Towards Compliance And The Penalties For Non-Compliance' (2009) 19 Revenue Law Journal 1; SNS Obid, 'The Influence of Penalties on Taxpayers' Compliance: A Comparison of the Theoretical Models' (2013) 12 International Journal of Economics, Management and Accounting 2462

terms of the economic benefits[365] and increased perceptions of social justice they provide.[366] However, owing to their disciplinary orientation, the results of these studies are not systematically used to formulate an appropriate enforcement policy, suggesting that the results needed to be reconciled with the wider legal framework.[367] This is unfortunate, as the findings of this research could be used to construct an optimal enforcement policy, and for the purposes of this thesis, a benchmark against which current practice may be evaluated. Of the few comprehensive studies in this area, Braithwaites' proposal for a system of 'responsive regulation' in tax enforcement, where a pyramid of sanctions are used depending on the receptiveness of the taxpayer, is notable in its holistic consideration of this literature in constructing a clear enforcement policy,[368] and its considerable impact on tax authorities.[369] However, Freedman draws attention to the lack of legal safeguards contained in this model, required to protect taxpayers and implement the Rule of Law,[370] demonstrating the importance of interdisciplinary studies.

Additionally, very few studies have sought to analyse the practical effect of the enforcement policy and practice adopted by HMRC. Both the IRS and HMRC release data on their enforcement actions,[371] and their practices are periodically reviewed by independent

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[365] L Leaderman, 'The Interplay Between Norms and Enforcement in Tax Compliance' (2003) 64 Ohio St LJ 1453; AH Plumley, 'The Impact of the IRS on Voluntary Tax Compliance: Preliminary Empirical Results' (2002) 95 National Tax Association 355; N Friedland, S Maital, A Rutenburg, 'A Simulation Study of Income Tax Evasion' (1978) 10 Journal of Public Economics 107

[366] M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493, 508; P Leighton, 'Fairness Matters—More than Deterrence' (2010) 9 Criminology & Public Policy 525; cf LP Feld, BS Frey, 'Deterrence and Tax Morale: How Tax Administrations and Taxpayers Interact' (2003) 3 OECD Papers (Special Issue on Taxation) 10; J Andreoni, B Erard, J Feinstein, 'Tax Compliance' (1998) 36 Journal of Economic Literature 818

[367] A few legal scholars have attempted to address this question in the US and Australia see M Doran, 'Tax Penalties and Tax Compliance' (2009) 46 Harv J on Legis 111; KD Logue, 'Optimal Tax Compliance and Penalties When the Law is Uncertain' (2007) 27 Va Tax Rev 241; K Devos, 'Penalties and Sanctions for Taxation Offences in Selected Anglo-Saxon Countries: Implications for Taxpayer Compliance and Tax Policy' (2004) 14 Revenue LJ 32; RD Schwartz, S Orleans, 'On Legal Sanctions' (1976) 34 University of Chicago Law Review 274

[368] Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, 2003); Incorporating regulatory theory, including the theory of responsive regulation developed by J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press 1985); I Ayres, J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992); J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 UBC L Rev 475; see also V Braithwaite (ed), *Special Issue on Responsive Regulation* (2007) 1 Law & Policy 1

[369] Ibid at p.6; see also K Murphy, 'Moving Forward Towards a More Effective Model of Regulatory Enforcement in the Australian Tax Office' (2004) 24 BTR 603

[370] See J Freedman, 'Responsive Regulation, Risk, and Rules: Applying the Theory to Tax Practice' (2012) 44 UBC Law Review 627

[371] IRS, 'SOI Tax Stats – Criminal Investigation Program, by Status or Disposition – IRS Data Book Table 24' (Last Updated 29 June 2020) <https://www.irs.gov/statistics/soi-tax-stats-criminal-investigation-program-by-status-or-disposition-irs-data-book-table-24> accessed 18th April 2021; HM Revenue & Customs, 'HMRC Quarterly Performance Report: October to December 2020' (4 February 2021)

inquiries.[372] However, research has not comprehensively explored the implications of this data, in terms of the effectiveness of the enforcement policy. This is a pressing concern, as the tension between the problems inherent in legislative frameworks in the UK, once only used for the most serious of cases, and prosecutorial targets to be met by the revenue, caused HMRC to prosecute lower-value cases to fulfil their objectives.[373] This led to inconsistency in the application of law and policy, which must be investigated thoroughly in order to restore public confidence in the system.[374] However, very few researchers have investigated the direct issues caused by the implementation of enforcement policies. Notable exceptions include Freedman, who investigated the scope of the Revenue's powers of discretion,[375] Deane, who analysed the enforcement policy and decisions made by the Board of Inland Revenue,[376] and Cook, who compared the prosecution of tax evasion offences to those for benefit fraud.[377] Yet, these studies are not contemporary and thus, do not evaluate the current use of the enforcement policy since the introduction of targets.[378] More recently, de la Feria has lamented the modern approach to addressing VAT fraud owing to the preoccupation with managing the costs of fraud, rather than suppressing the underlying criminal activity;[379] an observation that applies equally to other areas of tax enforcement. The US is less transparent about its selective prosecution policy. As such, the need to consider these issues is less apparent in this

<https://www.gov.uk/government/publications/hmrc-quarterly-performance-report-october-to-december-2020> accessed 12th April 2021.

[372] For instance see, National Audit Office, *HM Revenue & Customs 2016-17 Accounts* (Report by the Comptroller and Auditor General, National Audit Office 2017); Committee of Public Accounts, *HM Revenue & Customs Performance in 2015-16*, (HC 2016-17, 712-I); National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I); National Audit Office, *Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 1029-I); US Government Accountability Office, *2016 Filing Season: IRS Improved Telephone Service but Needs to Better Assist Identity Theft Victims and Prevent Release of Fraudulent Refunds* (GAO-17-186); National Taxpayer Advocate, *Annual Report to Congress 2016* < https://taxpayeradvocate.irs.gov/reports/2016-annual-report-to-congress/full-report> accessed 23 November 2017

[373] National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) para 16

[374] K Murphy, 'Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance' (2005) 32(4) JL & Soc 562, 563; *cf* R Mason, L Calvin, 'Public Confidence and Admitted Tax Evasion' (1984) 37(4) Nat'l Tax J 489

[375] J Freedman, J Vella, 'HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion' in C Evans, J Freedman and R Krever (eds), *The Delicate Balance - Tax, Discretion and the Rule of Law* (IBFD 2011) ; See also M Gammie, J Kay, 'Taxation, Authority and Discretion' (1983) 4 Fiscal Studies 46

[376] KD Deane, 'Tax Evasion, Criminality and Sentencing the Tax Offender' (1981) 21(1) Brit J Criminol 47; See also AK Jain, 'Income Tax Penalty and Prosecution Provisions: A Comparison of the UK and Indian Experiences' (1987) 10 BTR 353

[377] D Cook, *Rich Law, Poor Law: Different Responses to Tax & Supplementary Benefit Fraud.* (OUP 1989); D Cook, *Criminal and Social Justice* (Sage Publications, 2006)

[378] Weidenfeld and Spire have explored the implementation of the enforcement policy in the UK since the change in approach, but do not aim to evaluate the effectiveness of the policy. K Weidenfeld, A Spire, 'Punishing Tax Offenders in France and Great Britain: Two Criminal Policies' (2017) 24 JFC 574

[379] R de la Feria, 'Tax Fraud and Selective Law Enforcement' (2020) 47(2) Journal of Law and Society 240

jurisdiction. Nevertheless, researchers have considered how enforcement policies are applied,[380] highlighting a discrepancy between policy and practice by examining selective or politically motivated prosecutions.[381]

Finally, at the time of writing, there is only one comprehensive study contemporaneously exploring the law and enforcement policies governing tax evasion in the UK. Alldridge's study is a rare exception providing a comprehensive analysis of the measures used to combat tax evasion in the UK.[382] However, significant attention is not devoted to evaluating the use of these measures.[383] Further, as Alldridge's research merely explores tax evasion legislation and enforcement practice in the UK, there is still a lack of comparative studies in this area. This is a significant oversight, as the UK Government often looks for insights regarding good practice in tax evasion law and enforcement practice from other jurisdictions, particularly the US.[384]

2.5 Conclusion

As demonstrated by the preceding discussion, there is a shortage of literature on tax evasion law and enforcement practice in the UK. Within this small body of literature, researchers have explored the nature of tax evasion, including its relationship to other financial crimes, and have assessed legal measures developed to combat it at both the international and domestic level. In addition, a few researchers have explored the content and operation of enforcement policies, used to proscribe the use of the law in this area. Nonetheless, the fundamental weakness of this literature is the lack of comprehensive studies dedicated to analysing and evaluating the totality of measures employed to address tax evasion. Alldridge's recent study partially addresses this gap, by providing a comprehensive study of the UK legal framework.[385] However, there remains a lack of evaluative and comparative studies on this financial crime. This thesis aims to address this gap by drawing on the extensive experience of the US, and the thoughtful

[380] See generally BE Waguespack, 'Federal Criminal Tax Investigations (The Decision to Prosecute)' (1990) 37 La BJ 421; N Abrams, 'Internal Policy: Guiding the Exercise of Prosecutorial Discretion' (1971) 19 UCLA L. Rev. 1; RS Frase, 'The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion' (1980) 47(2) The University of Chicago Law Review 246

[381] AB Poulin, 'Prosecutorial Discretion and Selective Prosecution: Enforcing Protection after United States v Armstrong' (1996) 34 Am Crim L Rev 1071; Y Sapir, 'Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal' (2003) 19 Harv. BlackLetter LJ 127

[382] P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017)

[383] Ibid; Only four pages are dedicated to the question, 'Should more alleged tax evaders be prosecuted?' see p189-192

[384] Public Accounts Committee, *Oral evidence: Increasing the effectiveness of tax collection: a stocktake of progress since 2010* (HC 2014-15, 974-I) p36; The most comprehensive is A Mumford, *Taxing Culture: Towards A Theory of Tax Collection* (Socio-Legal Studies Series, Ashgate, 2002) although this work is not up to date, nor reform orientated.

[385] P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017)

treatment given to addressing tax evasion in this jurisdiction, to evaluate the effectiveness of UK anti-tax evasion law and its enforcement.

Methodology

2.6 Introduction

The second part of this chapter provides an explanation of, and justification for, the methodology and methods adopted for this thesis. The term methodology refers to the overarching research strategy,[386] the theoretical and philosophical bases of which determine the conceptualisation of law, the nature of acceptable research questions and the data used to answer them.[387] The research methodology thus determines the appropriate methods, or techniques, used to obtain and analyse data, in accordance with the stated standards and values of the methodology.[388] In light of the research aims and questions, the research for this thesis will be conducted using the socio-legal methodology, supported by doctrinal analysis and a comparative method.

2.7 Socio-legal Methodology

The socio-legal methodology is fundamental to this research owing to its ability to recognise law to be an essential aspect of social and political structures,[389] and consequent attempts to understand the construction, organisation and operation of law in its social, historical, economic and political contexts.[390] Within this approach, law is not perceived to be a relatively autonomous field, capable of discovery solely through its own sources detailing rules, principles and procedures,[391] but rather as an 'inevitably social phenomenon – representing the product of collective thought and action' and thus affected by external social influences.[392] This approach is essential for this thesis, as the research will adopt an instrumental view of law, whereby law is conceived as a pragmatic instrumental tool seeking to achieve the implementation of policy goals,[393] including encouraging or limiting certain behaviours for

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[386] M Henn, M Weinstein, N Foard, *A Critical Introduction to Social Research* (2nd edn, Sage Publications, 2009) p.10
[387] D Watkins, M Burton (eds), *Research Methods in Law* (Routledge, 2013) p.2
[388] M Henn, M Weinstein, N Foard, *A Critical Introduction to Social Research* (2nd edn, Sage Publications, 2009) p.10
[389] P Thomas, 'Curriculum Development in Legal Studies' (1986) 20 Law Teach 10, 12
[390] P Hillyard, J Sim, 'The Political Economy of Socio-Legal Research' in P Thomas (ed), Socio-Legal Studies (Ashgate Publishing, 1997) 45
[391] C McCrudden, 'Legal Research and the Social Sciences' (2006) 122 LQR 632, 635; citing D Ibbetson, 'Historical Research in Law' in P Cane, M Tushnet (eds), *Oxford Handbook of Legal Studies* (OUP, 2003) p864
[392] D O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in L Cahillane, J Schweppe, (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016) p110
[393] H Gribnau, 'Legislative Instrumentalism vs Legal Principles in Tax Law' (2012) 3 IELTR 9, 18

social or economic purposes.[394] Consequently, within this conception, law is evaluated in terms of its success or failure in achieving its intended results.[395] As the premise of an instrumentalist view is that the production of these objectives is external to the law itself, this thesis must adopt a socio-legal approach, which adopts a socially constructed rather than internally constituted conception of law, and subsequently provides the means to evaluate the law in terms of its external outcomes.[396]

Socio-legal research takes an external or outsider perspective,[397] aiming to shed light on the operation of law in action or 'the practical impact of how law actually functions in society.'[398] A socio-legal approach must be adopted for this thesis, as the research aims to ascertain the extent to which the legislation pertaining to tax evasion in the UK is effective in practice. In other words, the research will utilise a socio-legal approach to assess external effectiveness, or the extent to which the legislation achieves its aims within the context it is designed to function.[399] This would not be possible with the adoption of a doctrinal methodology, which adopts an internal or insider perspective, analysing legal rules and principles from the perspectives of those working within the system.[400] In adopting this perspective, the focus is on ascertaining and understanding the content rather than the effect of legal rules;[401] an understanding which is gained solely through the analysis of authoritative texts, largely

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[394] A Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 Buff L Rev 973, p973-4

[395] S Taekema, W van der Burg, 'Towards a Fruitful Cooperation between Legal Philosophy, Legal Sociology and Doctrinal Research: How Legal Interactionism May Bridge Unproductive Oppositions' in R Nobles, D Schiff, *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Ashgate, 2014) p141. As Priest notes, 'if a legal rule is viewed as an instrument for imparting a beneficial societal effect, expressing a value, or otherwise achieving the public interest, it is surely as important to study the societal effect, the value, and the definition of the public interest, as it is to study the legal mechanism employed to achieve it.' GL Priest, 'The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards' (1993) 91 Mich L Rev 1929, 1932

[396] S Taekema, W van der Burg, 'Towards a Fruitful Cooperation between Legal Philosophy, Legal Sociology and Doctrinal Research: How Legal Interactionism May Bridge Unproductive Oppositions' in R Nobles, D Schiff, *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Ashgate, 2014) p141

[397] Cotterrell advocates the rejection of this 'familiar dichotomy' R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 Journal of Law and Society 171, 188

[398] M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, (Pearson Education, 2007) 152

[399] W Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7 Utrecht L Rev 147, 148

[400] C McCrudden, 'Legal Research and the Social Sciences' (2006) 122 LQR 632, 633; Posner highlights that it is the 'internal perspective of the legal profession rather than that of the university' R Posner, 'Legal Scholarship Today' (2001) 115 Harv L Rev 1312, 1315

[401] D O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in L Cahillane, J Schweppe, (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016) p116

consisting of primary legal sources.[402] This reliance on legal doctrine means that the doctrinal methodology cannot be employed to determine the law's external effectiveness, for 'the law itself possesses neither an internal metric nor a methodology for determining effects.'[403]

The attempt to determine the external effectiveness of the legislation requires the ascertainment of both the content and practical application of extra-statutory enforcement policies, which provide exemption from criminal prosecution.[404] The adoption of a socio-legal methodology is essential, as a purely doctrinal account of the legal rules in this area would provide only a partial, and misleading, interpretation of the action taken to combat this crime and its efficacy.[405] In furtherance of this objective, the research also aims to assess the practical impact of enforcement policies on individuals, specifically, the basis and application of discretion in the current use of enforcement policies, and its effect on different groups in society. This is an important persistent theme of socio-legal research,[406] largely currently overlooked in this context.[407]

Additionally, the socio-legal methodology must be employed to ascertain the relevant context of the legislation, including the social, political and economic influences that affected and indeed, shaped the creation of law.[408] Where relevant, this thesis will explore the context of the legislation pertaining to tax evasion to produce a deeper understanding of the legislation itself.[409] Understanding the historical context of the legislation will enable the researcher to avoid the 'parochialism of the present' whereby potential solutions are presented as a favourable response to the identified problem, without consideration of similar failed past

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[402] DW Vick, 'Interdiciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163, 178; 'the question which cannot legitimately be answered by reference to a statute or judgement lies outside the doctrinal gaze' A Bradney, 'Law as a Parasitic Discipline' (1998) 25(1) Journal of Law and Society 71, 76

[403] GL Priest, 'The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards' (1993) 91 Mich L Rev 1929, 1933

[404] UK - HM Revenue & Customs, 'Guidance: HMRC Policy' (December 2015) <http://www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm> accessed 15th March 2016; HM Revenue & Customs, 'COP 9 - HM Revenue & Customs Investigations Where We Suspect Tax Fraud' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494808/COP9_06_14.pdf > accessed 30th June 2016; US - IRS Manual, Part 38, Ch3, s1 available from <https://www.irs.gov/irm/part38/irm_38-003-001.html> accessed 30th June 2016

[405] M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research,* (Pearson Education, 2007) 126

[406] Ibid at p143

[407] See the literature review presented in the first half of this chapter.

[408] 'Socio-legal approaches consider not only legal texts, but also the contexts in which they are formed, destroyed, used, abused, avoided and so on; and sometimes their subtexts.' A Perry-Kessaris, 'What Does it Mean to Take a Socio-Legal Approach to International Economic Law?' in A Perry-Kessaris, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge, 2013) p6

[409] DR Harris, 'The Development of Socio-legal Studies in the United Kingdom' (1983) 3 Legal Stud 315, 319

attempts.[410] Further, examining the law in context will assist the overarching research objective of making the law more effective and responsive, as it will enable the researcher to ground the examination of the operation of the legislation and enforcement policies in their specific cultural context, permitting the consideration of practical limitations and opportunities.[411]

The realisation of these aims involves a distinct commitment to interdisciplinarity, or the study of law through the theoretical insights, methods and techniques of other social sciences, which are integrated into the research.[412] These methods are not only obtained from the discipline of sociology,[413] but also, from a wide range of disciplines in the social sciences and humanities.[414] The aim of using a combination of methods drawn from other social sciences is to 'transcend some of the theoretical and methodological limitations of the disciplines in question,' creating a 'basis for developing a new form of analysis.'[415] As noted above, the researcher intends to use the socio-legal methodology and consequent interdisciplinary research methods, to generate data capable of assessing the effectiveness of the law pertaining to tax evasion as it operates in practice - an assessment that must be made primarily using non-legal data.[416] Accordingly, the insights and methods generated by other social sciences will be used in part for substantive analysis, but predominantly empirically, as a tool for data collection.[417] This reflects the unilateral research design, where the research questions are legal in orientation but, in part, can only be answered using data generated by other disciplines.[418]

The researcher must draw on a more extensive range of sources than required for traditional legal research,[419] using whichever methods are most likely to generate data relevant to the problem at hand.[420] A limitation of this thesis will be that the researcher is unable to collect her

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[410] Ibid at p332
[411] P Selznick, 'Law in Context Revisited' (2003) 30(2) Journal of Law and Society 177, 181
[412] DW Vick, 'Interdiciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163, 165
[413] 'Use of the word 'sociological' does not imply adherence to the distinct methods, theories or outlook of the academic discipline called sociology.' R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 Journal of Law and Society 171, 182
[414] DR Harris, 'The Development of Socio-legal Studies in the United Kingdom' (1983) 3 Legal Stud 315, 315
[415] R Banakar, M Travers, 'Law, Sociology and Method' in R Banakar, M Travers (eds), *Theory and Method in Socio-Legal Research* (Bloomsbury, 2005) p5
[416] W Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7 Utrecht L Rev 147, 149
[417] R Banakar, M Travers, 'Introduction' in R Banakar, M Travers (eds), *Theory and Method in Socio-Legal Research* (Bloomsbury, 2005) pxi
[418] W Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7 Utrecht L Rev 147, 151
[419] M McConville, WH Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 5; M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research,* (Pearson Education, 2007) 129
[420] A Bradshaw, 'Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods' in P Thomas (ed), *Socio-Legal Studies* (Ashgate Publishing, 1997) 99

own primary data.[421] However, the researcher will draw on secondary data generated by research in other disciplines to assess the extent to which the law pertaining to tax evasion is effective. This data will include descriptive statistics from official reports, providing the yield from civil penalties and prosecution rates for tax evasion offences. The researcher will also use this data to analyse the consistency of the application of enforcement policies. In order to evaluate the content of these policies, the research will draw on psychological, sociological, and economic insights into factors affecting taxpayer compliance.[422] This will permit broader considerations of the non-legal factors influencing the content of enforcement policies and will expand the conceptual framework within which they can be evaluated.[423] Finally, this thesis will draw on insights gained from historical and political research, to establish the relevant context of the current legislative frameworks and enforcement policies.

The researcher will not generate her own data. However, throughout the research process, she must still consider possible dangers that could limit the veracity of the research. These include the danger of taking alternative interpretations of data arising from her pre-existing disciplinary orientation,[424] and/or producing poor quality analyses because of her inexperience with these methods.[425] To counter this, the researcher will endeavour to understand other research methods, their limitations and inherent biases, and evaluate their contributions accordingly.[426] In addition, few ethical issues can arise from this research, as the sources used for this research are publicly available.[427] However, the researcher must engage in objective research, ensuring the correct interpretation and acknowledgement of all sources used.[428]

2.8 Method of Doctrinal Analysis

The research methodology will be complemented by doctrinal analysis, a method drawn from the doctrinal legal research approach. Doctrinal legal research represents a traditionally legal research approach, both stemming from and utilising the core research skills employed in legal

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[421] However, the research will utilise HMRC commissioned studies; for an overview, see the literature review presented in the second half of this chapter.
[422] For a summary of their respective contributions see SB Long, JA Swingen, 'Taxpayer Compliance: Setting New Agendas for Research' (1991) 25 Law & Soc'y Rev 637, 652
[423] DW Vick, 'Interdiciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163, 181
[424] W Hong Chui, 'Quantitative Legal Research' in M McConville, WH Chui, *Research Methods for Law* (Edinburgh University Press, 2007) p60
[425] F Cownie, A Bradney, 'Socio-legal Studies: A Challenge to the Doctrinal Approach' in D Watkins, M Burton (eds), *Research Methods in Law* (Routledge, 2013) 37
[426] GD Brewer, 'The Challenges of Interdisciplinarity' (1999) 32 Policy Sciences 327, 329; DW Vick, 'Interdiciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163, 185
[427] M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, (Pearson Education, 2007) 63
[428] Ibid p172

practice.[429] The aims of this thesis require this approach to be utilised, not in isolation, but as 'part of a broader attempt to understand law.'[430] Thus, this thesis will employ doctrinal analysis, which is a method used to simply 'identify, analyse and synthesise the content of the law,' in order to establish a verifiable statement of the law on a particular topic.[431] Doctrinal analysis will be used to provide an exposition of the law pertaining to tax evasion in each jurisdiction. This will provide an essential foundation to assessing its efficacy.[432]

The use of doctrinal analysis is a necessity, as one of the research questions concerns the aim of ascertaining the law pertaining to tax evasion in each jurisdiction. However, this research will not adopt a doctrinal methodology, as the primary aim of this thesis is to assess the legislation's external effectiveness, or its ability to achieve its aims in practice, which, as explained above, can only be determined through the adoption of a socio-legal methodology. In contrast, a doctrinal methodology aims to understand, explain and evaluate law through authoritative texts, largely consisting of primary legal sources.[433] In consequence, a doctrinal approach could only assess the legislation's internal effectiveness or the 'consistency and coherency of the legal norms and their definitions.'[434] Although the research will assess internal effectiveness, it is in furtherance of the ultimate aim of assessing external effectiveness; in order for legislation to realise its goals, legislation must be clear, coherent and compatible with other instruments.[435] Therefore, the research must adopt a socio-legal, rather than a doctrinal, methodology as in spite of the need to assess doctrinal coherence, the research's primary aim is to assess whether tax evasion law, *as it operates in practice*, is effective. Even though the use of doctrinal analysis contributes to this aim, the ultimate research goal can only be fully realised through the adoption of a socio-legal research methodology.

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[429] 'The doctrinal research method developed intuitively within the common law – a research method at the core of practice' T Hutchinson, N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 83

[430] 'The work does not depend on doctrinal theory for its theoretical underpinning' A Bradney, 'Law as a Parasitic Discipline' (1998) 25(1) Journal of Law and Society 71, 72

[431] T Hutchinson, 'Doctrinal Research: Researching the Jury' in D Watkins, M Burton (eds), *Research Methods in Law* (1st edn, Routledge, 2013) p.9-10

[432] As Hutchinson notes, before the researcher can begin to study the operation of law, the researcher must identify and 'verify the authority and status of the legal doctrine being examined,' ibid at p.7.

[433] 'Legal doctrine alone cannot determine effects or define either values or the public interest' GL Priest, 'The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards' (1993) 91 Mich L Rev 1929, 1933

[434] W Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7 Utrecht L Rev 147, 148; see also M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research,* (Pearson Education, 2007) 162

[435] W Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7 Utrecht L Rev 147, 148; cf H Gribnau, 'Legislative Instrumentalism vs Legal Principles in Tax Law' (2012) 3 IELTR 9

Doctrinal analysis requires the researcher to undertake a two-stage process, which involves locating the relevant legal sources and then interpreting and analysing their content.[436] In the first stage, the researcher must locate all relevant primary legal sources using their legal research skills. These include sources of law, such as legislation and related judicial precedent, and aids to their interpretation, such as Hansard. This process not only requires the researcher to obtain these sources but also, to check for any updates relating to their currency or status and for any recent judicial consideration.[437] In the second stage, the researcher must carry out a close reading of these sources,[438] carefully analysing 'every phrase, word or punctuation mark.'[439] The researcher must analyse the text by drawing on their existing legal knowledge, including the rules of precedent and statutory interpretation, and by employing reasoning methods, such as deduction, induction and analogy.[440] The final aspect of this process is where the researcher synthesises their findings and attempts to reveal 'a system of underlying principles ordering legal rules.'[441] This is essential, as the sources of law alone cannot provide a complete picture of the law in a particular area; the researcher must endeavour to consider their application to factual situations and must search for the rational legal principles that underpin this process.[442]

Although the aim is to establish a verifiable statement of the law pertaining to tax evasion in each jurisdiction,[443] this is not a purely descriptive exercise; the method of doctrinal analysis

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[436] T Hutchinson, N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 110

[437] I Dobinson, F Johns, 'Qualitative Legal Research' in M McConville, WH Chui, (eds) *Research Methods for Law* (Edinburgh University Press, 2007) p.26

[438] M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, (Pearson Education, 2007) p.64

[439] W Twinning, *Blackstone's Tower: The English Law School* (The Hamlyn Lectures Forty-Sixth Series, Sweet & Maxwell, 1994) p.92

[440] T Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 ELR 130, 132; see also M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education, 2007) p.90. Deductive reasoning refers to the process of examining the given rule in a relevant statutory provision, assessing the situation in question, and then determining whether the rule applies. Conversely, inductive reasoning refers to the process of examining the decisions of specific cases to formulate a general rule or proposition. The researcher must also employ tools of analogy in suitable instances. For example, the principles and outcomes of previously decided cases may be applied to newer cases if material similarities are present, ibid T Hutchinson, N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 111.

[441] This is achieved by creating a 'question set' where the researcher logically structures material facts relevant to the application of a discovered legal rule, allowing the analysis of the application of the rule to a new factual problem. M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, (Pearson Education, 2007) p.65-66.

[442] P Chynoweth, 'Legal Research' in L Ruddock, A Knight (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) p.29

[443] T Hutchinson, 'Doctrinal Research: Researching the Jury' in D Watkins, M Burton (eds), *Research Methods in Law* (1st edn, Routledge, 2013) p.7

requires the researcher to be critical of their findings and often, to advocate certain types of reform.[444] This traditional doctrinal legal criticism is an assessment of the legislation's internal effectiveness and will be used to further the ultimate research objective of assessing external effectiveness.[445] This internal evaluation will be predominately of a technical nature, seeking to highlight irregularities, ambiguities, contradictions or omissions in the interpretation, analysis and synthesis of legal sources.[446] For instance, when examining case law, the researcher may question case decisions on their application, or conformity with, the doctrine of precedent, their interpretation of statutes and/or judicial (mis)use of formal, deductive or inductive logic in reaching their decisions.[447] Additionally, the researcher must evaluate the law against 'normative conceptions of justice.'[448] Doctrinal analysis necessitates 'the endorsement of particular substantive values that operate as the yardstick for making critical assessments in legal research.'[449] These values include a commitment to individualism, civil and political rights, and the rule of law, as well as their corollaries, including values of formal equality, corrective or remedial justice and due process norms.[450] However, these criticisms are necessarily of a restricted nature and any proposals for reform must be advocated on the basis that they are necessary to make the law resemble a clearer and more coherent doctrine, distinct from recommendations based on the impact the legislative provision or its underpinning policy.[451] As highlighted above, this is one of the reasons why doctrinal analysis must be used for the purposes of this research, not in isolation, but as part of a broader socio-legal approach.

Therefore, this method will enable the researcher to determine the legal framework in place for tax evasion in both the UK and the US, by locating and analysing primary sources. These primary sources will include legislation and case law imposing and interpreting tax evasion offences. The researcher will endeavour to consider all tax evasion offences in the UK, governing both direct and indirect taxes. However, due to the federal system of government,

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[444] M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, (Pearson Education, 2007) p.100; see also DW Vick, 'Interdiciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163, 178

[445] W Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7 Utrecht L Rev 147, 148

[446] M Pendleton, 'Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article' in M McConville, WH Chui, (eds) *Research Methods for Law* (Edinburgh University Press, 2007) p.162

[447] Ibid

[448] DW Vick, 'Interdiciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163, 179

[449] M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, (Pearson Education, 2007) p.101

[450] Ibid

[451] Ibid at p.162

the analysis of US legislation will be largely confined to federal offences, with state legislation being referred to where appropriate. In addition, the influence of international and European Union (EU) legislation will be analysed to the extent that it is applicable to the jurisdictions under study. This will necessitate a consideration of applicable EU legislation, legislative recommendations advocated by intergovernmental organisations,[452] and implementing legislation in each jurisdiction. At present, these sources do not contain or recommend substantive tax evasion offences,[453] but largely seek to promote the adoption and implementation of cooperation for tax purposes.[454] Finally, the researcher will seek to proffer traditional doctrinal legal criticism, highlighting any irregularities, ambiguities, contradictions or omissions found in the interpretation, analysis and synthesis of these legal sources.[455]

2.9 Comparative Method

The research will also employ a comparative method, described as 'the juxtaposing, contrasting and comparing of legal systems, or parts thereof, with the aim of finding similarities or differences.'[456] The suitability of the comparative method, as opposed to a methodology, in this research is inherent because the comparative research does not constitute the purpose of the investigation itself, but rather, assists in answering questions relating to preferential law and enforcement practice in the UK.[457] The research will undertake a micro-level comparison, comparing the legal rules in each system,[458] namely the law and enforcement policies pertaining to tax evasion. The aim of the comparison is to generate additional insights into the efficacy of the operation of tax evasion legislation and enforcement policies in the UK, by

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[452] Such as, the Organisation for Economic Co-operation and Development (OECD) and the Financial Action Task Force (FATF)

[453] Perhaps with the exception of the alignment of administrative and criminal sanctions for tax offences proposed by the EU - Commission, 'An Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion' (Communication) COM(2012) 722 final

[454] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (2nd edn, OECD Publishing 2017); Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2014] OJ L359/1; FATCA - These provisions are named after the act they were originally introduced by - Foreign Account Tax Compliance Act of 2009 (H.R. 3933). They were subsequently enacted by the Hiring Incentives to Restore Employment Act of 2010, Public Law 111-147 (the HIRE Act), which added 26 USC §§1471-1474.

[455] M Pendleton, 'Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article' in M McConville, WH Chui, (eds) *Research Methods for Law* (Edinburgh University Press, 2007) p.162; M Salter, J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, (Pearson Education, 2007) p.101

[456] E Orucu, 'Developing Comparative Law' in E Orucu, D Nelken, *Comparative Law: A Handbook* (Hart Publishing, 2007) 44

[457] J Hage, 'Comparative Law as Method and the Method of Comparative Law' in M Adams, D Heirbaut (eds) *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing, 2014) 51

[458] M Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method 12, 21

examining and comparing the operation of the law.[459] The distance provided by the act of comparison will enable the researcher to critically examine each system under comparison[460] and to evaluate the solutions presented in the foreign legal system as options for national law,[461] contributing to the overarching research objective of making UK law and enforcement policies more effective and responsive.

The research will compare the law in the UK, the country at the centre of this research, with the US, a country that is perceived as leading global efforts in combatting financial crime, particularly with criminal penalties.[462] This perception largely arises from the US' longstanding commitment to taking criminal action against corporate economic crime; a task fraught with difficulties in the UK.[463] The difference in methods of attributing criminal liability to corporations has resulted in greater action being taken to combat corporate financial crime in the US, as demonstrated by the criminal charges brought by US authorities against several Swiss corporations for assisting US clients to evade taxes. For instance, the Department of Justice (DoJ) entered into a Deferred Prosecution Agreement (DPA) with UBS to settle allegations of tax evasion offences, resulting in a $780 million fine,[464] and brought criminal charges against Wegelin, Switzerland's oldest bank, which admitted facilitating tax evasion and was bankrupted by the resulting $58million paid in fines.[465] The US approach of combatting tax evasion with criminal penalties is also mirrored in efforts taken to combat tax evasion by individuals. The US has regularly prosecuted tax evasion offences throughout the

[459] For other aims of comparative law see HP Glenn, 'The Aims of Comparative Law' in in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar, 2012)
[460] JC Reitz, 'How To Do Comparative Law' (1998) 46(4) The Am J Comp L 617, 618
[461] See JM Smits, 'Comparative Law and Its Influence on National Legal Systems' in M Reimann, R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, 2006) 513
[462] See introduction; see also The Whitehouse, 'Fact Sheet: Obama Administration Announces Steps to Strengthen Financial Transparency, and Combat Money Laundering, Corruption, and Tax Evasion' (May 2016) < https://www.whitehouse.gov/the-press-office/2016/05/05/fact-sheet-obama-administration-announces-steps-strengthen-financial> accessed 16th June 2016
[463] In the UK, the attribution of criminal liability to corporations is governed by the identification principle, requiring proof of criminal intent on behalf of those who are considered to be the 'directing mind and will of the company' *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL); In contrast, in the US, criminal liability is attributed to corporations through vicarious liability, specifically the doctrine of *respondeat superior*, where the company is held to be responsible for the criminal actions of employees *New York Central & Hudson River Railroad Co. v. United States* 212 U.S. 481, 493 (1909); PH Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minnesota Law Rev 1095, 1102; Including mid-level managers, low-level employees, and even independent contractors HL Brown, 'Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents' (1995) 41 Loyola Law Review 279, 285-88
[464] US v UBS AG, US District Court, Southern District of Florida Case No. 09-60033; Department of Justice Office of Public Affairs, 'UBS Enters into Deferred Prosecution Agreement - Bank Admits to Helping U.S. Taxpayers Hide Accounts from IRS; Agrees to Identify Customers & Pay $780 Million' (18th February 2009) <https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement> accessed 26th July 2017
[465] BBC News 'Swiss Bank Wegelin to Close After US Tax Evasion Fine' (BBC News, 4 January 2013) <http://www.bbc.co.uk/news/business-20907359> accessed 20 June 2015

last century, and tax evasion offences are even used as a basis for pretextual prosecutions.[466] In effect, the US has been selected as it is hoped that this comparison will produce interesting insights when considering the efficacy of UK legislation in light of the current desire to tackle tax evasion using criminal penalties.

The US has also been selected as a suitable jurisdiction for comparison because there is existing precedent in the UK of looking to the US for insights into combatting financial crime. For instance, in attempting to resolve the difficulties in attributing criminal liability to corporations in the UK, the Ministry of Justice consulted on introducing legislation to enable corporate criminal liability to be governed by the doctrine of vicarious liability, as in the US.[467] The introduction of these measures followed a call from the Serious Fraud Office (SFO) for 'US-style powers to punish big business and root out financial crime in the City.'[468] The practice of looking to the US is also reflected in enforcement activities, where the UK has recently introduced DPAs;[469] a practice which has been followed in the US for over 20 years.[470] The UK's receptiveness to US insights into preferential law and enforcement policies is also replicated in the field of tax evasion. US legislation providing for the AEOI, commonly referred to as FATCA,[471] inspired, and formed the basis of, the standard developed by the OECD,[472] implemented by the EU,[473] and transposed into UK law.[474] The UK Government often looks for insights regarding good practice in tax evasion enforcement from the US Government, particularly since the manifestation of the public desire to combat this crime using criminal

[466] Most famously, the US prosecuted mobster Al Capone for tax evasion offences – see DC Richman, WJ Stuntz, 'Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution' (2005) 105 Colum L Rev 583

[467] Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (Cm 9370, 2017)

[468] M Bentham, 'Fraud Chief Calls for Tougher Corporate Prosecution Laws' (London Evening Standard, 6th January 2016) <http://www.standard.co.uk/news/uk/fraud-chief-calls-for-tougher-corporate-prosecution-laws-a3150011.html> accessed 22nd July 2017

[469] Crime and Courts Act 2013, Sch 17

[470] R Delaney, 'Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements' (2009) 93(2) Marquette Law Review 875, 878-9

[471] These provisions are named after the act they were originally introduced by - Foreign Account Tax Compliance Act of 2009 (H.R. 3933). They were subsequently enacted by the Hiring Incentives to Restore Employment Act of 2010, Public Law 111-147 (the HIRE Act), which added 26 USC §§1471-1474.

[472] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (July 2014, OECD Publishing)

[473] Council Directive 2011/16/EU of 15 February 2011 On Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EC [2011] OJ L64/1 Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2014] OJ L359/1

[474] The International Tax Compliance Regulations 2015, SI2015/878

penalties.[475] As such, the selection of the US as a comparator jurisdiction should ensure that the national legislature is receptive to recommendations for reform based on this comparison.

The comparative research will not take a purely cultural or functional approach, but rather, will take a moderate functional approach. In comparative research, a cultural approach is one which perceives law to be 'an expression and development of the general culture of a society'[476] and recognises that its meaning relies on that context.[477] In utilising a cultural approach the researcher must not only study the law itself, but must also pay considerable attention to the cultural context of law in order to gain a complete understanding of its operation.[478] In contrast, a functional approach rests on the belief that 'the legal systems of every society faces essentially the same problems, and solves these problems with different means though very often with similar results.'[479] As legal rules and institutions in every jurisdiction are perceived to solve the same problems, they perform the same function and it is this function that is usefully compared.[480]

The functional approach initially appears to be suitable for this research as it focuses on the purposes the law is intended to fulfil,[481] aiming to compare legislation designed to combat the problem of tax evasion. Orucu notes, if the researcher aims to undertake a micro-level comparison,[482] an approach concerned with function is useful as 'a body of rules is created for the purposes of solving human problems most of which are shared.'[483] Further, the functional approach requires the researcher to look at both legal rules, including their application, and 'extra-legal' solutions to the problem in each system.[484] As such, the functional approach would be suitable for this thesis as it enables the researcher to look at the law in action, or how law is

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[475] Public Accounts Committee, *Oral Evidence: Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 974-I) p36
[476] R Michaels, 'Comparative Law' in J Basedow, KJ Hopt, R Zimmermann, A Stier (eds) *Max Planck Encyclopaedia of European Private Law* (OUP, 2012) 2
[477] M Graziadei, 'The Functionalist Heritage' in P Legrand, R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP, 2003) 110
[478] E Eberle, 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 451, 465
[479] K Zweigert, H Kotz, *An Introduction to Comparative Law* (2nd edn OUP, 1987) 34
[480] Ibid
[481] G Wilson, 'Comparative Legal Scholarship' in M McConville, WH Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 91
[482] Comparing the legal rules in each system, M Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method 12, 21
[483]E Orucu, 'Something Old, Something New in Comparative Law' (2015) 2 JICL 323, 329-30
[484] K Zweigert, H Kotz, *An Introduction to Comparative Law* (2nd edn OUP, 1987) 35; R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, 2006) 364

actually applied in a society in relation to the identified problem.[485] Thus, the functional approach would accord with one of the aims of this research, i.e. to ascertain the extent to which the legislation and enforcement policies pertaining to tax evasion in the UK are effective in practice. However, the traditional functional approach requires the legal solutions found in each legal system to be '"cut loose" from their context' and seen purely in light of their function.[486] Consequently, the functional approach may be perceived to be too 'rule-based or too rule-centred.'[487] This is of concern, since law cannot be completely understood without considering its historical, political, social or economic context.[488] As such, a traditional functional approach may produce a superficial analysis by concentrating on rules alone.[489] This is recognised by the research aims of this thesis and consequently, this approach would not accord with the aforementioned attempt to ascertain the context of the law using a socio-legal methodology.

Consequently, the research must employ an alternative approach in utilising the comparative method. However, the research will not adopt a strictly cultural approach. This is because the concept of function still provides a useful analytical tool to understand law and to ensure the comparability of rules to be compared between the two jurisdictions.[490] The comparative research will utilise a 'moderate functional approach,' which involves taking 'a tolerant position accepting the inborn limitations of functionalism in comparative law but considering it as a legitimate form of comparative law.'[491] Owing to the limits of functionalism, the functional approach will be combined with other approaches allowing the researcher to ascertain not only the legal solutions found in each jurisdiction, but also their context.[492]

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[485] 'The focus is on the societal problem and the actual result of the legal approach to that problem' M Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method 12, 28; 'It is not, as is commonly thought, restricted to consideration of formal laws and so appears to lend itself to wider socio-legal research' P Mahy, 'The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia' (2016) 12 Int JLC 420, 422

[486] G Frankenburg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harv Int'l LJ 439, 440; 'Many would say that functionalism is not specifically interested in the context of law' J Husa, 'Methodology of Comparative Law Today: From Paradoxes to Flexibility?' (2006) 58 RIDC 1095, 1100

[487] M Graziadei, 'The Functionalist Heritage' in P Legrand, R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP, 2003) 110; citing Merryman's views in P Legrand, 'John Henry Merryman and Comparative Legal Studies: A Dialogue' (1999) 47 AM J Comp L 3, 48-9

[488] M Van Hoecke, M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 ICLQ 495, 496

[489] M Van Hoecke, M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 ICLQ 495, 508

[490] J Husa, 'Functional Method in Comparative Law – Much Ado About Nothing?' (2013) 2 EPLJ 4, 18-20; see also J Husa, 'Methodology of Comparative Law Today: From Paradoxes to Flexibility?' (2006) 58 RIDC 1095, 1103

[491] J Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 Rabels Z 419, 421

[492] E Ocuru, 'Methodology of Comparative Law' in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar, 2012) 445

Contrary to popular thought,[493] there is not a rigid dichotomy between the two approaches[494] and both may be employed to answer certain research questions.[495]

In using the moderate functional approach, the researcher will use the traditional functional technique of identifying a social problem, here the illegal non-payment of tax, and will compare the solutions to this problem in each jurisdiction.[496] This problem acts as *tertium comparitionis* or 'the common point of departure for the comparison.'[497] Following the identification of the problem, the researcher must examine the nature of the problem in each jurisdiction and collect data on the discovered solutions to the problem.[498] The comparative method does not provide methods of data collection, but rather, the researcher must collect this data using the doctrinal and interdisciplinary methods described in the earlier sections of this chapter; the comparative method simply denotes that these data collection methods should be employed across both jurisdictions.[499] The core 'method' of the comparative method itself involves investigating similarities and differences by contrasting and comparing the solutions identified in each jurisdiction.[500] This constitutes the second stage, where the researcher must undertake this comparison and discuss these similarities and differences.[501] It is at the explanatory stage where the moderate functional approach differs from a traditional functional approach. Within a traditional functional approach, the researcher would start their analysis with a *praesumptio similitudinis*, a presumption that the same or similar solutions will be found in each jurisdiction

[493] A view perhaps epitomised by Michaels, 'If the functional method is deficient, it is not clear why a moderated version should be maintained; if it is not deficient, it is unclear why it should be moderated' R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, 2006) 364

[494] Several researchers have taken this approach including C Valcke, 'Reflections on Comparative Law Methodology – Getting Inside Contract Law' in M Adams, J Bomhoff (eds) *Practice and Theory in Comparative Law* (Cambridge University Press, 2012); M Adams, J Griffiths, 'Against 'Comparative Method': Explaining Similarities and Differences' in M Adams, J Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press, 2012); P Mahy, 'The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia' (2016) 12 Int JLC 420

[495] 'The name of the method points to the specific feature of that approach, without excluding its combination with other methods' M Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method 12, 9

[496] K Zweigert, H Kotz, *An Introduction to Comparative Law* (2nd edn OUP, 1987) 34

[497] JC Reitz, 'How To Do Comparative Law' (1998) 46(4) The American Journal of Comparative Law 617, 622

[498] E Ocuru, 'Methodology of Comparative Law' in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar, 2012) 448

[499] E Orucu, 'Developing Comparative Law' in E Orucu, D Nelken, *Comparative Law: A Handbook* (Hart Publishing, 2007) 48-49

[500] JC Reitz, 'How To Do Comparative Law' (1998) 46(4) The American Journal of Comparative Law 617, 623

[501] K Zweigert, H Kotz, *An Introduction to Comparative Law* (2nd edn OUP, 1987) 43; P Mahy, 'The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia' (2016) 12 Int JLC 420, 429

and can use this presumption to check their results.[502] However, within a moderate functional approach this presumption is considered merely to represent functional equivalence,[503] or is flatly rejected,[504] in favour of paying equal consideration to both similarities and differences.[505] It is at this point that a contextual approach will be adopted, in that the researcher will look to account for the discovered similarities and differences by considering the context of the legal solutions.[506]

Although, as Frankenburg notes, 'supressing the context and considering it' may seem contradictory and artificial,[507] it is a suitable approach for the aims of this thesis. As the research will compare the law and enforcement policies pertaining to tax evasion in the UK with those in the US, it will be limited to an intra-cultural comparison, defined as 'the comparison of legal systems rooted in similar cultural traditions and operating in similar socio-economic conditions.'[508] As these jurisdictions are at a similar level of development and share a common law legal system, a western legal culture and a common language, a fully contextual approach is not required.[509] The appeal to context must also be justified by the research questions.[510] Whilst the research aims to consider the context of law, it is with the aim of producing a deeper understanding of the law itself to assist with its evaluation. The aim of considering context is subsidiary to the objective of discovering and evaluating the solutions themselves. As such, this approach is suitable as it prevents the researcher from being overwhelmed by contextual differences that may have little impact on the law or research question.[511] This approach should

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[502] Ibid p40; see also M Graziadei, 'The Functionalist Heritage' in P Legrand, R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP, 2003) 102-3

[503] R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, 2006) 369

[504] Hill notes that this presumption can be linked to the political climate at the time J Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 OJLS 101, 109-11

[505] 'Similarities or differences are the outcome of research, not a priori methodological choices' J Husa, 'Functional Method in Comparative Law – Much Ado About Nothing?' (2013) 2 EPLJ 4, 20

[506] J Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 Rabels Z 419; It is unlikely that the researcher will be able to prove causation of similarities or differences and will need to qualify their conclusions P Mahy, 'The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia' (2016) 12 Int JLC 420, 431

[507] G Frankenburg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harv Int'l LJ 439, 440

[508] WJ Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 ICLQ 485, 511; cited in M Van Hoecke, M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 ICLQ 495, 509

[509] Ibid; see also E Orucu, 'Something Old, Something New in Comparative Law' (2015) 2 JICL 323, 330

[510] AE Platsas, 'The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks' (2008) 12 EJCL 1 available from <http://www.ejcl.org/123/art123-3.pdf> p5

[511] P Mahy, 'The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia' (2016) 12 Int JLC 420, 430

ensure that the time and expense devoted to ascertaining context are commensurate with the benefits gained in terms of its utility in answering the research questions.[512]

The researcher is using the functional approach for a traditional purpose, to ascertain how the law may be improved.[513] Nevertheless, this use of the functional approach is also highly controversial,[514] for the researcher's determination of the 'better law' may not be objective.[515] However, this criticism is misplaced, for the functional approach does not provide means of evaluating law, nor does it intend to do so;[516] it merely provides the data on which such evaluation can take place.[517] Therefore, the researcher will undertake an evaluation of the internal effectiveness of legislation using doctrinal analysis and its standards of criticism; 'this is a task that the jurist is both able and entitled to do.'[518] The researcher will also undertake an evaluation of external effectiveness or the extent to which the legislation and enforcement policies achieve their aims in practice.[519] In so doing, the researcher will use research from other disciplines, which will provide further data on their operation and will provide additional standards by which they can be evaluated.[520] These standards will be explicitly stated before any evaluation takes place. Thus, attempts to ascertain 'better' law may be objectionable, but relate to the research questions themselves rather than the use of the comparative method or, specifically, a functional approach.[521]

A final concern may be that if US legislation and/or enforcement policies are found to be superior and the researcher recommends the adoption of this approach to combatting tax evasion in the UK, the 'legal transplant' may not work as intended because of differences in

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[512] VV Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53 Am J Comp L 261, 265

[513] The 'applied version' of comparative law K Zweigert, H Kotz, *An Introduction to Comparative Law* (2nd edn OUP, 1987) 11

[514] For instance, see Legrand 'There cannot be a 'better' law. The very notion is fallacious. Who could finally and definitively say what it is?' P Legrand, ' Comparative Legal Studies and the Matter of Authenticity' (2006) 1 JCL 371, 448

[515] For Hill, this 'does not mean that is has no role to play in the field of law reform' J Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 OJLS 101, 105

[516] J Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 Rabels Z 419, 434

[517] R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, 2006) 379

[518] Ibid at 374 referring to the opinion of Konrad Zweigert

[519] The internal/external distinction is offered by W Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7 Utrecht L Rev 147

[520] DW Vick, 'Interdiciplinarity and the Discipline of Law' (2004) 31(2) Journal of Law and Society 163, 181; see also M Siems, 'Bringing in Foreign Ideas: The Quest for 'Better Law' in Implicit Comparative Law' (2014) 9 Journal of Comparative Law 119

[521] 'In relation to the search for 'better law', there is scope for evaluation and prescription, but the legitimacy of this activity will always remain questionable.' E Ocuru, 'Methodology of Comparative Law' in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar, 2012) 450

context.[522] However, this problem should be alleviated by the intra-cultural nature of the comparison and the researcher's attempts to examine context throught the comparison.[523] This will assist the researcher in modifying the transplant to fit the UK context, helping to ensure its success.[524] In this respect, the researcher is not looking for 'a blueprint that should simply be adopted without further reflections,' but insights into good practice that can potentially be adopted in the UK.[525]

2.10 Conclusion

In summary, the research must be conducted using the socio-legal methodology, as it aims to assess the extent to which legislation pertaining to tax evasion in the UK is effective in combatting this financial crime. The socio-legal methodology will be supported by the use of the method of doctrinal analysis, which will be used to provide an exposition of the content of legal doctrine in this area, providing an essential foundation to assessing its impact. Finally, the research adopts a comparative method with the aim of producing additional insights into the efficacy of the operation of tax evasion legislation and enforcement policies in the UK, by closely examining and comparing the operation of the law in this jurisdiction with that of its US counterpart. This combination of approaches is the most apt to provide answers to the questions this thesis answers.

[522] M Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method 12, 30
[523] ibid
[524] VV Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53 Am J Comp L 261, 276
[525] M Siems, 'Bringing in Foreign Ideas: The Quest for 'Better Law' in Implicit Comparative Law' (2014) 9 Journal of Comparative Law 119, 127

Chapter 3 – Combatting Offshore Tax Evasion

The Importance of International Cooperation in Tax Matters

3.1 Introduction

Globalisation, advances in technology and the increasing mobility of capital, enabled individuals to move their wealth offshore with the aim of concealing income or profits from national tax authorities.[526] A small number of states, known variously as tax havens, offshore financial centres and secrecy jurisdictions, facilitate offshore tax evasion by providing a refuge for illicit funds and preventing their discovery by national authorities. Successive data leaks from offshore banks and service providers have served to exhibit the nature and extent of these activities.[527] Revelations contained in the Panama Papers, a leak of over 11 million documents from the Panamanian law firm Mossack Fonseca, illustrated how the firm provided incorporation services and set up complex structures for clients from more than 200 countries and territories.[528] Clients of the firm included drug dealers, members of the Mafia, corrupt politicians and tax evaders aiming to hide their wealth from national authorities.[529] The UK taskforce dedicated to investigating the leaks,[530] opened civil and criminal investigations into the affairs of at least 22 individuals suspected of tax evasion and has placed a further 43 high net worth individuals under special review.[531] Similarly, in 2015 a whistle blower, revealed that HSBC Private Bank (Suisse) had assisted many wealthy clients in evading millions of pounds in tax.[532] Of the leaked accounts held by 106,000 clients in 203 countries,

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[526] 'Technological advancements made financial and criminal transactions faster, more transnational and sophisticated.' RMB Antoine, 'The Protection of Offshore Confidentiality: Policy Implications and Legal Trends' (1999) 7 JFC 9, 16

[527] Including, 'Offshore leaks', 'Lux leaks', 'Swiss leaks', 'Panama Papers' and 'Bahamas Leaks' A Scherrer, 'Money Laundering, Tax Avoidance and Tax Evasion: Research Papers' (European Parliamentary Research Service Blog, 27 April 2017) <https://epthinktank.eu/2017/04/27/money-laundering-tax-avoidance-and-tax-evasion-research-papers-and-a-video/> accessed 18th September 2017

[528]MM Hamilton, 'Panamanian Law Firm Is Gatekeeper To Vast Flow of Murky Offshore Secrets' (International Consortium for Investigative Journalists, 3rd April 2016) <https://panamapapers.icij.org/20160403-mossack-fonseca-offshore-secrets.html > accessed 18th September 2017

[529] Ibid

[530] HM Treasury, Cabinet Office, The Rt Hon David Cameron, and The Rt Hon David Gauke MP, 'UK Launches Cross-Government Taskforce on the 'Panama Papers'' (News Story, 10 April 2016) <https://www.gov.uk/government/news/uk-launches-cross-government-taskforce-on-the-panama-papers > accessed 18th September 2017

[531] HM Revenue & Customs, 'Taskforce Launches Criminal and Civil Investigations into Panama Papers' (News Story, 8th November 2016) <https://www.gov.uk/government/news/taskforce-launches-criminal-and-civil-investigations-into-panama-papers> accessed 18th September 2017

[532] The International Consortium for Investigative Journalists, 'Banking Giant HSBC Sheltered Murky Cash Linked to Dictators and Arms Dealers' (8 February 2015) <http://www.icij.org/project/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers> accessed 15th March 2016

approximately 7,000 clients were based in the UK and of those, 1,100 had not paid the correct amount of tax.[533]

Tax evasion is no longer simply a national crime committed within national borders, but a transnational crime necessitating international cooperation. However, thus far, international cooperation has been limited. This is because, while the public international law principle of universality holds that sovereign states are able to tax connected persons globally, the private international law principle of territoriality prevents sovereign states from enforcing the tax laws of foreign states, without prior formal agreement.[534] As such, in the *Government of India v Taylor*, the House of Lords reiterated the longstanding rule against revenue enforcement namely, the courts will not collect taxes levied by foreign states for their sole benefit.[535] This rule restricted the ability of national governments to employ information gathering and debt collection powers necessary to combat tax evasion.[536] In response, states have attempted to overcome these limitations by entering into formal agreements with other states, to share tax related information and provide enforcement assistance.[537] International organisations have attempted to coordinate these efforts by providing model agreements and pressuring states for their commitment.[538] However, secrecy jurisdictions continue to provide a shelter for persons to hide income and profits from national tax authorities.[539]

This chapter will begin by examining offshore jurisdictions used to facilitate tax evasion and will define some of the most popular terms used to describe them. The chapter will then explore and provide examples of the features of these jurisdictions, which make them attractive to tax evaders and other financial criminals, including banking secrecy and the use of structural bank forms and impediments. This section highlights the particular use of secrecy mechanisms to

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[533] BBC News, 'HSBC Bank 'Helped Clients Dodge Millions in Tax' (10th February 2015) <http://www.bbc.co.uk/news/business-31248913> accessed 18th September 2017

[534] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) 1. Any attempt to do so would represent 'an extraterritorial intrusion' AR Johnson, L Nirenstein, SE Wells, 'Reciprocal Enforcement of Tax Claims Through Tax Treaties' (1980) 33 Tax Lawyer 469, 470

[535] *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 (HL); see also *Re Visser, Queen of Holland v Drukker* [1928] Ch 877, 884

[536] M Dirkis, B Bondfield, 'The Developing International Framework and Practice for the Exchange of Tax Related Information: Evolution or Change?' (2013) 11 eJournal of Tax Research 115, 122

[537] Ibid

[538] Most notably the OECD and the OECD Global Forum; see European Parliament, 'European initiatives on Eliminating Tax Havens and Offshore Financial Transactions and the Impact of these Constructions on the Union's Own Resources and Budget' (Study for the Directorate General for Internal Policies, Policy Department D: Budgetary Affairs, 2013) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/490673/IPOL-JOIN_ET(2013)490673_EN.pdf> accessed 18th September 2017 at p.11

[539] CT Jones, 'Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy' (1992) 12 Nw J Int'l & Bus 454

evade taxes and provides estimates of the extent of wealth held offshore. After providing the relevant context, the chapter proceeds to outline the traditional initiatives taken to facilitate international cooperation, considering their application to tax cases and highlighting deficiencies in their operation, particularly in respect of secrecy jurisdictions. This section focuses on international agreements relating to extradition, the obtaining of evidence abroad in civil and criminal cases and other forms of assistance, such as the service of documents. The next chapter will examine the recent initiatives specifically developed to combat offshore tax evasion.

3.2 Definitions

A myriad of expressions are often used synonymously to describe countries which, through secrecy legislation or opaque structures, assist individuals in evading taxes. For the sake of clarity, three of these terms will be considered and distinguished here – tax havens, offshore financial centres, and secrecy jurisdictions.

Tax havens are said to have existed since around the second century BC,[540] yet have proliferated in the last 40-50 years with the liberalisation and deregulation of financial markets.[541] Practically speaking, tax havens tend to be small island states with low populations and are generally recognised by their adoption of favourable tax regimes, including low or zero tax rates for foreign investors.[542] However, tax havens may offer other attractions to investors, such as limited regulation and banking secrecy.[543] The reliance of tax havens on foreign direct investment arises from their tendency to have limited options for developing their national economies, arising from their small populations, limited geographical area, lack of natural resources, inability to diversify, and high transportation costs.[544] It is pertinent to note that

[540] See AM Raposo, PR Mourão, 'Tax Havens or Tax Hells? A Discussion of the Historical Roots and Present Consequences of Tax Havens' (2013) 37 Financial Theory and Practice 311
[541] RA Johns, *Tax Havens and Offshore Finance, A Study of Transnational Economic Development* (Pinter, 1983) p.20; see also M Hampton, *The Offshore Interface: Tax Havens in the Global Economy* (Macmillan, 1996) p.1; Picciotto notes that this development coincided with the unravelling of the post-war arrangements for international monetary regulation and the end of the fixed exchange rate system S Picciotto, 'Offshore: The State as Legal Fiction' in MP Hampton, JP Abbott, *Offshore Finance Centres and Tax Havens: The Rise of Global Capital* (Palgrave, 1999) p.57
[542] D Darmaphala, 'What Problems and Opportunities are created by Tax Havens?' (2008) 24 Oxford Review of Economic Policy 1,3
[543] Ibid
[544] MP Hampton, M Levi, 'Fast Spinning into Oblivion? Recent Developments in Money-Laundering Policies and Offshore Financial Centres' (1999) 20 Third World Quarterly 645, 649

many tax havens are linked to the UK,[545] and historically, the UK Government encouraged their development, possibly to reduce reliance on UK Government funding.[546]

The term tax haven is a commonly used expression, yet there is no international consensus on what a tax haven is.[547] Picciotto points out, 'the broadest definition of a tax haven would include any country whose tax laws interact with those of another so as to make it possible to produce a reduction of tax liability.'[548] However, this definition would seemingly encompass any jurisdiction that offered a favourable tax regime compared to another.[549] The subjectivity of the term is also reflected in the US reputation, or smell, test whereby a country is considered a tax haven 'if it looks like one and if it is considered to be one by those who care.'[550] The term tax haven was first adopted in the 1950s, where it had positive connotations of allowing individuals to escape from the oppressive tax regimes of their home countries.[551] However, the term has since come to be negatively associated with the erosion of national tax bases, through unfair tax competition.[552] In its 1998 report, the OECD identified four key factors in identifying jurisdictions as tax havens including 'no or only nominal taxes, a lack of effective exchange of information, a lack of transparency and no substantial activities.'[553] Following this report, the OECD identified 35 tax havens and 47 preferential tax regimes,[554] yet this list has been

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[545] See N Shaxson, *Treasure Islands: Tax Havens and the Men who Stole the World* (2nd edn, Penguin, 2012)
[546] House of Commons, *Report of Mr Rodney Gallagher of Coopers and Lybrand on the Survey of Offshore Finance Sectors in the Caribbean Dependent Territories* (HC 1990, 121)
[547] G Schjelderup, 'Secrecy Jurisdictions' (2016) 23 Int Tax Public Finance 168, 169
[548] S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (CUP, 1992) p.132
[549] ibid
[550] RA Gordon, *Tax Havens and Their Use By United States Taxpayers – An Overview: A Report to the Commissioner of Internal Revenue the Assistant Attorney General (Tax Division) and the Assistant Secretary of the Treasury (Tax Policy)* (Publication 1150, 12 January 1981) p.14; see also the definition provided by the OECD in 1987 'a good indicator that a country is playing a role of a tax haven is where the country or territory offers itself or is generally recognised as a tax haven.' Cited in OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publications, 1998) p.22
[551] Orlov notes that the term was first mentioned in the British Tax Review by GSA Wheatcroft, 'The General Principles of Tax Planning' (1963) BTR 184; M Orlov, 'The Conept of a Tax Haven: A Legal Analysis' (2004) 32 Intertax 95, 97
[552] Ibid
[553] OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publications, 1998); A definition endorsed by the US Government Accountability Office, 'International Taxation: Larger US Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions' (Report to Congressional Requesters, GAO-09-157, December 2008) <http://www.gao.gov/assets/290/284522.pdf> accessed 18th September 2017
[554] Listing Andorra, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Dutch Antilles, Niue, Panama, Samoa, Seychelles, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines, Tonga, Turks and Caicos, US Virgin Islands, Vanuatu OECD, *2000 Progress Report: Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (OECD Publications, 2000) p.17

subjected to sustained criticism.[555] Depending on the author, alternative lists of tax havens identify twenty to almost one hundred jurisdictions.[556] Although the OECD highlights the opacity of financial systems in tax havens, it is not the key characteristic of these jurisdictions. This is because tax havens are primarily recognised by their adoption of low or zero tax rates for foreign investors and indeed, often have to satisfy this test before being characterised as a tax haven.[557] Accordingly, this term will not be used in this chapter, as it is principally secrecy mechanisms, rather than lower tax rates per se, which encourage tax evasion.[558]

An offshore financial centre may be defined as 'any jurisdiction where financial services are offered to non-residents.'[559] However, as the International Monetary Fund (IMF) notes, this definition is capable of encompassing all major financial centres globally.[560] As such, the IMF defines an offshore financial centre, as 'a country or jurisdiction that provides financial services to nonresidents on a scale that is incommensurate with the size and the financing of its domestic economy.'[561] Offshore financial centres may provide incentives for nonresidents to invest in their economy, such as, low or zero taxation, moderate or light financial regulation, banking secrecy, and anonymity.[562] However, although these incentives may be conducive to tax

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[555] Most notably because of the absence of OECD member countries that refused to participate in effective exchange of information, including Switzerland, Luxembourg, Austria, Belgium and the US P Harris, D Oliver, *International Commercial Tax* (Cambridge Tax Law Series, CUP, 2010) p.106; The US also voiced its concerns over the project's attempts to curtail harmful tax competition, rather than simply reduce the opacity of financial systems. Treasury Secretary Paul O'Neill explained that he was 'troubled by the notion that any country, or group of countries, should interfere in any other country's decisions about how to structure its own tax system.' Statement of Paul H. O'Neill Before the Senate Committee on Governmental Affairs Permanent Subcommittee on Investigations: OECD Harmful Tax Practices Initiative, July 18, 2001 cited in JK Jackson, *The OECD Initiative on Tax Havens* (Congressional Research Service, 2010) p.8

[556] JC Sharman, *Havens in a Storm: The Struggle for Global Tax Regulation* (Cornell University Press, 2006) p.21

[557] L De Broe, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties, and EC Law in Relation to Conduit and Base Companies* (IBFD, 2007) p.48. This approach is in line with that taken in other disciplines where, as Gravelle notes, 'others, particularly economists, might characterize as a tax haven any low-tax country with a goal of attracting capital, or simply any country that has low or non-existent taxes' JG Gravelle, *Tax havens: International Tax Avoidance and Evasion* (Congressional Research Service, 2015) p.2

[558] Additionally, the author does not wish to enter into debates surrounding the appropriateness and effectiveness of tax competition, on which see MP Devereux, 'The OCED Harmful Tax Competition Initiative' R Biswas (ed), *International Tax Competition: Globalisation and Fiscal Sovereignty* (Commonwealth Secretariat, 2002); see also AP Morriss, L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign Against "Harmful Tax Competition"' (2012) 4 Columbia Journal of Tax Law 1

[559] MA Young, *Banking Secrecy and Offshore Financial Centers: Money Laundering and Offshore Banking* (Routledge, 2013) p.12

[560] Monetary and Exchange Affairs Department, 'Offshore Financial Centers: IMF Background Paper' (IMF, 23 June 2000) <https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm> accessed 18th September 2017

[561] A Zoromé, 'Concept of Offshore Financial Centers: In Search of an Operational Definition' (IMF Working Paper 07/87, April 2007) <https://www.imf.org/external/pubs/ft/wp/2007/wp0787.pdf> accessed 18th September 2017 at p.7

[562] Monetary and Exchange Affairs Department, 'Offshore Financial Centers: IMF Background Paper' (IMF, 23 June 2000) <https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm> accessed 18th September 2017

evasion, not all offshore financial centres offer all of these incentives. Rather, some may be characterised by their adoption of preferable legal and/or regulatory regimes, as opposed to tax advantages or secrecy mechanisms.[563] Therefore, this definition will not be employed here.

As suggested by the preceding discussion, this chapter will utilise the term secrecy jurisdiction, as it is the adoption of banking secrecy and structural secrecy mechanisms, which facilitate offshore tax evasion by preventing the disclosure of information regarding income or assets to national revenue collection authorities.[564] Secrecy jurisdictions tend to be self-governing microstates providing a combination of strict banking secrecy, favourable regulatory environments, low or zero tax rates for foreign investors, the non-disclosure of the beneficial ownership (BO) of companies, trusts and foundations, and a lack of information exchange agreements with other jurisdictions.[565] Accordingly, a secrecy jurisdiction may be defined as, 'a state, dependency or other form of government which is either unable to obtain, unwilling to hold, or reluctant to share tax and financial information in accordance with accepted international practices and agreements.'[566] As will be demonstrated below, it is this reluctance to share financial information, which is the 'root cause' of offshore tax evasion.[567]

3.3 Bank Confidentiality

The term bank confidentiality refers to the legal obligation imposed on banks not to disclose information about a customer's account, discovered during the banking relationship.[568] The historical justification for the implementation of bank confidentiality is that it enabled banks to protect the privacy of their clients in the face of religious or political persecution, particularly before, and during, the Second World War.[569] Many, including Swiss bankers, treat the

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[563] 'Whilst all tax havens are offshore financial centres, not all offshore financial centres are tax havens' A Miller, L Oats, *Principles of International Taxation* (Bloomsbury, 2016) p.545

[564] A similar approach is taken by the Tax Justice Network, which has provided an index of jurisdictions ranked according to their level of financial secrecy - Tax Justice Network, 'Financial Secrecy Index: What is a Secrecy Jurisdiction?' (TJN, 2015) < http://www.financialsecrecyindex.com/> accessed 18th September 2017

[565] J Christensen, 'The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface' (2012) 57 Crime Law Soc Change 325, 326

[566]R Eccleston, *The Dynamics of Global Economic Governance: The OECD, The Global Financial Crisis and the Transformation of International Tax Regulation* (Edward Elgar, 2013) p.5; citing OECD, *Improving Tax Information for Tax Purposes* (OECD Publications, 2000)

[567]R Eccleston, *The Dynamics of Global Economic Governance: The OECD, The Global Financial Crisis and the Transformation of International Tax Regulation* (Edward Elgar, 2013) p.5

[568] D Neo, 'A Conceptual Overview of Bank Secrecy' in S Booysen, D Neo (eds), *Can Banks Still Keep a Secret? Bank Secrecy in Financial Centres Around the World* (CUP, 2017) p.3

[569] MA Young, *Banking Secrecy and Offshore Financial Centers: Money Laundering and Offshore Banking* (Routledge, 2013) p.135; It is often claimed that the Swiss Federal Parliament introduced bank secrecy to hide accounts held by Jewish depositors from confiscation by Nazi Germans see A Ramasastry, 'Secrets and Lies? Swiss Banks and International Human Rights' (1998) 31 Vand J Transnat'l L 325; However, this view is contested, see D Chaikin, 'Policy and Fiscal Effects of Swiss Bank Secrecy' (2005) 15 Revenue LJ 90

obligation as one giving effect to an individual's right to privacy.[570] This is because the obligation of confidentiality protects against the disclosure of personal information that may be gleaned from bank records, including personal interests, political interests and economic interests, ascertained from records of employment income, purchases, and investment products.[571] The obligation of confidentiality ensures that information does not get into the wrong hands; for instance, those of commercial competitors and potential heirs.[572] Thus, there is an economic rationale for the duty of confidentiality, in that it encourages the customer to obtain banking services and enables the banker to perform them successfully, as the customer will be able to reveal all pertinent information.[573] Accordingly, the banker's duty of confidentiality is considered essential in maintaining customer confidence in the banking system.[574]

The banker's duty of confidentiality is a well-established principle in common law jurisdictions, where it is an implied term of the contract between the banker and his customer.[575] This contract is considered confidential, as the relationship between a banker and his customer contains components of an agency relationship.[576] The obligation extends not only to bankers, but also to others entrusted with confidential financial information.[577] Moreover, it extends beyond the termination of an account.[578] In the UK, bank confidentiality has not been codified,[579] but is contained in the Lending Code, which sets out voluntary standards of good practice for banks.[580] In addition to this common law principle, many statutory enactments seek to impose obligations on banks and other professionals in respect to the storage and disclosure

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[570] I Carr, R Jago, 'Corruption, Money Laundering, Secrecy and Societal Responsibility of Banks' in N Ryder, U Turksen, S Hassler (eds), *Fighting Financial Crime in the Global Economic Crisis* (Routledge, 2015) p.157
[571] H Ping, 'Bank Secrecy and Money Laundering' (2004) 7 JMLC 376, 376
[572] Ibid
[573] 'The credit of the customer depends very largely upon the strict observance of the confidence' *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 (CA), at 474
[574] The Jack Committee noted that the roots of banking confidentiality 'go deeper than the business of banking: it has to do with the kind of society in which we want to live' Committee on the Review of Banking Services Law (Jack Committee), *Report on Banking Services: Law and Practice* (Cm622, 1987) at para 5.26
[575] *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 (CA); For an analysis of the case law preceding *Tournier* see R Stokes, 'The Genesis of Banking Confidentiality' (2011) 32 Journal of Legal History 279
[576] EP Ellinger, E Lomnicka, CVM Hare, *Ellinger's Modern Banking Law* (5th edn, Oxford University Press, 2011) p.171
[577] Such as accountants, insurance companies, and securities firms, A Arora, *Banking Law* (Pearson, 2014) p.260
[578] The obligation 'extends beyond the period when the account is closed, or ceases to be active' *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 (CA) at 458
[579] Despite the recommendations of the Jack Committee; see UK Government, *White Paper on Banking Services: Law and Practice* (Cm1026, 1990)
[580] The British Bankers' Association, The UK Cards Association, *The Lending Code: Setting Standards for Banks, Building Societies, Credit Card Providers and their Agents* (March 2011)

of information, including the Data Protection Act 2018, the Human Rights Act 1998, and the Financial Services and Markets Act 2000.[581]

In *Tournier,* the Court of Appeal held that the banker's duty of confidentiality was not absolute, but subject to limited exceptions:

> (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.'[582]

The first exception refers to any legislation requiring banks to disclose information to relevant parties, such as national authorities, the courts or the police. At the time of *Tournier*, only two statutory enactments compelled banks to disclose customer information.[583] However, presently, many UK statutes compel banks to disclose confidential information, including requirements imposed under anti-money laundering legislation.[584] Similarly, HMRC has been given information and data-gathering powers, providing it with access to bank information for the purposes of ascertaining tax liabilities and countering tax evasion.[585] The second exception relieves the bank from its duty to maintain the confidential nature of information in instances of 'crimes, frauds and misdeeds.'[586] However, it is unclear whether the exception applies in relation to the disclosure of past criminal conduct.[587] The third exception is thought to apply when disclosure is required for the purpose of protecting the legal interests of the bank.[588] For instance, the exception may apply when a bank needs to collect or sue for an overdraft, or when the bank needs to disclose information in the ordinary course of setting up and maintaining an account.[589] The final exception applies when the customer gives implied or express consent to

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[581] K Stanton, 'The United Kingdom' in S Booysen, D Neo (eds), *Can Banks Still Keep a Secret? Bank Secrecy in Financial Centres Around the World* (CUP, 2017) p.347
[582] *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 (CA) at 473
[583] British Bankers' Book Evidence Act 1879, s7 and the Extradition Act 1873, s5 as cited in Committee on the Review of Banking Services Law (Jack Committee), *Report on Banking Services: Law and Practice* (Cm622, 1987) at para 5.06
[584] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, as amended by The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511; Proceeds of Crime Act 2002, s330, s331; Terrorism Act 2000, s21A
[585] Information collection powers are provided by Finance Act 2008, s36; data-gathering powers are provided by Finance Act 2011, Schedule 23. See chapter seven.
[586] *Initial Services Ltd v Putterill* [1968] 1 Q.B. 396 (CA), 405
[587] For instance see, *Weld-Blundell v Stephens* [1919] 1 KB 520 (CA); See D Chaikin, 'Adapting the Qualifications to the Banker's Duty of Confidentiality to Fight Transnational Crime' (2011) 33 Sydney L Rev 265, 279
[588] Ibid at p284
[589] *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 (CA) at 473, 481

the bank to disclose their information, for example to supply reference checks to third parties.[590]

It is questionable whether these exceptions apply to permit the bank to disclose confidential information to foreign authorities under the compulsion of foreign law. In a few cases, the exceptions have been held not to apply, particularly when disclosure is considered to contravene the UK's sovereignty and state interests. For instance, an injunction was granted and retained against a London branch of a US bank, prohibiting it from disclosing information about corporate clients' accounts during a US investigation, as the disclosure would be contrary to its duty of confidentiality.[591] In tax cases, the disclosure of information relating to client accounts to foreign revenue collection authorities has been considered to breach the duty of confidentiality.[592] In *Re State of Norway's Application,*[593] the Court of Appeal declined a request by the Norwegian tax authorities to orally examine two bankers on the affairs of a trust, holding that the duty of confidentiality outweighed the Court's desire to assist the foreign authority. The Court held that the duty of confidentiality must be balanced against other competing interests requiring disclosure.[594] This decision was later overturned by the House of Lords.[595]

The compulsion of law exception applied where national law expressly requires the provision of assistance to foreign authorities.[596] The UK legislature has decided that the duty of confidentiality must be outweighed by international efforts to combat financial crimes, including tax evasion, and has enacted measures warranting disclosure in this context. Nevertheless, while in present times the UK may be willing to exchange confidential information with foreign authorities for the purposes of combatting tax evasion, this exchange

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[590] This example would require express, rather than implied, consent *Turner v Royal Bank of Scotland Plc* [1999] 2 All Er (Comm) 664 (CA)
[591] *X AG v A Bank* [1983] 2 All ER 464 (QB)
[592] *FDC Co. Ltd v Chase Manhattan Bank* [1985] 2 HKC 470 (HKCA)
[593] [1987] QB 433 (CA)
[594] Ibid; Kerr LJ and Gibson LJ justified the disclosure under the first exception, while Glidewell LJ justified the disclosure under the second exception
[595] *In Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723, 811 (HL); In recent years, there has been an increased willingness by English courts to accede to requests from foreign authorities concerning financial crimes. For instance, it has been held that a London branch of a US bank was able to rely on the public interest exception in providing information regarding the movement of funds in its Libyan customer's bank accounts to US regulators, before the imposition of a Presidential freeze order. *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 (QB) Similarly, in two cases concerning bank fraud surrounding the collapse of the Bank of Credit and Commerce International (BCCI), it was held that the public interest requiring disclosure outweighed the duty of confidentiality *Price Waterhouse (a firm) v BCCI Holdings (Luxemburg) SA* [1992] BCLC 583 (Ch); *Pharaon v Bank of Credit and Commerce International SA (in liquidation)* [1998] 4 All ER 455 (Ch)
[596] D Chaikin, 'Adapting the Qualifications to the Banker's Duty of Confidentiality to Fight Transnational Crime' (2011) 33 Sydney L Rev 265, 273

of information is not always reciprocated, facilitating offshore tax evasion by UK taxpayers. The next section considers secrecy jurisdictions that fail to provide foreign authorities with tax related information on the grounds of bank secrecy, effectively assisting individuals to evade taxes in their home jurisdictions.

3.4 Bank Secrecy

In secrecy jurisdictions, the duty of confidentiality owed by a banker to a customer is not merely a contractual obligation, but also a statutory one, backed by civil and criminal sanctions.[597] In this respect, the duty may be more appropriately described as one of bank secrecy.[598] The term bank secrecy refers to 'legislative requirements and associated criminal penalties prohibiting banks or their employees from disclosing any information about client accounts.'[599] These laws 'strengthen the normal obligation of confidentiality between a bank and its customer by providing criminal penalties to prohibit banks from revealing the existence of an account or disclosing account information without consent.'[600] Further, as Emmenegger notes, bank secrecy also concerns the rules governing sharing and access to account information, without breaching bank secrecy.[601]

Bank Secrecy Law

The archetypal example of bank secrecy legislation is the Swiss model, where banking secrecy is inherent in an individual's right to privacy.[602] Swiss law provides for the imposition of a contractual,[603] and statutory, obligation on Swiss bankers to keep their customer's information confidential.[604] Any breach of this duty is likely to be met with civil action against the bank or

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[597] See B Vischer, G Wuest, 'Switzerland' in DE Osborne, EM Schurig (eds), *Asset Protection: Domestic and International Law Treaties* (Clark Boardman Callaghan, 2011)

[598] Although the term bank secrecy was used to refer to bank confidentiality in *Tournier*, it will be used here to emphasise the strictness of the obligation in secrecy jurisdictions. This approach is taken by the OECD in defining bank secrecy provisions OECD, 'Glossary of Tax Terms' <http://www.oecd.org/ctp/glossaryoftaxterms.htm> accessed 20th October 2017; cf D Neo, 'A Conceptual Overview of Bank Secrecy' in S Booysen, D Neo (eds), *Can Banks Still Keep a Secret? Bank Secrecy in Financial Centres Around the World* (CUP, 2017) p.4-6

[599] P Emmenegger, 'Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters: A Nut Too Hard to Crack?' (2017) 11 Regulation & Governance 24, 27

[600] R Palan, R Murphy, C Chavagneux, *Tax Havens: How Globalisation Really Works* (Cornell University Press, 2010) p.249

[601] P Emmenegger, 'The Politics of Financial Intransparency: The Case of Swiss Banking Secrecy' (2014) 20 Swiss Political Science Review 146, 148

[602] Ibid

[603] Swiss Code of Obligations of March 30 1911. RS 220. Article 398 §2

[604] Swiss Civil Code of December 10 1907. RS 210. Articles 27-28; Federal Act on Banks and Savings Banks 1934 (as amended), Article 47

its employee, which may result in an award of compensation[605] and, for serious breaches of this legal obligation, in the bank losing its license.[606] Under Article 47 of the Swiss Banking Act, breach of bank secrecy is a criminal offence, punishable by up to three years imprisonment.[607] As Chaikin notes, 'violations of bank secrecy are taken very seriously in Switzerland and will usually result in the professional ruination of a violator coupled with a prison sentence.'[608] In Switzerland, the duty of secrecy is very broad, encompassing any information concerning clients or third parties encountered during the course of the banking relationship.[609] This information must not be exchanged with third parties, including government authorities, without the client's consent or express legislative provision to this effect. The Swiss authorities have permitted banks to disclose information required for the purposes of debt collection, bankruptcy proceedings, or family law proceedings.[610] Additionally, banks are required to disclose information to Swiss regulators in limited circumstances,[611] and national authorities or courts during the course of a criminal investigation or proceeding.[612] However, neither banks nor their employees are permitted to disclose information to foreign authorities,[613] who must instead utilise international methods authorising the Swiss government to provide assistance.[614] A key problem with many of these methods was that dual criminality was required; in other words, the investigation of a crime with which an authority required assistance must have been a crime in both the requesting and requested country.[615] As tax evasion, as distinct from tax fraud,[616] is not a crime in Switzerland,

[605] Swiss Civil Code of December 10 1907. RS 210. Article 41

[606] Federal Act on Banks and Savings Banks 1934 (as amended), Article 23

[607] Or a fine not exceeding 250,000 Swiss francs, Federal Act on Banks and Savings Banks 1934 (as amended), Article 47; see also Swiss Criminal Code of December 21 1937. RS 311. Articles 162 (disclosure of business secrets) and 273 (espionage); see O Dunant, M Wassmer, 'Swiss Bank Secrecy: Its Limits under Swiss International Laws' (1988) 20 Case W Res J Int'l LV 541

[608] D Chaikin, 'Policy and Fiscal Effects of Swiss Bank Secrecy' (2005) 15 Revenue LJ 90, 99

[609] See Federal Act on Banks and Savings Banks 1934 (as amended), Article 47; see also See B Vischer, G Wuest, 'Switzerland' in DE Osborne, EM Schurig (eds), *Asset Protection: Domestic and International Law Treaties* (Clark Boardman Callaghan, 2011)

[610] RL Stauter, 'Swiss Bank Secrecy Laws and the US Internal Revenue Service – Are the Swiss to Blame for Tax Dollars that the US IRS Cannot Collect when US Citizens Hide Their Money in Swiss Banks' (1988) 20 Case W Res J Int'l L 623, 626

[611] PC Honegger, 'Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding' (1983) 9 NCJ Int'l L & Com Reg 1, 8

[612] O Dunant, M Wassmer, 'Swiss Bank Secrecy: Its Limits under Swiss International Laws' (1988) 20 Case W Res J Int'l LV 541, 549

[613] Swiss Criminal Code of December 21 1937. RS 311. Articles 271 and 273

[614] Including, letters rogatory, mutual assistance treaties and double taxation treaties. These are discussed at length later on in this chapter.

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[616] 'Tax evasion occurs when a taxpayer does not declare income and, as a consequence, is not taxed on that income. At the federal and cantonal level, tax evasion is an administrative offense.' Conversely, 'tax fraud is committed when a taxpayer uses false, falsified or inaccurate documents with the purpose of defrauding the tax authorities. Tax fraud is qualified as a criminal offense by the Federal Law on Income Tax.' O Dunant, M

prior to recent international intervention, bank secrecy was retained and assistance was not provided to foreign authorities in these circumstances.[617]

In common law secrecy jurisdictions, conceptions of the duty of confidentiality, as expressed in *Tournier*,[618] have been retained. It is unclear whether the exceptions identified in *Tournier* apply to permit the bank to disclose confidential information to foreign authorities, under the compulsion of foreign law. Nonetheless, when concerning tax offences,[619] the provision of assistance is highly unlikely in secrecy jurisdictions, as *Tournier* is interpreted in a manner that is consistent with national interests. The exceptions are balanced against the recognition that bank secrecy is vital to secrecy jurisdictions' economies.[620] Thus, while the obligation to ensure confidentiality expressed in *Tournier* is retained, the fairly wide exceptions are confined to a limited set of circumstances, usually specifically excluding the provision of assistance to foreign authorities for the enforcement of foreign revenue laws.[621] This is because the financial interests of the secrecy jurisdiction in ensuring confidentiality, outweigh its interests in assisting other jurisdictions by disclosing tax related information.[622] Moreover, bank confidentiality in common law secrecy jurisdictions is often 'fortified' with bank secrecy laws, based on the Swiss model.[623] For instance, s.5 of the Confidential Relationships (Preservation) Law of the Cayman Islands provided that a person who offered or threatened to divulge information, or who willfully obtained or attempted to obtain it, commited an offence

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Wassmer, 'Swiss Bank Secrecy: Its Limits under Swiss International Laws' (1988) 20 Case W Res J Int'l LV 541, 551

[617] See BJ Bondi, 'Don't Tread On Me: Has the United States Government's Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws?' (2010) 30 Northwestern Journal of International Law & Business 1,6

[618] *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 (CA)

[619] Many secrecy jurisdictions have issued injunctions preventing the disclosure of information to foreign authorities RM Antoine, *Confidentiality in Offshore Financial Law* (OUP, 2002) p298-302

[620] In Vanuatu, the adoption and interpretation of English common law is considered 'subject to such qualifications as local circumstances render necessary' *Western Pacific (Courts) Order in Council 1961*, cl 15. See also the judgment of Knowles CJ in *Re Nassau and Trust C Ltd* (1977) 1 Bahamas Law Reports 1, 4-5, quoting DM Fleming, a former Minister of Finance in the Federal Government of Canada, 'any weakening of this guarantee [bank secrecy] would be harmful to the interest of the Bahamas, any strengthening of it would be reassuring.' Both examples are provided by J Corrin, 'Responding to Challenges to a Bank's Duty of Confidentiality in Offshore Financial Centres: The Vanuatu Example' (2013) 28 Banking and Finance Law Review 249

[621] RMB Antoine, 'The Protection of Offshore Confidentiality: Policy Implications and Legal Trends' (1999) 7 JFC 9, 12

[622] 'The secrecy provision is one of the pillars of this part of our economic structure, the destruction of which would lead to the collapse of the whole structure it supports' *Re Nassau Bank and Trust Company* [1985] CILR 418

[623] *Bertoli v Malone* [1990-91] CILR 59, at p78 (Cayman Islands); cited in RMB Antoine, 'The Protection of Offshore Confidentiality: Policy Implications and Legal Trends' (1999) 7 JFC 9, 12

punishable by imprisonment.[624] The penalty doubled when the offender received a reward for his actions or was acting in a professional capacity.[625] Similar legislation exists in a plethora of secrecy jurisdictions, including Vanuatu,[626] and the Bahamas.[627] These secrecy laws contained limited exceptions authorising banks to disclose information to national authorities in certain circumstances, but historically prohibited disclosure to foreign authorities for the purposes of investigating tax offences.

Complex Structures, Structural Bank Forms and Practical Impediments

The opacity of secrecy jurisdictions is also sustained through structural bank forms and impediments, and the provision of complex legal structures. In secrecy jurisdictions, the nondisclosure of financial dealings may be ensured through the provision of complex entities, such as limited liability companies.[628] Characteristically, these companies do not have a physical presence in the jurisdiction, but rather are 'shell companies', with the registered office simply existing as a 'brass plate' address, permitting transactions to be booked in secrecy jurisdictions and attributed to the shell company.[629] Such companies may be used by tax evaders and other financial criminals to simply hold money offshore or to engage in various transactions, such as investments in UK or US financial products, without paying tax on the interest or gains.[630] The preservation of the anonymity of the owner of the company is achieved using nominee directors, secretaries, and shareholders, or through the issuance of bearer

[624] Confidential Relationships (Preservation) Law, Law 16 of 1976 (revised in 2015), s5; repealed by the Confidential Information Disclosure Law 2016

[625] Ibid; see also MA Young, *Banking Secrecy and Offshore Financial Centers: Money Laundering and Offshore Banking* (Routledge, 2013)

[626] International Companies Act [Cap 222] (Vanuatu) s125 (amended 2017); see also Trust Companies Act [Cap 69], s9 and the Companies Act [Cap 191], s376; J Corrin, 'Responding to Challenges to a Bank's Duty of Confidentiality in Offshore Financial Centres: The Vanuatu Example' (2013) 28 Banking and Finance Law Review 249

[627] Banks and Trust Companies Regulations Act 1965, s10 (amended 2015); see HS Eberstein, 'Of Securities Law in Haven Jurisdictions Palm Trees Hide More than Sunshine: The Extraterritorial Application' (1995) 13 Dick J Int'l L 441

[628] It is important to note that often, these structures are established with the assistance of advisors and intermediaries located in the UK and the US. See WP de Groen, 'Role of Advisors and Intermediaries in the Schemes Revealed in the Panama Papers' (European Parliament, Study for the PANA Committee, April 2017) <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602030/IPOL_STU(2017)602030_EN.pdf> accessed 28th October 2017; see also US Senate Permanent Subcommittee on Investigations, *Tax Haven Abuses: The Enablers, The Tools and Secrecy* (August 2006)

[629] S Picciotto, 'Offshore: The State as Legal Fiction' in MP Hampton, JP Abbott, *Offshore Finance Centres and Tax Havens: The Rise of Global Capital* (Palgrave, 1999) p.54; However, there is evidence that recent international measures have ensured it is now 'more than three times more difficult to obtain an anonymous shell in tax havens than in OECD member countries.' MG Findley, DL Nielson, JC Sharman, *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism* (Cambridge Studies in International Relations, CUP 2014) p.74

[630] JG Gravelle, *Tax havens: International Tax Avoidance and Evasion* (Congressional Research Service, 2015) p.24

shares.[631] These structures assist the individual concerned to retain ultimate ownership of the funds whilst preventing the disclosure of their identity.[632] Accordingly, 'anonymous shell companies are perfect instruments for money laundering and tax evasion.'[633]

Trusts or foundations may also be established in secrecy jurisdictions. A trust permits an individual, the settlor, to give their assets to someone else, the trustee, under a trust deed, with the purpose of holding them for an identified person, the beneficiary. However, in secrecy jurisdictions the former owner of the assets is permitted to benefit from the trust, without being identified as the original owner or beneficiary.[634] Their name will not appear on any document, but the owner of the assets will retain control over them by signing a separate agreement with a service provider,[635] or by appointing a trust protector whose role is to accomplish their wishes.[636] Assets may be given to offshore trusts for the purposes of hiding assets to evade taxation, or channeled through trusts for money laundering purposes.[637] While some individuals will simply set up one offshore trust or shell company, others desire an extra level of protection through complex structures using several trusts and corporations.[638] A plethora of offshore companies may be established to hold assets offshore, with trusts being formed to formally own the companies.[639] Bank accounts can be opened in the name of the trust or company, rather than the owner of the assets.[640]

The business models of offshore banks and secrecy jurisdictions can provide a further level of *de facto* secrecy. Secrecy can be ensured by banks through the provision of anonymous or

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[631] House of Commons Treasury Committee, *Offshore Financial Centres: Oral and Written Evidence* (HC 2007-08, 895-I) p.35

[632] Ibid

[633] P Emmenegger, 'The Politics of Financial Intransparency: The Case of Swiss Banking Secrecy' (2014) 20 Swiss Political Science Review 146, 151

[634] G Schjelderup, 'Secrecy Jurisdictions' (2016) 23 Int Tax Public Finance 168, 177; see also R Palan, R Murphy, C Chavagneux, *Tax Havens: How Globalisation Really Works* (Cornell University Press, 2010) p.92

[635] These agreements may also be used to retain control over shell companies. For instance, see the documentation held by Cititrust in the Cayman Islands relating to the company created for Raul Salinas US Senate Permanent Subcommittee on Investigations, *Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities* (September 1999) at 890

[636] JG Gravelle, *Tax havens: International Tax Avoidance and Evasion* (Congressional Research Service, 2015) p.25; US Senate Permanent Subcommittee on Investigations, *Tax Haven Abuses: The Enablers, The Tools and Secrecy* (August 2006) p.13

[637] HM Silets, MC Drew, 'Offshore Asset Protection Trusts: Tax Planning or Tax Fraud?' (2001) 5 JMLC 9, 9

[638] US Senate Permanent Subcommittee on Investigations, *Tax Haven Abuses: The Enablers, The Tools and Secrecy* (August 2006) p.13; see also the examples in US Senate Permanent Subcommittee on Investigations, *Tax Haven Banks and US Tax Compliance* (July 2008)

[639] Ibid

[640] Plenty of examples of these structures can be found in the Panama Papers Leak MM Hamilton, 'Panamanian Law Firm Is Gatekeeper To Vast Flow of Murky Offshore Secrets' (International Consortium for Investigative Journalists, 3rd April 2016) <https://panamapapers.icij.org/20160403-mossack-fonseca-offshore-secrets.html > accessed 18th September 2017

pseudonymous accounts, where the account holder is not identified by name, but rather a number or pseudonym,[641] providing additional protection against unscrupulous or blackmailed employees.[642] Further, the business models of many secrecy jurisdictions serve to exacerbate the impenetrability of financial records in these jurisdictions by providing practical impediments to disclosure. One feature is the adoption of a ring-fenced system of law and taxation, whereby tax laws and regulatory requirements imposed on residents of the secrecy jurisdiction are different to those applied to foreign investors and companies.[643] Ring fencing ensures foreign individuals and companies are alleviated from many reporting and auditing requirements, resulting in the absence, or inadequate maintenance, of public corporate and trust registries.[644] Moreover, even if well-maintained and accessible registers of corporations and trusts exist, these registers will rarely contain information on the beneficial, or real, owners of these structures.[645] Ring fencing also ensures that foreign individuals do not pay tax in these jurisdictions, preventing the evasion of taxes and thus dual criminality, which was often a precursor to the provision of international assistance.[646]

3.5 Secrecy Jurisdictions and Tax Evasion

It must be remembered that many individuals hold accounts in secrecy jurisdictions for a multitude of reasons unrelated to taxation, including diversifying or enhancing investment opportunities, engaging in international business transactions, protecting assets, or facilitating access to funds while living or working abroad.[647] The complex legal structures established within the borders of secrecy jurisdictions may also be used for legal purposes including tax avoidance, as revealed by the Paradise Papers leak.[648] However, the preceding discussion

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[641] CT Jones, 'Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy' (1992) 12 Nw J Int'l & Bus 454, 459 citing E Chambost, *Bank Accounts: A World Guide to Confidentiality* (Wiley and Sons, 1983)

[642] Ibid

[643] OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publications, 1998) p.26; see also JG Salinas, 'The OECD Tax Competition Initiative: A Critique of its Merits in the Global Marketplace' (2003) Hous J Int'l L 531,541

[644] G Schjelderup, 'Secrecy Jurisdictions' (2016) 23 Int Tax Public Finance 168, 171

[645] There have been calls for the UK to require its overseas territories to introduce public registers of company ownership M Marriage, 'UK Must Push for Public Register in Offshore Centres, say MPs' (Financial Times, 6 November 2017) <https://www.ft.com/content/991ab660-c31a-11e7-a1d2-6786f39ef675> accessed 10 November 2017

[646] G Schjelderup, 'Secrecy Jurisdictions' (2016) 23 Int Tax Public Finance 168, 172

[647] United States Government Accountability Office, *Offshore Tax Evasion: IRS Has Collected Billions of Dollars, but May be Missing Continued Evasion* (Report to Congressional Requesters, GAO-13-318, March 2013) p.3

[648] International Consortium of Investigative Journalists, 'An ICIJ Investigation Paradise Papers: Secrets of the Global Elite' (ICIJ, from 5 November 2017) <https://www.icij.org/investigations/paradise-papers/> accessed 16th November 2017

demonstrates that secrecy jurisdictions may also be utilised to conceal legally or illegally obtained income and assets,[649] facilitating tax evasion and other financial crimes.[650]

Estimates of the amount of wealth held offshore in secrecy jurisdictions confirm the potential magnitude of the problems caused by offshore tax evasion. In 2007, the OECD estimated that approximately $5-7tr is held offshore,[651] while, in 2008, the Boston Consulting Group suggested offshore wealth amounted to $6.7tr,[652] a figure that rose to almost $10tr in 2015.[653] Zucman, who proposes that 10% of global financial wealth is held offshore, also provides a similar estimate of approximately $7.8tr in 2017.[654] Henry controversially estimated that a significantly larger sum was held offshore in 2010, of between $21 and $32tr.[655] This was raised to between $24 and $36tr in 2015.[656] Due to the clandestine nature of tax evasion, there

[649] This is also demonstrated by the revelations contained in recent tax evasion scandals including, but not limited to, the resent HSBC scandal and the Panama Papers leak; The International Consortium for Investigative Journalists, 'Banking Giant HSBC Sheltered Murky Cash Linked to Dictators and Arms Dealers' (8 February 2015) <http://www.icij.org/project/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers> accessed 15th March 2016; MM Hamilton, 'Panamanian Law Firm Is Gatekeeper To Vast Flow of Murky Offshore Secrets' (International Consortium for Investigative Journalists, 3rd April 2016) <https://panamapapers.icij.org/20160403-mossack-fonseca-offshore-secrets.html > accessed 18th September 2017

[650] For a survey of the action taken by international organisations to tackle financial crime associated with secrecy jurisdictions see M Young, 'The Exploitation of Offshore Financial Centres: Banking Confidentiality and Money Laundering' (2013) 16 JMLC 198

[651] J Owens, 'Written Testimony of Jeffrey Owens, Director, OECD Center for Tax Policy and Administration before Senate Finance Committee on Offshore Tax Evasion' (3 May 2007) <http://www.bus.umich.edu/otpr/papers/Owens_papers.pdf> accessed 11 November 2017

[652] J Becerra et al, 'Global Wealth 2009: Delivering on the Client Promise' (Boston Consulting Group, September 2009) <https://www.bcg.com/documents/file29101.pdf> accessed 11 November 2017

[653] B Beardsley et al, 'Global Wealth 2016: Navigating the New Client Landscape' (Boston Consulting Group, June 2016) <https://www.bcgperspectives.com/content/articles/financial-institutions-consumer-insight-global-wealth-2016/#chapter1> accessed 11 November 2017

[654] A Alstadsaeter, N Johannesen, G Zucman, 'Who Owns the Wealth in Tax Havens? Macro Evidence and Implications for Global Inequality' (September 2017) National Bureau of Economic Research, Working Paper 23805 <http://gabriel-zucman.eu/files/AJZ2017b.pdf>; In 2013, Zucman suggested that 8% of global financial wealth is held offshore, or $7.6tr, of which 6% is unrecorded G Zucman, 'Taxing Across Borders: Tracking Personal Wealth and Corporate Profits' (2014) 28 Journal of Economic Perspectives 121, 140; Increased from an estimate of $5.9 trillion for 2008 G Zucman, 'The Missing Wealth of Nations: Are Europe and the US Net Debtors or Net Creditors?' (2013) Quarterly Journal of Economics 1321, 1343

[655] JS Henry, 'The Price of Offshore Revisited: New Estimates for "Missing" Global Private Wealth, Income, Inequality and Lost Taxes' (Tax Justice Network, July 2012) <http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf> accessed 11 November 2017; This estimate has been criticised by the OECD see C Vellacott, S Cruise, 'Analysis: Tax Haven Clampdown Yields Cash but Secrecy Still Thrives' (Reuters, 26 July 2012) <http://uk.reuters.com/article/uk-tax-offshore/analysis-tax-haven-clampdown-yields-cash-but-secrecy-still-thrives-idUKBRE86P0D920120726> accessed 11 November 2017

[656] JS Henry, 'Let's Tax Anonymous Wealth! A Modest Proposal to Reduce Inequality, Attack Organized Crime, Aid Developing Countries and Raise Badly Needed Revenue from the World's Wealthiest Tax Dodgers, Kleptocrats and Felons' in T Pogge, K Mehta (eds), *Global Tax Fairness* (OUP 2016) p.79; both figures significantly exceed the TJN's original estimate of $11.5trillion in 2005 Tax Justice Network, 'Briefing Paper: The Price of Offshore' <http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore.pdf> accessed 11 November 2017

are very few estimates of the proportion of the estimated sums held offshore, which may be attributed to this illegal activity. One estimate is provided by Zucman, who suggests that the extent of wealth hidden offshore results in global tax losses imputable to tax evasion of $190bn, specifically equating to tax losses of $75bn in Europe and $36bn in the US.[657] Zucman *et al* find that approximately 2.8% of all taxes go unpaid due to tax evasion,[658] with 20% of this sum attributable to offshore, rather than domestic, tax evasion.[659] Moreover, they note that it is the top 0.05%, or the wealthiest individuals, who are the most likely to evade tax offshore, with the top 0.01% evading 30% of their taxes, or five times more than the average individual.[660]

Neither HMRC nor the IRS provide an official estimate of the extent of tax evasion attributable to offshore activities by individuals or entities subject to UK or US taxation.[661] This is unfortunate, as unofficial estimates are widely believed to be unreliable and/or politically charged.[662] In 2001, US attorney Blum stated that US tax evasion losses attributable to offshore activity amounted to $70bn.[663] However, he later failed to provide details of his methodology, stating 'you just have to take a guess at it.'[664] In 2008, a report from the Senate Subcommittee on Permanent Investigations stated that 'each year, the US loses an estimated $100bn in tax revenues due to offshore tax abuses.'[665] Yet, this figure simply appears to be the result of an

[657] He states, 'My method probably delivers a lower bound, in part because it only captures financial wealth and disregards real assets' G Zucman, 'Taxing Across Borders: Tracking Personal Wealth and Corporate Profits' (2014) 28 Journal of Economic Perspectives 121, 140

[658] Using a sample from Scandinavian countries. A Alstadsaeter, N Johannsen, G Zucman, 'Tax Evasion and Inequality' (September 2017) National Bureau of Economic Research, Working Paper 23772 <http://www.nber.org/papers/w23772>; HMRC estimates that the tax gap attributable to tax evasion, criminal attacks and the hidden economy in the UK amount to 40% of the total tax gap, or 2.4% of total tax liabilities. See HM Revenue & Customs, *Measuring Tax Gaps 2017 Edition: Tax Gap Estimates for 2015-16* (26 October 2017)

[659] A Alstadsaeter, N Johannsen, G Zucman, 'Tax Evasion and Inequality' (September 2017, National Bureau of Economic Research, Working Paper 23772) <http://www.nber.org/papers/w23772> p.28

[660] Ibid

[661] See HM Revenue & Customs, *Measuring Tax Gaps 2017 Edition: Tax Gap Estimates for 2015-16* (26 October 2017); Internal Revenue Service, *Tax Gap Estimates for Tax Years 2008-10* (April 2016); The IRS has was tasked with examining the feasibility of measuring the extent of offshore tax evasion Treasury Inspector General for Tax Administration, Office of Inspections and Evaluations, 'The Internal Revenue Service Needs to Improve the Comprehensiveness, Accuracy, Reliability, and Timeliness of the Tax Gap Estimate' (2013-IE-R008, 21 August 2013) <https://www.treasury.gov/tigta/iereports/2013reports/2013ier008fr.html> accessed 13 November 2017; see Internal Revenue Service, *The Feasibility of Estimating the Offshore Portion of the Individual Income Tax Gap*. (Research, Analysis & Statistics, Publication 5161, January 2015)

[662] A point made by W Vlcek, *Offshore Finance and Small States: Sovereignty, Size and Money* (Palgrave Macmillan 2008) p.51

[663] WH Byrnes, D Kleinfeld, AG Soriano, 'Background and Current Status of FATCA' in D Byrnes, RJ Munro, *LexisNexis Guide to FATCA Compliance* (2nd edn, LexisNexis 2014) p.9

[664] Ibid

[665] US Senate Permanent Subcommittee on Investigations, *Tax Haven Banks and US Tax Compliance* (July 2008) p.1; This statement is repeated in US Senate Subcommittee on Investigations, *Staff Report on Dividend Tax Abuse: How Offshore Entities Dodge Taxes on US Stock Dividends* (September 2008) p.1

unsystematic amalgamation of estimates produced by academics and organisations.[666] HMRC estimated the size of the offshore tax gap for 2004-05 at between £1.9bn and £3.1bn, but only in respect of twelve tax havens.[667] HMRC's recent estimates of the UK tax gap do not specify how much revenue is lost due to offshore tax evasion.[668] The UK's first money laundering risk assessment merely remarked that 'the threat to the UK from offshore tax evasion is a sizeable one.'[669] Tax Research LLP estimated that UK revenue losses due to offshore tax evasion amount to £4.3bn per year.[670] However, senior government officials have dismissed this estimate.[671]

International organisations have neglected to estimate the extent of tax evasion, let alone the extent of offshore tax evasion. In 2006, the EU proposed that revenue losses due to tax fraud within the EU amounted to between 2 and 2.5% of GDP, or €200 to €250bn.[672] However, this estimate was based on academic studies, as opposed to being drawn from precise figures provided by Member States.[673] The EU suggested that tax evasion within the EU totals approximately €860bn per year,[674] citing a figure produced by an organisation.[675] Perhaps more

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[666] Including that of Guttentag and Avi-Yonah, who estimate that between $40 and $70billion of US tax revenues are lost each year due to offshore tax evasion J Guttentag, RS Avi-Yonah, 'Closing the International Tax Gap' in MB Sawicky (ed), *Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration* (Economic Policy Institute, 2006)

[667] HM Revenue & Customs, 'Offshore Tax Gap 2004/05- 6/11/06 Update' (6 November 2006) <http://webarchive.nationalarchives.gov.uk/20130605220316/http:/www.hmrc.gov.uk/freedom/update-offshore-tax-gap061106.pdf> accessed 17th November 2017

[668] See for instance, HM Revenue & Customs, 'Measuring Tax Gaps 2020 Edition: Tax Gap Estimates from 2018 to 2019' (9 July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907122/Measuring_tax_gaps_2020_edition.pdf> accessed 1st April 2021. This was despite HMRC noting in its previous reports that 'this type of tax evasion is thought to be so significant that it merits separate estimation of the consequent tax loss', ibid.

[669] HM Treasury, Home Office, 'UK National Risk Assessment of Money Laundering and Terrorist Financing' (October 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468210/UK_NRA_October_2015_final_web.pdf> accessed 17 November 2017 at p.34

[670] R Murphy, 'The Tax Gap: Tax Evasion in 2014 - and What Can be Done About It' (Tax Research UK, Public and Commercial Services Union, September 2014) <http://www.taxresearch.org.uk/Documents/PCSTaxGap2014Full.pdf> accessed 17th November 2017

[671] HC Deb 16 June 2010, vol 511, col 190WH. Notwithstanding their unwillingness to require HMRC to proffer an official estimate, despite the IMF encouraging them to do so, International Monetary Fund, *United Kingdom: Technical Assistance Report - Assessment of HMRC's Tax Gap Analysis* (IMF Country Report No. 13/314, October 2013) p.8

[672] European Commission, 'EU Coherent Strategy Against Fiscal Fraud – Frequently Asked Questions' (MEMO/06/221, Press Release Database, 31 May 2006) <http://europa.eu/rapid/press-release_MEMO-06-221_en.htm?locale=en> accessed 17th November 2017

[673] Ibid

[674] European Commission, 'Tax Evasion and Avoidance: Questions and Answers' (MEMO/12/949, Press Release Database, 6 December 2012) <http://europa.eu/rapid/press-release_MEMO-12-949_en.htm#footnote-1> accessed 17 November 2017

[675] R Murphy, 'Closing the European Tax Gap: A Report for Group of the Progressive Alliance of Socialists & Democrats in the European Parliament' (Tax Research LLP, 29 February 2012)

reliably, the IMF has estimated that the scale of money laundering equates to between 2 and 5% of global GDP.[676] The nature of this figure is clarified by the United Nations Office on Drugs and Crime (UNODC), which explains that estimates of money laundering tend to fall within the lower bound of this range when tax and customs related money laundering are excluded but, if they are accounted for, the figure would likely fall within, or even marginally exceed, the upper bound of the IMF's estimate.[677]

The lack of estimates in this area is a major concern, as despite the inherent difficulties involved in estimating the extent of any illegal activity, the extent of losses caused by tax evasion must be quantified in order to assess and monitor the progress of international efforts.[678] This information would also enable researchers to undertake a cost benefit analysis of the operation of the international measures in this area; a vital process that will enable the theoretical assumptions underpinning the legislation to be tested,[679] namely, the assumption that transparency will lead to greater tax compliance,[680] and will outweigh the costs of implementation.[681] Nonetheless, it is clear that offshore tax evasion poses a significant threat to worldwide revenues. However, many secrecy jurisdictions are unwilling to temper strict bank secrecy laws and mechanisms, owing to their intrinsic importance to national economies. This problem is compounded by the fact that secrecy jurisdictions must be willing to act in

<http://www.socialistsanddemocrats.eu/sites/default/files/120229_richard_murphy_eu_tax_gap_en.pdf> accessed 17 November 2017

[676] M Camdessus, 'Money Laundering: the Importance of International Countermeasures--Address by Michel Camdessus' (IMF, 10 February 1998) <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp021098> accessed 17th November 2017

[677] UNODC, 'Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crimes' (Research Report, October 2011) <http://www.unodc.org/documents/data-and-analysis/Studies/Illicitfinancialflows2011web.pdf> accessed 17th November 2017

[678] A point recognised and inadequately addressed in efforts to combat money laundering, B Unger, EM Busuioc, *The Scale and Impacts of Money Laundering* (Edward Elgar 2007) p.8-9

[679] A point made by Harvey in regard to AML measures; J Harvey, 'Compliance and Reporting Issues Arising for Financial Institutions from Money Laundering Regulations: A Preliminary Cost Benefit Study' (2004) 7 JMLC 333; J Harvey, 'An Evaluation of Money Laundering Policies' (2005) 8 JMLC 339; J Harvey, 'Guest Editorial: The Search for Crime Money – Debunking the Myth: Facts Versus Imagery' (2009) 12 JMLC 97

[680] 'The absence of data is a principal impediment to the successful tackling of tax evasion.' S Phua, 'Convergence in Global Tax Compliance' [2015] Singapore Journal of Legal Studies 77, 81

[681] The need for a cost benefit analysis of financial crime legislation has been raised extensively in relation to AML measures, see European Union Committee, *Nineteenth Report Money Laundering and the Financing of Terrorism Volume I: Report* (HL 2008-09, 132-I) paras 124-129; see the articles contained in the special issue of the Journal of Money Laundering Control, 'The Search for Crime Money' (2009) 12 JMLC 97; see also P Sproat, 'The New Policing of Assets and the New Assets of Policing: A Tentative Financial Cost-Benefit Analysis of the UK's Anti-Money Laundering and Asset Recovery Regime' (2007) 10 JMLC 277; RL Sarker, 'Anti-Money Laundering Requirements: Too Much Pain for Too Little Gain?' (2006) 27 Comp Law 250

unison, or else a few such states may profit from the retention of strict bank secrecy laws at the expense of others.[682]

Traditional Measures used to Obtain Evidence and Assistance from Abroad and their Application in Tax Cases

3.6 Introduction

A lack of information on the wealth held by taxpayers is the primary impediment to enforcing tax laws and thus, is a fundamental cause of tax evasion.[683] This problem is particularly prevalent when the taxpayer's income or assets are held offshore because, in contrast to domestically held income, information relating to these funds is less likely to be accessible to the national tax authority.[684] The problem derives from the legal and practical impediments states face when attempting to enforce tax laws beyond their borders, which largely developed as a result of notions of state sovereignty, conceptions of comity and national self-interest.[685] These impediments were not restricted to the obtaining of information, evidence or enforcement assistance from secrecy jurisdictions, yet, as will be seen below, attempts to break down these barriers have been most fiercely resisted within their borders. The 'obvious solution' to the problem of information and enforcement deficiency in the international sphere is the provision of information, evidence and assistance between states in relation to tax matters.[686] This section examines the first phase of international cooperation in tax matters, originating in general international arrangements concerning cooperation in civil and criminal matters, and will assess their contribution to UK and US attempts to combat tax evasion. Considering the propensity of states, including the UK and US, to consider tax evasion as both

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[682] Alldridge offers the analogy of a leaky bathtub, which will continue to leak until the final hole is plugged P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) p.155-6; Others have likened this collective action problem to the classic prisoner's dilemma P Emmenegger, 'Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters: A Nut Too Hard to Crack?' (2017) 11 Regulation & Governance 24

[683] 'Tax authorities across the world should automatically share information to fight the scourge of tax evasion' G8, 'Policy paper: G8 Lough Erne Declaration' (18 June 2013) <https://www.gov.uk/government/publications/g8-lough-erne-declaration/g8-lough-erne-declaration-html-version> accessed 11 February 2018; N Johannesen, G Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal 65, 68

[684] Ibid

[685] AR Albrecht, 'The Enforcement of Taxation under International Law' (1953) 30 Brit YB Int'l L 454, 459-461

[686] N Johannesen, G Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal 65, 68

a civil and criminal concern, this section examines measures providing for assistance within each system.

3.7 Voluntary Provision of Information

In both the UK and US, there are minimal restrictions on the ability to obtain evidence from witnesses located abroad, who are willing to provide information voluntarily.[687] Unless witnesses are subject to foreign laws prohibiting the disclosure of this information,[688] legal issues are unlikely to arise.[689] However, when the witness will not or cannot voluntarily cooperate, a principle of customary international law must be considered; a state may not conduct official activities or attempt to enforce its laws in another state without the latter's consent.[690] The following sections examine the agreements reached by states for the purposes of obtaining information and assistance in combatting tax evasion.

3.8 Letters of Request or Letters Rogatory

A letter of request or a letter rogatory,[691] is a well-established method used to gather evidence from authorities, entities or individuals located abroad.[692] A letter of request is a 'medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country.'[693] In other words, following a successful application a letter of request is sent through diplomatic channels to a judge in the recipient country with the aim of securing certain actions, including the production of documents, the issuance of a search warrant and the provision of evidence by a

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[687] For example, in England and Wales, if the Secretary of State prohibits compliance under the Protection of Trading Interests Act 1980; P Summerfield, S Loble, 'The Procedure for Obtaining Evidence In England and Wales for Use In United States Proceedings' (1988) 1 Transnat'l Law 271, 272

[688] See section X above

[689] JP Springer, 'An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases' (1988) 22 Geo Wash J Int'l L & Econ 277, 310

[690] '[T]he first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State' *The Case of the S.S. "Lotus" (France v. Turkey)* PCIJ Rep Series A No. 10 (1027) at 18; CH Gustafson, 'The Role of International Law and Practice in Addressing International Tax Issues in the Global Era' (2011) 56 Vill L Rev 475, 486

[691] The UK uses the term letter of request, the US letter rogatory.

[692] 'The traditional method' JIK Knapp, 'Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy' (1988) 20 Case W Res J Int'l L 405, 409; For an historical summary of the use of letters of request in England see PF Sutherland, 'The Use of the Letter of Request (Or Letter Rogatory) for the Purpose of Obtaining Evidence for Proceedings in England and Abroad' (1982) 31 ICLQ 784, 785-787

[693] *The Signe* (E.D. La. 1941), 37 F. Supp. 819, at p.820

witness.[694] Letters of request can be sought to obtain evidence for both civil and criminal proceedings,[695] but may only usually be issued where proceedings have already commenced, or are at least contemplated.[696] However, letters of request do not impose any obligation on the receiving state; compliance is discretionary, and, when granted, is based solely on comity.[697]

Letters of request have rarely been used to obtain evidence in tax cases.[698] On a practical level, the procedure for obtaining evidence pursuant to a letter of request is both time-consuming, in that the process involves both judicial and diplomatic channels,[699] and arduous, in that requests must be appropriately drafted for the receiving legal system.[700] Of greater concern is the reliance on the comity of foreign nations,[701] for the lack of a legal obligation on states to comply with letters of request means that states are not obliged to make exceptions to bank secrecy laws, potentially rendering the information sought unavailable in tax evasion cases.[702] Assistance through letters of request may be specifically prohibited for certain offences, of which fiscal offences are a classic example.[703]

3.9 The Revenue Rule

The exclusion of fiscal offences can be attributed in part to the revenue rule, which developed in England and Wales and was extended to jurisdictions following English common law.[704] It

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[694] JIK Knapp, 'Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy' (1988) 20 Case W Res J Int'l L 405, 409; US Criminal Tax Manual 2012, at 41.05[3] available from <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0>

[695] 28 U.S.C. §§ 1781, 1782; Federal Rules of Civil Procedure 28(b) and 4(f)(2)(B) and Federal Rules of Criminal Procedure 15(e); Evidence (Proceedings in Other Jurisdictions) Act 1975, s1; Crime (International Co-operation) Act 2003, s7, s13; Civil Procedure Rules, Part 34; Criminal Procedure Rules, Part 32

[696] In the US, this rule is not considered absolute see *United States v Reagan*, 453 F.2d 165, 171-74

[697] In both the UK and US, the judiciary will endeavour to comply with the request whenever it is appropriate to do so *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation* [1978] AC 547, at p.625 (HL); *Hilton v Guyot*, 159 US 113, 202-3 (1895); see also TM Funk, *Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges* (Federal Judicial Center International Litigation Guide, 2014) p.17

[698] H Spall, 'International Tax Evasion and Tax Fraud: Typical Schemes and the Legal Issues Raised by Their Detection and Prosecution' (1981) U Miami Inter-Am L Rev 325, 346

[699] RC O'Brien, 'Compelling the Production of Evidence by Nonparties in England under the Hague Convention' (1997) 24 Syracuse J Int'l L & Com 77, 80

[700] JIK Knapp, 'Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy' (1988) 20 Case W Res J Int'l L 405, 410

[701] 'Compliance is not required by customary international law' CH Gustafson, 'The Role of International Law and Practice in Addressing International Tax Issues in the Global Era' (2011) 56 Vill L Rev 475, 486

[702] IRS, 'Internal Revenue Manual, Part 35.4.5 Evidence and Information from Abroad' <https://www.irs.gov/irm/part35/irm_35-004-005> Accessed 11 February 2018; JP Springer, 'Obtaining Foreign Evidence and Other Types of Assistance for Criminal Tax Cases' (2001) 49 US Att'ys Bull 43, 48

[703] JIK Knapp, 'Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy' (1988) 20 Case W Res J Int'l L 405, 410

[704] Including the US - *HM the Queen in Right of British Columbia v Gilbertson* 433 F Supp 410, 597 F.2d 1161 (1979); Canada - *United States of America v Harden* 41 DLR (2d) 721 (1963); Ireland - *Peter Buchanan Ltd. and Macharg v McVey* [1954] IR 89, [1955] AC 516; South Africa - *Commissioner of Taxes, Federation of*

'is a well recognised rule, which has been enforced for at least 200 years or thereabouts, under which… courts will not collect the taxes of foreign states for the benefit of the sovereigns of those foreign states.'[705] The rule originated in the 18th century, when Lord Mansfield declared that 'no country ever takes notice of the revenue laws of another',[706] yet the classic authority for this proposition is said to be *Government of India v Taylor*.[707] The revenue rule was recognised by a US state court in 1806,[708] and was initially held to apply in relation to both the enforcement of sister state and foreign state tax claims or judgments,[709] before being held inapplicable in the interstate context,[710] at least in relation to judgments.[711] The rule was once 'a fundamental rule of private international law.'[712] The rule has been applied to the enforcement of various forms of taxation, including income tax,[713] capital gains tax,[714] and a customs duty,[715] and to the direct and indirect enforcement of both tax claims and judgments.[716] However, its application has been inconsistent.[717] English courts have determined the rule inapplicable to the extradition of an individual charged with tax related offences,[718] and US courts have determined that the rule does not prevent the criminal prosecution of individuals, notwithstanding the fact that tax may be recovered for a foreign government.[719] However, in

Rhosdesia v McFarland (1965) (1) SA 470; Australia - *Permanent Trustee Co. (Canberra) Ltd. V Finlayson* (1968) 122 CLR 338; P Baker, 'The Transnational Enforcement of Tax Liabilities' (1993) 5 BTR 313, 313

[705] *Re Visser* [1928] Ch 877, at 884

[706] *Holman v Johnson* (1775) 98 Eng Rep 1120, 1121 (KB); The case law can be traced from *Att'y Gen v Lutwydge* (1729) 145 Eng Rep 674 (Ex Div); *Boucher v Lawson* (1734) 95 Eng Rep 55; *Holman v Johnson* (1775) 98 Eng Rep 1120 (KB); *Planche v Fletcher* (1779) 99 Eng Rep 164

[707] Where the House of Lords refused to permit the enforcement of a tax judgment by the Indian Government *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 (HL); see also *Municipal Council of Sydney v Bull* [1909] 1 KB 7

[708] *Ludlow v Van Rensselaer* 1 Johns 93, 94 (NY 1806)

[709] *Maryland v Turner,* 132 NY 173, 174 (1911); *Colorado v Harbeck,* 133 NE 357, 360 (NY 1921)

[710] *Milwaukee County v ME White Co.,* 296 US 268, 268 (1935), due to the Full Faith and Credit Clause of the US Constitution US Const. art. IV, §1

[711] Many states have since recognised sister state tax claims, believing the rule to be outdated and unjustified *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W.2d 919, 927 (Mo. Ct. App. 1946); *Buckley v. Huston,* 291 A.2d 129, 131 (N.J. 1972) see EJ Farnam, 'Racketeering, RICO and the Revenue Rule in Attorney General of Canada v RJ Reynolds: Civil RICO Claims for Foreign Tax Law Violations' (2002) 77 Wash L Rev 843, 852; see also TB Stoel, 'The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States' (1967) 16 ICLQ 663, 675

[712] AR Albrecht, 'The Enforcement of Taxation under International Law' (1953) 30 Brit YB Int'l L 454, 461

[713] *Indian and General Investment Trust Co Ltd v Borax Consolidated Ltd* [1920] 1 KB 539, 550; *USA v Harden* (1963) 41 DLR (2d) 721 (Sup Ct Can)

[714] *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 (HL)

[715] *Holman v Johnson* (1775) 1 Cowp. 341, 343; See generally Lord Collins of Mapesbury et al, *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) at 5-030

[716] P Baker, 'The Transnational Enforcement of Tax Liabilities' (1993) 5 BTR 313, 313

[717] As noted in *Pasquantino v. United States,* 544 U.S. 349, 367 (2004).

[718] *R v Chief Metropolitan Stipendiary Magistrate* [1988] 1 WLR 1204 (QB), at 1214-5

[719] Due to the provisions of the Mandatory Victims Restitution Act 1996, *Pasquantino v. United States,* 544 U.S. 349, 367 (2004).

re State of Norway's Application,[720] the judiciary took a more expansive view of its ambit, holding that the rule prevented one state from providing another with tax related evidence or information pursuant to a letter of request.[721] Some common law jurisdictions applied this interpretation of the rule to both civil and criminal proceedings,[722] while others took a more restrictive interpretation.[723] Many states that followed this legal precedent refused to fulfil letters of requests issued to obtain information in tax cases.[724] The House of Lords later overturned the decision,[725] 'dramatically enhancing' MLA in civil and criminal tax cases.[726]

Although the English courts have demonstrated their willingness to assist with the provision of evidence in tax evasion cases in the last few decades, many jurisdictions are unwilling, and ultimately, are not *obliged*, to do so, particularly if bank secrecy laws protect the information.[727] Even if the revenue rule does not prohibit the provision of evidence, it still applies to the enforcement of tax laws, preventing the enforcement of judgments and recognition of tax claims, without formal agreement.[728] Although this may be a limited problem, in that taxpayers will usually have domestic assets or income through which the state can achieve enforcement in its own territory,[729] this gap must still be closed to ensure that those without property do not escape their tax liabilities.[730] Many rationales have been offered to support the revenue rule. In *Moore v Mitchell*, Learned Hand J stated that revenue laws are similar to penal or criminal laws, which cannot be enforced without an innapropriate examination of the law's compatibility with national public policy.[731] Rather, this determination should be left to the

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[720] *In Re State of Norway's Application* [1987] QB 433 (CA)
[721] Ibid at 445-46
[722] *In re the Criminal Proceedings before the US District Court for the District of Kansas Concerning Marcel Samuel Lambert and Arloho Mae Pinto,* No. 962 (Bahamas Sup Ct 1986)
[723] For instance see, *Re Request for International Judicial Assistance* 102 DLR 3d 18, 38 (Can. 1979)
[724] JP Springer, 'Obtaining Foreign Evidence and Other Types of Assistance for Criminal Tax Cases' (2001) 49 US Att'ys Bull 43, 49
[725] *In Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723 (HL)
[726] US Criminal Tax Manual 2012, at 41.05[6] available from <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0>
[727] Ibid; JP Springer, 'Obtaining Foreign Evidence and Other Types of Assistance for Criminal Tax Cases' (2001) 49 US Att'ys Bull 43, 48
[728] *In Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723 (HL); *HM the Queen in Right of British Columbia v Gilbertson* 433 F Supp 410, 597 F.2d 1161 (1979)
[729] B Mallinak, 'The Revenue Rule: A Common Law Doctrine for the Twenty-First Century' (2006) 16 Duke J Comp & Int'l L 79, 122
[730] For instance, enforcement assistance will be necessary where a tax evader coverts all property into cash and flees the country concerned, RE Smith, 'The Nonrecognition of Foreign Tax Judgments: International Tax Evasion' [1981] U Ill L Rev 241, 242; Kovatch states that the rule may inhibit the enforcement of IRC §877, which aims to prevent US citizens from renouncing their citizenship solely for tax purposes WJ Kovatch, 'Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule' (2000) 22 Hous J Int'l L 265, 282
[731] *Moore v Mitchell* 30 F 2d 600, 604 (2d Cir. 1929); See also *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W.2d 919, 926-927 (Mo. Ct. App. 1946)

other branches of government.[732] In *Government of India v Taylor*, the House of Lords highlighted the sovereign nature of the enforcement of revenue laws and the practical difficulties courts would face in interpreting and applying another country's tax laws.[733] Nevertheless, the revenue rule has faced sustained academic criticism for well over a century.[734] Commentators have refuted this justification highlighting the dissimilarities between revenue and penal laws,[735] the harmful and indefensible historical justification for the rule, rooted in commercial protectionism,[736] the high threshold to be met in declaring a law contrary to state public policy,[737] the judiciary's familiarity with reviewing foreign law,[738] and the benefits to both nations that would be derived from the revocation of the rule, in terms of tax collection,[739] and the prevention of tax evasion.[740] Whatever the merits of these arguments, there is still a risk to the separation of powers when the judiciary are tasked with making foreign policy decisions.[741]

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[732] Ibid

[733] *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 (HL) at 514

[734] *Reynolds II*, 268 F.3d 103, 124 (2d Cir. 2001); EJ Farnam, 'Racketeering, RICO and the Revenue Rule in Attorney General of Canada v RJ Reynolds: Civil RICO Claims for Foreign Tax Law Violations' (2002) 77 Wash L Rev 843, 852

[735] 'A tax is not a penalty but a duty; it is imposed not as a punishment but as a civic obligation' AR Albrecht, 'The Enforcement of Taxation under International Law' (1953) 30 Brit YB Int'l L 454, 463; BA Silver, 'Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments' (1992) 22 Ga J Int'l & Comp L 609, 619

[736]Ibid (Silver) at 613; 'the Anglo-Saxon doctrine of *stare decisis* built an impregnable fortress out of a principle of dubious validity' MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003) p.30

[737] 'The standard is high and infrequently met' *Ackermann v Levine,* 788 F.2d 830, 841 (2d Cir 1986); discussed in WJ Kovatch, 'Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule' (2000) 22 Hous J Int'l L 265, 277; Leflar argues that selective refusal is unlikely to be less offensive than refusal in all circumstances RA Leflar, 'Extrastate Enforcement of Penal and Governmental Claims' (1932) 46 Harv L Rev 193, 217 *cf* TB Stoel, 'The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States' (1967) 16 ICLQ 663, 670

[738] This point has been made by many commentators including P Baker, 'Changing the Norm on Cross-border Enforcement of Debts' (2002) 30 Intertax 216, 216; see also *Commissioner of Taxes v McFarland* [1965] 1 SA 470, 473 (Witwatersrand Local Div) discussed in WS Dodge, 'Breaking the Public Law Taboo' (2002) 43 Harv Int'l LJ 161, 210

[739] P Burgess, 'Globilization Comes to Tax Collection' (2004) 34 Tax Notes Int'l 645, 645

[740] 'What 'justice' is there in facilitating fiscal evasion by itinerant taxpayers?' AR Albrecht, 'The Enforcement of Taxation under International Law' (1953) 30 Brit YB Int'l L 454, 462; FAG Prats, 'Mutual Assistance in Collection of Tax Debts' (2002) 30 Intertax 56, 59; Carter linked the non-recognition of revenue laws to a 'sporting theory of tax evasion' PB Carter, 'Transnational Recognition and Enforcement of Foreign Public Laws' (1989) 48 CLJ 417, 423; The revocation of the rule may also assist in preventing capital flight from developing countries, SD Brunson, 'The U.S. as Tax Haven - Aiding Developing Countries by Revoking the Revenue Rule' (2014) 5 Colum J Tax L 170

[741] B Mallinak, 'The Revenue Rule: A Common Law Doctrine for the Twenty-First Century' (2006) 16 Duke J Comp & Int'l L 79, 121

Irrespective, the revenue rule is now so well established that it is unlikely to be revoked, necessitating the adoption of formal executive agreements in relation to tax matters,[742] which would enable the abrogation of the revenue rule.[743] The next section examines the international formal agreements that may assist in combatting tax evasion.

3.10 Civil Matters

The Service of Documents and Taking of Evidence

The Hague Conventions

The first Hague Conventions on Civil Procedure entered into force in 1896,[744] followed by a revised text in 1909, which was signed and ratified by fifteen States.[745] Both conventions contained provisions on the service of process and the taking of evidence abroad. However, neither the UK nor the US became parties to this, or subsequent conventions,[746] due to political concerns,[747] concern over the compatibility of civil law and common law systems,[748] and the compatibility and acceptability of their corresponding rules of discovery.[749] Rather, each jurisdiction entered into a series of bilateral agreements with select countries.[750] Nevertheless, subsequent events in each jurisdiction altered this perception,[751] and both States became parties to the Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial

[742] AR Johnson, L Nirenstein, SE Wells, 'Reciprocal Enforcement of Tax Claims Through Tax Treaties' (1980) 33 Tax Lawyer 469, 470
[743] 'That Rule was always liable to be abrogated by treaty.' *Revenue and Customs Commissioners v Ben Nevis (Holdings) Ltd* [2013] EWCA Civ 578; [2013] STC 1579 at para 53
[744] D McClean, *The Hague Convention on International Access to Justice: Explanatory Documentation prepared for Commonwealth Jurisdictions* (Commonwealth Secretariat 1982) p.1
[745] Hague Civil Procedure Convention 1905 (Signed 17 July 1905, entered into force 4 April 1909) available from <https://www.hcch.net/en/instruments/the-old-conventions/1905-civil-procedure-convention> accessed 9 April 2018
[746] Hague Convention Relating to Civil Procedure (enacted 1 March 1954, entered into force 12 April 1957) 286 UNTS 4173
[747] D McClean, *International Co-operation in Civil and Criminal Matters* (OUP 2002) p.20
[748] KH Nadelmann, 'The United States Joins the Hague Conference on Private International Law: A "History" with Comments' (1965) 30 LCP 291, 292; citing MH Van Hoogstraten, 'The United Kingdom Joins an Uncommon Market: The Hague Conference on Private International Law' (1963) 12 ICLQ 148, 150
[749] The scope and subjects of disclosure under discovery procedures in the US are much broader than in other jurisdictions, including the UK KB Gilchrist, 'Rethinking Jurisdictional Discovery Under the Hague Evidence Convention' (2011) 44 Vand J Transnat'l L 155, 161
[750] For early UK bilateral conventions see D McClean, *International Co-operation in Civil and Criminal Matters* (OUP 2002) p106; for the US, see HL Jones, 'International Judicial Assistance: Procedural Chaos and a Program for Reform' (1953) 62 Yale LJ 515, 523-524; Early US efforts to negotiate treaties in this area were considered unsuccessful see TJ Perry, 'Judicial Treatment of the Hague Evidence Convention and the Worth of International Judicial Comity: In Re Anschuetz & Co.' (1987) 2 Am U J Int'l L & Pol'y 331, 333
[751] Including the signature of bilateral civil procedure conventions with European countries in the UK and lobbyist movements in the US, PF Sutherland, 'The Use of the Letter of Request (Or Letter Rogatory) for the Purpose of Obtaining Evidence for Proceedings in England and Abroad' (1982) 31 ICLQ784, 787-788

Documents in Civil or Commercial Matters (Service Convention),[752] and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention).[753]

61 States are contracting parties to the Evidence Convention, which aims to 'facilitate the transmission and execution of Letters of Request and to(…) improve mutual judicial co-operation in civil or commercial matters.'[754] The Convention provides rules governing the taking of evidence abroad through a letter of request, relating to the content, language, transmission and return of the documents, their execution and associated costs.[755] 73 states are contracting parties to the Service Convention, which aims to 'create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time' and 'to improve the organisation of mutual judicial assistance for that purpose'.[756] Accordingly, the Convention provides for several channels through which documents may be served on defendants abroad.[757] Principal to each convention is the system of central authorities, set up to receive and process requests for the service of documents and the taking of evidence,[758] although other channels may be permitted.[759] The Evidence Convention has reduced the delay and bureaucracy inherent in the letters rotatory procedure,[760] but the success of the Service Convention is debateable, as it has been plagued by procedural difficulties.[761] The benefit of both conventions is that they provide a binding

[752] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (signed 15 November 1965, entered into force 10 February 1969) 658 UNTS 163
[753] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (signed 18 March 1970, entered into force 7 October 1972) 847 UNTS 231
[754] Ibid, Preamble
[755] Ibid
[756] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (signed 15 November 1965, entered into force 10 February 1969) 658 UNTS 163, Preamble
[757] Ibid
[758] Ibid, Article 2; Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (signed 18 March 1970, entered into force 7 October 1972) 847 UNTS 231, Article 2; see D McClean, C McLachlan, *The Hague Convention on the Taking of Evidence Abroad: Explanatory Documentation prepared for Commonwealth Jurisdictions* (Commonwealth Secretariat 1985) p.3
[759] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (signed 15 November 1965, entered into force 10 February 1969) 658 UNTS 163, Articles 8-11, Art.19; Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (signed 18 March 1970, entered into force 7 October 1972) 847 UNTS 231, Articles 15-17
[760] RB Morrill, 'Innocents Abroad: Obtaining Discovery in Foreign Jurisdictions' (1995) 6 Cal Int'l Prac 31, 33; RC O'Brien, 'Compelling the Production of Evidence by Nonparties in England under the Hague Convention' (1997) 24 Syracuse J Int'l L & Com 77, 81
[761] See E Porterfield, 'Too Much Process, Not Enough Service: International Service of Process under the Hague Service Convention' (2014) 86 Temp L Rev 331, 341-347

legal instrument with which litigants, including tax authorities, can obtain evidence and assistance.[762]

During the submission of the Draft Evidence Convention, it was agreed that a definition of 'civil or commercial matters' was not required.[763] However, this omission has caused great difficulties in determining the applicable scope of each Convention, as states have arrived at different interpretations.[764] For the purposes of the Convention, the requested state's interpretation of the term should prevail.[765] While common law countries consider the provision of assistance in civil tax cases as within the scope of the Conventions, civil law countries tend to consider 'civil or commercial' to exclude fiscal matters.[766] In 1989, the Special Commission of the Hague Conference decided that tax cases should not fall within the phrase 'civil or commercial matters'.[767] In the UK, in *Re Norway's Application*, the court initially held that the phrase 'civil or commercial matters' excluded fiscal matters, in conformity with most other states.[768] However, the House of Lords later held that the traditional interpretation of civil matters should be applied, with the phrase encompassing all non-criminal matters and thus, civil tax cases.[769] As the provision of assistance in tax cases no longer amounted to the indirect enforcement of revenue laws, the revenue rule did not preclude assistance under the Hague Convention.[770] A similar interpretation is held in the US and many other common law countries.[771]

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[762] JP Springer, 'An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases' (1988) 22 Geo Wash J Int'l L & Econ 277, 315

[763] At the Eleventh Session of the Hague Conference, Anon, 'Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law' (1969) 8 ILM 785, 808

[764] United States Delegation, 'Report on the Work of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters' (1978) 17 ILM 1417, 1419

[765] 'Report on the work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters' (1978) 17 ILM 1425, 1426

[766] IRS, 'Internal Revenue Manual, Part 35.4.5 Evidence and Information from Abroad' <https://www.irs.gov/irm/part35/irm_35-004-005> Accessed 11 February 2018

[767]

[768] *Re State of Norway's Application (No.2)* [1988] 3 WLR 603 (CA); 'I am encouraged to adopt this view by Dr. F. A. Mann's note "'Any Civil or Commercial Matter'" (1986) 102 L.Q.R. 505 , 509 on the decision on the first appeal and his statement that "it can be asserted with confidence that very few states (if any) will ever regard a tax claim as a civil or commercial matter."' Ibid per Wolf LJ at 606

[769] *In Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723 (HL)

[770] Ibid at 808, 'I do not see how such letters of request, or their execution, could amount to the enforcement, direct or indirect, of a foreign revenue law; nor do I see how they could constitute an invasion of this country's sovereignty.'

[771] 'The United States delegate informed the Special Commission that the U.S. Central Authority interprets the term "civil or commercial" liberally, and considers any foreign proceeding that is not criminal as "civil or commercial' United States Delegation, 'Report on the Work of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters' (1978) 17 ILM 1417, 1418

Therefore, while it may be possible to obtain evidence or the service of documents under the Hague Conventions in tax cases from many common law countries, it will be impossible to do so from countries which take a restrictive interpretation of the phrase 'civil or commercial matters'.[772] Thus, the effectiveness of the Hague Conventions in providing states with mechanisms whereby they can secure international cooperation in tax cases is questionable.[773] In both the UK and US, the Hague Convention has been given effect by domestic legislation and will be considered to apply in tax cases.[774] Yet, although other states may be able to seek assistance to combat tax evasion from the UK and US, assistance sought from other countries under the Hague Conventions may not be forthcoming in tax cases.[775] Further, even where the requested state considers tax cases to fall within the ambit of the Convention, exceptions may serve to limit its utility. For instance, under the Evidence Convention,[776] States may be precluded from seeking pre-trial discovery,[777] or requiring the production of witness testimony or documents where the request amounts to 'fishing' for information,[778] where the execution of a request would infringe national security or sovereignty,[779] and/or where national law prevents the provision of information[780] (including where the information may cause the witness to incriminate his or herself,[781] or where bank secrecy or bank confidentiality laws protect the information).[782] Accordingly, States have sought alternative tools to secure the provision of evidence and assistance in civil tax cases.

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[772] GN Horlick, 'A Practical Guide to Service of United States Process Abroad' (1980) 14 Int'l L 637, 647

[773] 'The efficacy of these tools is quite inconsistent from country to country' CH Gustafson, 'The Role of International Law and Practice in Addressing International Tax Issues in the Global Era' (2011) 56 Vill L Rev 475, 488

[774] 28 U.S.C. §§ 1781, 1782; Federal Rules of Civil Procedure 28(b) and 4(f)(2)(B); Evidence (Proceedings in Other Jurisdictions) Act 1975, s1; Civil Procedure Rules, Part 34

[775] This position may be regarded as unjustifiable FA Mann, 'The International Enforcement of Public Rights' (1987) 19 NYU J Int'l L & Pol 603, 617

[776] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (signed 18 March 1970, entered into force 7 October 1972) 847 UNTS 231

[777] Ibid; States are permitted to make a declaration under Art. 23; Art. 23 was proposed by the UK in response to widespread reservations regarding US discovery procedures, see *Graco, Inc. v Kremlin, Inc.*, 101 F.R.D. 503, 520 (N.D. I11. 1984); discussed in RC O'Brien, 'Compelling the Production of Evidence by Nonparties in England under the Hague Convention' (1997) 24 Syracuse J Int'l L & Com 77, 84

[778] As the UK's declaration under Art.23 is interpreted in UK legislation, see Evidence (Proceedings in Other Jurisdictions) Act 1975, s2(3); *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation (Nos. 1 and 2)* [1978] AC 547 (HL); *First American Corporation v Zayed* [1999] 1 WLR 1154, 1166 (CA)

[779] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (signed 18 March 1970, entered into force 7 October 1972) 847 UNTS 231, Art.12

[780] ibid Art.1, Art.11; or the law of the requesting state *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation (Nos. 1 and 2)* [1978] AC 547 (HL)

[781]Evidence (Proceedings in Other Jurisdictions) Act 1975, s3; U.S. Const. amend. V; 28 U.S.C. § 1782(a); P Summerfield, S Loble, 'The Procedure for Obtaining Evidence In England and Wales for Use In United States Proceedings' (1988) 1 Transnat'l Law 271, 275

[782] Here, a balancing exercise must be undertaken between the interests in maintaining confidentiality and the interest in providing all relevant information to the court Lord Collins of Mapesbury et al, *Dicey, Morris &*

European Union Agreements

In 1997, a Convention on the service in the EU of judicial and extrajudicial documents in civil or commercial matters was produced,[783] yet the Convention did not come into force. The Convention was later transformed into a Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.[784] The Regulation replaced the use of the Hague Convention between Member States,[785] yet builds on its work.[786] The Regulation provides for the establishment of agencies[787] to transmit and receive judicial and extrajudicial documents,[788] and to serve the document or otherwise effect service.[789] The phrase 'civil or commercial matters' is not defined, but is considered to follow the interpretation afforded to the Hague Conventions.[790] Therefore, it was impossible to gain assistance in the service of documents in tax cases under the Regulation from countries that adopted a restrictive interpretation of the phrase 'civil or commercial matters'. The Regulation was replaced in 2007,[791] with the aim of improving and expediting the transmission of judicial and extrajudicial documents between the Member States.[792] This Regulation admits of no ambiguity as to its scope, in terms of its applicability to tax cases, as fiscal matters are expressly excluded from the interpretation of civil or commercial matters.[793]

Collins on the Conflict of Laws (15th edn, Sweet & Maxwell 2012) 8-087; *In Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723 (HL)

[783] Council Act of 26 May 1997 drawing up a Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters [1997] OJ C 261

[784] Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2000] OJ L160/37

[785] Art. 20(1)

[786] D McLean, *International Co-operation in Civil and Criminal Matters* (OUP 2002) p.55

[787] Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2000] OJ L160/37, Art. 2; A Central Body must also be established under Art. 3

[788] Art. 4

[789] Art. 7

[790] D McLean, *International Co-operation in Civil and Criminal Matters* (OUP 2002) p.55; Or the interpretation given to the phrase in the Brussels Convention, Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 1541

[791] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 [2007] OJ L 324/79

[792] Following Commission, 'Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Regulation (EC) 1348/2000 on the service in the Member States of Judicial and Extrajudicial documents in civil or commercial matters' (Report) COM/2004/0603 final

[793] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 [2007] OJ L 324/79, Art. 1

In 2001, the EU adopted a Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.[794] The Regulation is inspired by the Evidence Convention,[795] although requests are made through Member States' courts, as opposed to central authorities.[796] The scope of the Regulation is again uncertain, with no definition of the terms 'civil or commercial' included in the Regulation itself.[797] However, it is apparent from relevant case law that fiscal offences are not covered by this expression, as the term excludes matters concerning a public authority 'acting in the exercise of its public powers'.[798]

3.11 Criminal Matters

The development of international cooperation in relation to criminal matters has progressed at a much slower pace.[799] This is largely due to the international prohibition against the enforcement of penal laws beyond sovereign borders,[800] and the fact that, until the decision in *Re State of Norway's Application*,[801] there remained doubts as to whether the provision of assistance in criminal matters amounted to an indirect application of penal laws.[802] Accordingly, some of the first measures in this area concerned extradition.[803]

Extradition

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[794] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174

[795] Ibid, Preamble

[796] Art. 2; A Central Body must also be established under Art. 3

[797] European Judicial Network in Civil and Commercial Matters, 'Practice Guide for the Application of the Regulation on the Taking of Evidence (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters' <http://ec.europa.eu/civiljustice/evidence/evidence_ec_guide_en.pdf> accessed 30 April 2018 p.5

[798]Case C-271/00 *Gemeente Steenbergen v Luc Baten* [2002] ECR I-10489, at para 30; see also Case 814/79 *Netherlands State v Reinhold Rüffer* [1980] ECR 3807; Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 1541

[799] D McClean, *International Co-operation in Civil and Criminal Matters* (OUP 2002) p.160

[800] *The Antelope* 23 U.S. (10 Wheat.) 66, 123 (1825); 'States have a tendency to think that anything connected with criminal law, even quite minor procedural matters, affects national sovereignty.' R Dussaix, 'Some Problems Arising from the Practical Application, from the Judicial Point of View, of the European Convention on Mutual Assistance in Criminal Matters', in European Committee on Crime Problems, *Problems Arising from the Practical Application of the European Convention on Mutual Assistance in Criminal Matters,* cited in WC Gilmore (ed), *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge International Document Series Vol. 8, CUP 1995) p.xiii

[801] *In Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723 (HL)

[802] 'It is believed that this judgment is of general application, and that it removes any doubts as to the legitimacy at common law of the provision of assistance in criminal matters' D McClean, *International Co-operation in Civil and Criminal Matters* (OUP 2002) p.155

[803] Indeed, from the nineteenth century onwards, the primary response of States to the increasingly transnational nature of criminal activity was to negotiate treaties providing for the return of fugitive offenders R Clark, 'The UN Agenda on International Cooperation in the Criminal Process' (1991) 15 Nova L Rev 475,476

The term extradition refers to a 'formal process by which a person is surrendered by one state to another.'[804] The process is designed to ensure that those who have committed crimes do not escape prosecution or punishment by fleeing to other States, through the provision of assistance in returning the offender.[805] Extradition is fundamental to efforts to combat tax evasion, as it provides the means to ensure that criminal tax evaders cannot escape prosecution and punishment by crossing national borders.[806] In both the UK and US, extradition is governed by bilateral and multilateral agreements and implementing national legislation.[807] Such agreements contain an obligation to extradite offenders in respect of extraditable offences, included in a set list, or identified through a dual criminality provision.[808]

Initially, extradition both to and from the UK and US was rarely forthcoming in respect of tax offences,[809] either through an express prohibition in bilateral treaties,[810] a failure to list the crime as an extraditable offence,[811] or a failure to satisfy a dual criminality requirement.[812] The latter situation will occur where tax offences do not exist,[813] where such offences exist, but are not punishable by the specified minimum period, or where such offences are incomparable due to the diverse nature of tax laws.[814] Extradition was often unavailable in respect of fiscal offences due to national statutes, which, in some countries, override applicable treaty

[804] MC Bassiouni, *International Extradition: United States Law and Practice* (6th edn, OUP 2014) p.2
[805] *Re Arton* [1896] 1 QB 108, 111 (QB)
[806] MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003) p.142
[807] The existence of a treaty was formerly a requirement in the UK *R. v Governor of Brixton Prison Ex p. Soblen (No.2)* [1963] 2 QB 283 (CA); *cf* Extradition Act 2003, s194; The existence of treaty is still a requirement in the US 18 U.S.C. § 3184; the exception in 18 U.S.C. § 3181 and § 3184 is unlikely to apply in tax evasion cases
[808] The enumerative or eliminative method, MC Bassiouni, *International Extradition: United States Law and Practice* (6th edn, OUP 2014) p.509
[809] Early extradition agreements rarely included fiscal offences generally AR Albrecht, 'The Enforcement of Taxation under International Law' (1953) 30 Brit YB Int'l L 454, 466
[810] See for instance, Extradition Treaty between the Government of the United States of America and the Government of the Swiss Confederation (signed 14 November 1990, entered into force 10 September 1997) 1990 UST LEXIS 2211, Art 3(3); '[T]his provision would not be used to shield from extradition underlying criminal conduct, such as fraud, embezzlement, or falsification of public documents, if that conduct is otherwise extraditable.' Letter of Submittal dated May 1, 1995, from Secretary of State Warren Christopher to President Clinton quoted in Senate Executive Report 104-32, 'Extradition Treaty with Switzerland' (30 July 1996, 104th Congress, 2nd Session) < https://www.gpo.gov/fdsys/pkg/CRPT-104erpt32/html/CRPT-104erpt32.htm> accessed 18th June 2018
[811] B Zagaris, 'U.S. Efforts to Extradite Persons for Tax Offences' (2003) 25 Loy LLA Int'l & Comp L Rev 652, 662
[812] G Kemp, 'The United Nations Convention against Transnational Organized Crime: A Milestone in International Criminal Law' (2001) 14 S Afr J Crim Just 152, 166
[813] As is common in secrecy jurisdictions, G Schjelderup, 'Secrecy Jurisdictions' (2016) 23 Int Tax Public Finance 168, 171
[814] Particularly when a narrow interpretation is given to dual criminality provisions, see *Canada v Aronson* [1990] 1 AC 579 (HL) interpreting Fugitive Offenders Act 1967, s3(1)(c). For its implications in revenue cases see, SA Williams, 'The Double Criminality Rule and Extradition: A Comparative Analysis' (1999) 15 Nova L Rev 581, 594-595. The offence based test does not apply to the Extradition Act 2003, *Norris v Government of the United States of America* [2008] UKHL 16; [2008] 1 AC 920

provisions.[815] The exclusion of tax crimes from extradition treaties was based on the application of the revenue rule, with extradition thought to involve the indirect enforcement of another State's fiscal law.[816] Indeed, the Revenue Rule was also thought to preclude the extradition of offenders charged with or prosecuted for offences connected to tax crimes.[817] However, it is now clear that the Revenue Rule does not apply to tax offences.[818]

Thus, under the earliest extradition treaties agreed by the UK, extradition was only available in respect of a small category of serious offences, including murder, piracy and arson.[819] The first modern extradition statute provided that extraditable offences were those contained in the first Schedule to the Act and in the relevant treaty with the foreign State,[820] yet fiscal offences were excluded.[821] Various statutes incrementally amended the Act by adding to the list of offences,[822] yet tax offences were not included until the Extradition Act 1989, which defined extraditable offences using a dual criminality provision.[823] In the US, extradition can only be granted in accordance with a treaty,[824] with statutes governing extradition primarily providing procedural, as opposed to substantive, rules governing the process.[825] All US treaties agreed before 1970 do not enable extradition for tax offences.[826] However, some provide for

[815] See for instance, Irish Extradition Act 1965, s13
[816] P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) p.154
[817] Such as fraud, deception, and the falsification of documents, *R. v Pentonville Prison Governor Ex p. Khubchandani* (1980) 71 Cr App R 241
[818] *R. v Chief Metropolitan Stipendiary Magistrate Ex p. Secretary of State for the Home Department* [1988] 1 WLR 1204
[819] For an historical overview see S Baker, D Perry, A Doobay, 'A Review of the United Kingdom's Extradition Arrangements' (Presented to the Home Secretary on 30 September 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf> accessed 5 May 2018 at p.26
[820] Extradition Act 1870, s.26
[821] J Fisher, J Bewsey, 'Laundering the Proceeds of Fiscal Crime' (2000) 15 JIBL 11, 11
[822] Extradition Acts of 1873, 1895, 1906 and 1932; Counterfeit Currency (Convention) Act 1935
[823] The Extradition Act 1989, s2 as enacted provided that an extradition crime was 'conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law.'
[824] 18 U.S.C. § 3184 and 3181; the exception relating to those 'who have committed crimes of violence against nationals of the United States in foreign countries' is unlikely to apply in tax cases. Interstate rendition is required under USCS Const. Art. IV, § 2, Cl 2.1 and given effect by Stat. 302 (1793), 18 U.S.C. § 3182
[825] B Zagaris, 'U.S. Efforts to Extradite Persons for Tax Offences' (2003) 25 Loy LLA Int'l & Comp L Rev 652, 658
[826] Ibid at p.678

extradition for customs or smuggling offences.[827] Other extraditable crimes included in the treaties, including fraud and breach of trust, were on occasion used to prosecute tax crimes.[828]

On a multilateral level, the European Convention on Extradition initially excluded fiscal offences from the list of extraditable offences, unless the parties expressly agreed otherwise.[829] This rule was abrogated by the Second Additional Protocol to the Convention, which provides that fiscal offences are extraditable if they correspond to an offence of the same nature in both States.[830] Over 50 States have ratified or acceded to the Convention and 42 have ratified or acceded to the Second Additional Protocol, including three non-members of the Council of Europe.[831] Some States have entered a reservation in respect of Chapter 2.[832] Nevertheless, extradition may still be forthcoming from such States, if the conduct involved forms one of the extraditable offences detailed in the main Convention.[833] The UN Model Convention on Extradition provides that an extraditable offence is one provides for a period of imprisonment.[834] It replicates the provision in Paragraph 2 of Article 2 of the European Convention.[835] The Inter-American Convention on Extradition similarly designates extraditable offences using a dual criminality provision and tax evasion is regarded as unexceptional.[836] The most recent Convention has not been signed or ratified by the US, yet it has concluded bilateral treaties with all of its current signatories.[837] The Commonwealth

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[827] For example, Treaty of Extradition between the United States of America and the United States of Brazil (signed, 13 January 1961, entered into force 17 December 1964) 15 U.S.T. 2093, Art 2(29)

[828] See fn 314; see also *In re Extradition of Feliciano Palma Matus*, 784 F Supp 1052, 1055 (S.D.N.Y 1992)

[829] European Convention on Extradition (Opened for signature 13 December 1957, Entered into force 18 April 1960) ETS 24

[830] Second Additional Protocol to the European Convention on Extradition (Opened for signature 17 March 1978, Entered into force 5 June 1983) ETS 98, Chapter 2, Article 2

[831] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 024 European Convention on Extradition' < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p_auth=FsfY3vhJ> accessed 8th June 2018; Council of Europe, 'Chart of Signatures and Ratifications of Treaty 098 Second Additional Protocol to the European Convention on Extradition' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/098/signatures?p_auth=FsfY3vhJ> accessed 8th June 2018; The UK implemented the Convention and the Second Additional Protocol via the European Convention on Extradition (Fiscal Offences) Order 1993, SI2663; European Convention on Extradition (Fiscal Offences) Order 2001, SI1453

[832] E.g. Switzerland

[833] For instance, see *R v Leaf* [2007] EWCA Crim 802; [2008] 1 Cr App R (S.) 3 at para 3 'at the material time Mr Leaf was resident in Switzerland and that country does not extradite for fiscal offences. For this reason, Mr Leaf was extradited and prosecuted for offences of fraudulent trading pursuant to s.458 of the Companies Act 1985.' He initially received a sentence of 12.5 years imprisonment, the longest yet for a tax offence P Binning, E Zeisler, 'Crime and Punishment' (2007) 160 Taxation 52

[834] Model Treaty on Extradition (adopted 14 December 1990) UNGA RES 45/116, Art 2(1)

[835] Ibid Art 2(3)

[836] 'Not less than two years of deprivation of liberty under the laws of both the requesting State and the requested State' Inter-American Convention on Extradition (adopted 25 February 1981, entered into force 28 March 1992) 1752 UNTS 177; OAS Treaty Series No. 60

[837] ibid; Title 18 U.S.C. 'Crimes and Criminal Procedure, Part II Criminal Procedure, Chapter 209 Extradition' § 3181. <https://www.state.gov/documents/organization/71600.pdf> accessed 8th June 2018; The US signed the

scheme for extradition defines an extraditable offence using a dual criminality provision[838] and, following a review of the Scheme in 1983,[839] fiscal offences were expressly included.[840] The Scheme does not create binding obligations, but is implemented via national legislation.[841]

The European Union Arrest Warrant (EAW) Scheme[842] and its predecessors,[843] treat tax evasion as an extraditable offence and similarly attempts to ensure that those accused or convicted of tax offences can be extradited, despite the interaction between dual criminality provisions and the technical differences between the laws concerned.[844] The UK has implemented the EAW scheme via Part 1 and 3 of the Extradition Act 2003. Consequently, extradition for tax offences is available to and from participating States, when the conduct forms an offence in both the UK and requesting State and is punishable in the latter with imprisonment or another form of detention.[845] Part 2 of the Act governs extradition to non-EAW countries, with which the UK has an extradition agreement. Here, the definition of an extradition crime is substantively similar, save that the offence must also be punishable by 12 months imprisonment in the UK.[846] As noted, the US has made little use of multilateral

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1933 Convention on Extradition (Inter-American) (signed 26 December 1933, entered into force 25 January 1935) 16 LNTS 45; OAS Treaty Series 882. However, the US has made little use of this convention EA Nadelmann, 'The Role of the United States in the International Enforcement of Criminal Law' (1990) 31 Harv Int'l L J 37, 65; See also US Bilateral Extradition Treaties with Organization of Eastern Caribbean States (Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St Vincent and The Grenadines) (all 1996) <https://web.oas.org/mla/en/Treaties_B/USA_biltreat_antigbarb_eng_1.pdf>

[838] Home Office, S*cheme Relating to the Rendition of Fugitive Offenders within the Commonwealth* (Cmnd 3008, 1966) The current version reads, 'For the purpose of this Scheme, an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty.'

[839] Meeting of Commonwealth Law Ministers Colombo, Sri Lanka, 14–18 February 1983

[840] PL Robinson, 'The Commonwealth Scheme Relating to the Rendition of Fugitive Offenders: A Critical Appraisal of Some Essential Elements' (1984) 33 ICLQ 614, 630

[841] D McClean, *International Co-operation in Civil and Criminal Matters* (OUP 2002) p197; The Scheme is implemented in the UK via Extradition Act 2003, Part 2 and 3

[842] Council Framework Decision of 13 June 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision OJ L190/1, Article 2

[843] Convention of 10 March 1995 drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union OJ C78/2; Council Act of 27 September 1996 drawing up the Convention relating to extradition between the Member States of the European Union OJ C313/12; Both were superseded by the EAW scheme

[844] Council Framework Decision of 13 June 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision OJ L190/1, Article 4(1)

[845] For a term of at least 12 months Extradition Act 2003, s64 (accusation cases). For conviction cases, the conduct must be an offence in the UK and a sentence of imprisonment or another form of detention for a term of 4 months must have been imposed in the requesting State, Extradition Act 2003, s65. The same conditions are imposed in s148 of the Act governing extradition to the UK, from an EAW scheme country.

[846] Extradition Act 2003, s137 (accusation cases). For conviction cases, a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment must also have been imposed, Extradition Act 2003, s138

conventions pertaining to extradition, yet it can be considered 'the world leader in the negotiation of bilateral enforcement treaties'.[847] Here, the adoption of the Second Additional Protocol to the European Convention signalled a shift in policy not only in Europe, but also the US, which began to include fiscal offences in extradition treaties.[848] Accordingly, almost all post-1970 US extradition treaties provide for extradition for revenue offences, if the double criminality provision used to determine extraditable offences is satisfied.[849] Recent US treaties also include a similar provision to Paragraph 2, Article 2, of the European Convention.[850]

Nevertheless, it must be remembered that even where extradition arrangements do not explicitly exclude tax offences, extradition may not be available if the definition of an extraditable offence is governed by a dual criminality provision. This is because, although tax evasion is a criminal offence in the UK and US, it may not be an offence in the country to which a request is made,[851] the offence may differ in substance and/or may not punishable by the minimum requisite period.[852] Further, national statutes can prohibit extradition in respect of fiscal offences and may override treaty provisions.[853] These problems are likely to be faced when requesting extradition from secrecy jurisdictions.[854] Other concerns lie in the delay inherent in the system[855] and the refusal by some States to extradite their own nationals.[856]

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[847] EA Nadelmann, 'The Role of the United States in the International Enforcement of Criminal Law' (1990) 31 Harv Int'l L J 37, 65

[848] B Zagaris, 'U.S. Efforts to Extradite Persons for Tax Offences' (2003) 25 Loy LLA Int'l & Comp L Rev 652, 678

[849] EA Nadelmann, 'The Role of the United States in the International Enforcement of Criminal Law' (1990) 31 Harv Int'l L J 37, 66

[850] See for instance, Extradition Treaty between the Government of the United States of America and the Government of the Republic of South Africa (signed 16 September 1999, entered into force 25 June 2001) 1999 U.S.T. LEXIS 158, Art 2(6)

[851] In a few States, it may be a civil, as opposed to a criminal, offence, e.g. Switzerland, Luxemburg, R Palan, R Murphy, C Chavagneux, *Tax Havens: How Globalisation Really Works* (Cornell University Press, 2010) p.9; Some jurisdictions impose no taxes on foreign investors and so tax evasion is not a crime at all G Schjelderup, 'Secrecy Jurisdictions' (2016) 23 Int Tax Public Finance 168, 172

[852] P Gully-Hart, 'The European Approach to Extradition' in M Cherif Bassiouni, *International Criminal Law Volume II: Multilateral and Bilateral Enforcement Mechanisms* (3rd edn, Koninklijke Brill 2008) p.360

[853] See for instance Extradition Act 1965 (Ireland), s13; The Act does not apply to EAW scheme countries, which has been implemented via the European Arrest Warrant Act (Ireland) 2003; This situation may also occur where national legislation requires that tax offences are prosecuted by the State's tax administration MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003) p.142

[854] G Schjelderup, 'Secrecy Jurisdictions' (2016) 23 Int Tax Public Finance 168, 172

[855] 'The procedures[…] have in the past been characterised by technicality and delay so great as to impede or even frustrate the efficacy of the process' *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2005] UKHL 67; [2006] 2 AC 1, para 2

[856] Unlike many other countries, the US will extradite their own nationals if the treaty provides explicit authorisation *Valentine v United States* 299 U.S. 5 (1936); the UK has no reservations as to extraditing their own nationals, providing the extradition is lawful Home Office, 'Extradition: Processes and Review' (Guidance, updated 5 January 2016) <https://www.gov.uk/guidance/extradition-processes-and-review> accessed 8th June 2018. In this situation, treaties often oblige the State to prosecute the offender in their own system B Zagaris, 'U.S. Efforts to Extradite Persons for Tax Offences' (2003) 25 Loy LLA Int'l & Comp L Rev 652, 665

However, whilst it is clear that many bilateral and multilateral treaties agreed by both the UK and US since the 1970s now provide for extradition for tax offences, agreements with all States must provide for extradition for such offences, to ensure that no shelters remain for tax criminals. In this respect, greater action is needed in this area to ensure that individuals cannot flee to uncooperative States to escape prosecution or punishment for tax offences. The case of Marc Rich, who fled to Switzerland in 1983 prior to being indicted for tax evasion, is but a prime example.[857]

Mutual Legal Assistance

Mutual legal assistance (MLA) is 'the process by which States seek and obtain cooperation from other States in the gathering of evidence for the investigation and prosecution of criminal offences.'[858] MLA agreements were essential to providing international cooperation in criminal matters. International cooperation in criminal matters is currently achieved through bilateral Mutual Legal Assistance Treaties (MLATs), multilateral MLATs and domestic legislation.[859]

Bilateral MLATs

MLATs enable requests to be made directly from one central authority to another for assistance in criminal matters, with the aim of reducing delay in international cooperation.[860] Assistance under MLATs may be provided for the purposes of investigations or proceedings and assistance may include the taking of witness testimony or statements, the conduct of searches and seizures, the service of documents, the production and authentication of documents or other evidence, the location of persons, the provision of judicial records and information, and, in some cases, the transfer of prisoners in custody to give evidence abroad and/or the forfeiture and confiscation of the proceeds of crime.[861]

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[857] Rich was pardoned by President Clinton in 2001, after residing in Switzerland since 1983. For a brief description of the events see L Frei, S Trechsel, 'Origins and Applications of the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters' (1990) 31 Harv Int'l L J 77, 94

[858] D Chaikin, 'The Impact of Swiss Principles of Mutual Assistance on Financial and Fiscal Crimes' (2006) 16 Revenue LJ 192, 198

[859] D Chaikin, 'The Impact of Swiss Principles of Mutual Assistance on Financial and Fiscal Crimes' (2006) 16 Revenue LJ 192, 198

[860] JIK Knapp, 'Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy' (1988) 20 Case W Res J Int'l L 405, 408

[861] WC Gilmore (ed), *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge International Document Series Vol. 8, CUP 1995) p.xii

The US signed its first bilateral MLAT with Switzerland in 1973,[862] prompted by concerns over Swiss bank secrecy and its interaction with organised crime.[863] The offences for which assistance may be given were detailed in a schedule to the treaty,[864] and tax offences were expressly included,[865] unless committed by an organised crime group.[866] Once evidence is obtained through the treaty, it may not be used in respect of offences that were not detailed in the original request,[867] and information must not be used for offences expressly excluded under the Treaty.[868] The scope of assistance provided by Switzerland has since been amended by domestic Swiss legislation, which provides for assistance in respect of tax fraud.[869] In the period since, the US has signed MLATs with over 60 jurisdictions, over 50 of which are currently in force.[870] Almost all US bilateral MLATs provide for assistance in respect of tax offences, including those with the UK,[871] and the European Union.[872] However, MLATs with States traditionally regarded as secrecy jurisdictions, such as the Cayman Islands,[873] Panama[874] and the Bahamas,[875] expressly exclude assistance in respect of 'cases of pure tax evasion',[876]

[862] Treaty on Mutual Assistance in Criminal Matters (United States-Switzerland), (signed 25 May 1973, entered into force 23 January 1977) 27 UST 2019, TIAS No. 8302

[863] L Frei, S Trechsel, 'Origins and Application of the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters' (1990) 31 Harv. Int'l. L J 77, 79; Citing S. Exec. Rep. No. 29, 94th Cong., 2d Sess. 1 (1976)

[864] Treaty on Mutual Assistance in Criminal Matters (United States-Switzerland), (signed 25 May 1973, entered into force 23 January 1977) 27 UST 2019, TIAS No. 8302

[865] Treaty on Mutual Assistance in Criminal Matters (United States-Switzerland), (signed 25 May 1973, entered into force 23 January 1977) 27 UST 2019, TIAS No. 8302, Article 2(1)(c)

[866] Ibid Articles 6,7 and 8; The provision was inserted to enable the US to continue to make use of pretextual prosecutions L Frei, S Trechsel, 'Origins and Application of the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters' (1990) 31 Harv. Int'l. L J 77, 83

[867] Ibid Article 5(1)

[868] Ibid Article 5(3); *cf United States v Johnpoll*, 739 F.2d 702 (2nd Cir. 1984)

[869] Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (Switzerland), Article 3

[870] US Criminal Tax Manual 2012, at 41.02 'Obtaining Foreign Evidence or Other Types of Assistance under Mutual Legal Assistance Treaties' <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 2nd July 2018

[871] Treaty on Mutual Legal Assistance in Criminal Matters (United Kingdom of Great Britain and Northern Ireland - United States of America) (signed 6 January 1994, entered into force 2 December 1996) UKTS 14/1997 Cm 3546

[872] Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America [2009] OJ L 291

[873] Treaty Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters (United Kingdom of Great Britain and Northern Ireland – United States of America) (signed 3 July 1986, entered into force 19 March 1990) S. Treaty Doc. No. 8, 100th Cong., 1st Sess. (1987)

[874] Treaty on Mutual Assistance in Criminal Matters (United States – Panama) (signed 11 April 1991, entered into force 6 September 1995) S. Treaty Doc. No. 15, 102nd Cong., 1st Sess. (1991)

[875] Treaty on Mutual Assistance in Criminal Matters (United States- Bahamas) (signed 18 August 1987, entered into force 18 July 1990) S. Treaty Doc. No. 17, 100th Cong., 2d Sess. (1988)

[876] 'The Treaty covers a broad range of offenses, except pure cases of tax evasion. Narcotics-related money laundered or tax cases involving unreported income acquired through drug trafficking are considered offenses under the Treaty' Treaty with Panama on Mutual Assistance in Criminal Matters. Exec. Rept. 3, 104th Cong., 1st Sess. (1995) p.3

and only apply to tax offences if other offences covered by the treaty are involved in their commission.[877]

The UK was relatively slow to enter into bilateral MLATs compared to other common law countries, such as the US.[878] The UK's first MLATs were specifically restricted to the provision of assistance in respect of drug offences.[879] Although intended to be temporary agreements,[880] in many cases, subsequent agreements were never negotiated.[881] Accordingly, many of the UK's MLATs concluded with States regarded as secrecy jurisdictions only provide for assistance in respect of drug trafficking.[882] Of the general MLATs to which the UK is a party, some expressly provide for assistance in respect of tax offences,[883] some treat tax evasion as unexceptional,[884] and some specifically preclude assistance in respect of designated fiscal

[877] Ibid; the Article 3(1) of the US-Cayman Islands Treaty excludes any matter related directly or indirectly to the regulation of taxes. However, under Article 19(3) assistance will be provided if the tax offence concerns the promotion of tax shelters, false statements to tax authorities, or narcotics. The exclusion in Article 3 was inserted due to Cayman Island Authorities' concern over the impact on their economy of providing assistance in tax evasion cases WC Gilmore (ed), *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge International Document Series Vol. 8, CUP 1995) p.301

[878] D McClean, *International Co-operation in Civil and Criminal Matters* (3rd edn, OUP 2012) p.234

[879] Ibid

[880] AV Lowe, C Warbrick, I Cameron, 'Mutual Assistance in Criminal Matters' (1989) 38 ICLQ 954, 957

[881] See for instance, Agreement concerning the Investigation of Drug Trafficking and Confiscation of the Proceeds of Drug Trafficking (United Kingdom of Great Britain and Northern Ireland – Bahamas) (signed 28 June 1988, entered into force 24 October 1990) UKTS 013/1991 Cm 1448; Agreements concerning Mutual Assistance in Relation to Drug Trafficking (United Kingdom of Great Britain and Northern Ireland – Barbados) (signed 19 April 1991, entered into force 1st June 1993); Agreement concerning Mutual Assistance in relation to Drug Trafficking (United Kingdom of Great Britain and Northern Ireland – Grenada) (signed 6 February 1995, entered into force 1 October 2001) UKTS 032/2003 Cm 5940; Agreement concerning Mutual Assistance in relation to Drug Trafficking (United Kingdom of Great Britain and Northern Ireland – Panama) (signed 18 September 1989, entered into force 30 October 1993) UKTS 018/1994 Cm 2497

[882] Ibid

[883] 'Criminal matters shall also include investigations or proceedings relating to offences concerning taxation, duties, customs and international transfer of capital or payments' Treaty on Mutual Assistance in Criminal Matters (Drug Trafficking) (United Kingdom of Great Britain – Canada) (signed 22 June 1988, entered into force 4 August 1990) UKTS 84/1990 Cm 1326, Article 1(a) as amended by Exchange of Notes amending the Treaty on Mutual Assistance in Criminal Matters (Drug Trafficking) (United Kingdom of Great Britain – Canada) (signed 22 March 1992, entered into force 4 August 1990) UKTS 74/1993 Cm 2383

[884] See for instance Treaty on Mutual Legal Assistance in Criminal Matters (United Kingdom of Great Britain and Northern Ireland - United States of America) (signed 6 January 1994, entered into force 2 December 1996) UKTS 14/1997 Cm 3546

offences.[885] The UK has negotiated bilateral MLATs with over 40 jurisdictions, of which over 20 are limited to drug trafficking offences.[886]

Multilateral MLATs

One of the first multilateral MLATs was the Council of Europe's (CoE) European Convention on Mutual Assistance in Criminal Matters.[887] The Convention states that parties should afford each other 'the widest measure of mutual assistance in proceedings in respect of offences'.[888] The Convention provides for restrictions on assistance, stating that a request may be refused if the requested party considers it to be a fiscal offence.[889] However, the application of the exclusion is likely to depend on the requested State.[890] This exception was removed by the Additional Protocol in 1978, and States can no longer refuse assistance solely on the ground that the request concerns a fiscal offence.[891] 50 States have ratified the Convention,[892] whereas 44 States have signed the Additional Protocol, including three non-members of the CoE.[893] The UK was relatively late to ratify the Convention,[894] which was achieved with the enactment of the Criminal Justice (International Co-operation) Act 1990.

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[885] . In the latter category falls the Treaty between the UK and US in respect of the Cayman Islands, which provides assistance for tax fraud only, Treaty Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters (United Kingdom of Great Britain and Northern Ireland – United States of America) (signed 3 July 1986, entered into force 19 March 1990) S. Treaty Doc. No. 8, 100th Cong., 1st Sess. (1987) Article 3(1) excludes any matter related directly or indirectly to the regulation of taxes. However, under Article 19(3) assistance will be provided if the tax offence concerns the promotion of tax shelters, false statements to tax authorities (i.e. tax fraud), or narcotics.

[886] Home Office, 'International MLA & Extradition Agreements the UK is Party To' (International Criminality Unit, Updated April 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/516418/Treaty_List.pdf> accessed 8th June 2018

[887] European Convention on Mutual Assistance in Criminal Matters (opened for signature 10 April 1959, entered into force 16 June 1962) ETS 30

[888] Ibid Article 1(1)

[889] Ibid Article 2

[890] D McClean, *International Co-operation in Civil and Criminal Matters* (3rd edn, OUP 2012) p.173

[891] Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (opened for signature 17 March 1978, entered into force 12 April 1982) ETS 99

[892] Council of Europe, 'Chart of signatures and ratifications of Treaty 030 European Convention on Mutual Assistance in Criminal Matters' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030/signatures?p_auth=2h60p8uV> accessed 4th July 2018

[893] Council of Europe, 'Chart of signatures and ratifications of Treaty 099 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/099/signatures?p_auth=2h60p8uV> accessed 4th July 2018

[894] C Nicholls et al, *Nicholls, Montgomery and Knowles on the Law of Extradition and Mutual Assistance* (3rd edn, OUP 2013) Para 17.08; Both the UK and US had a longstanding aversion to multilateral agreements in this area, due their perception of the incompatibility of rules and procedures emanating from civil law jurisdictions see HL Jones, 'International Judicial Assistance: Procedural Chaos and a Program for Reform' (1953) 62 Yale Law Journal 515, 554

The Convention was not successful in regards to tax offences.[895] A few States have not ratified the Additional Protocol and, of those that have, many entered reservations and declarations regarding dual criminality and proportionality, limiting its effectiveness.[896] Accordingly, the EU began to work on a multilateral MLAT, which was adopted in 2000.[897] This Convention aimed to facilitate the application of the CoE Convention.[898] The EU Convention provides for assistance in relation to offences potentially publishable by criminal proceedings in the requesting or requested state.[899] The Convention does not explicitly deal with fiscal offences. However, the Protocol to the Convention introduced a prohibition against excluding fiscal offences.[900] The Protocol is an improvement on the Additional Protocol to the CoE Convention, as it does not permit any of the reservations which hindered the latter's effectiveness.[901] In addition, it provides for assistance in obtaining information in relation to bank accounts and transactions,[902] excluding bank secrecy as a justification for failing to cooperate.[903] From this beginning, the European Union later developed the European Evidence Warrant (EEW) Scheme,[904] which similarly provided for mutual assistance in respect of fiscal offences, although dual criminality was required if a search or seizure was necessary to execute the request.[905] The EEW was replaced by the European Investigation Order (EIO),[906] which does not exclude fiscal offences from the scope of assistance, but provides that recognition or

[895] 'The evaluations showed that the issue of tax offences remained such a sensitive one that mutual assistance could, on this basis be limited and slowed down or at worst be refused.' Council of the European Union, Final Report on the first evaluation exercise — mutual legal assistance in criminal matters [2001] OJ C216/14 p.18
[896] Ibid; see also F Noseda, 'EU Mutual Assistance In Criminal Matters and the Adoption of the Third Money Laundering Directive – Traps for the Unscrupulous' (2005) 5 BTR 456, 459; The Convention was criticised generally for the delay inherent in obtaining assistance see C Gane, M Mackarel, 'The Admissibility of Evidence Obtained from Abroad into Criminal Proceedings – The Interpretation of Mutual Legal Assistance Treaties and Use of Evidence Irregularly Obtained' (1996) 4 Eur J Crime Crim L & Crim Just 98, 100
[897] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C197
[898] Ibid Article 1(1); It also aimed to supplement the Schengen Implementation Convention and the Benelux Treaty
[899] Ibid Article 3
[900] Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2001] OJ C 326, Article 8
[901] F Noseda, 'EU Mutual Assistance In Criminal Matters and the Adoption of the Third Money Laundering Directive – Traps for the Unscrupulous' (2005) 5 BTR 456, 461
[902] Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2001] OJ C 326, Articles 1-3
[903] Ibid Article 7
[904] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L 350/72
[905] Ibid Article 14
[906] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in Criminal Matters [2014] OJ L 130/1

execution of an EIO may be refused where the conduct does not constitute an offence under the law of the executing State.[907] The Directive was transposed into UK legislation.[908]

The United Nations has developed a model MLAT,[909] which provides for *inter alia* assistance in obtaining evidence from persons, conducting searches and seizures, serving documents and providing records,[910] alongside assistance in relation to locating, freezing and seizing the proceeds of crime.[911] The UN model MLAT does not preclude assistance in respect of fiscal offences but, as it is a model agreement, notes that States may wish to include fiscal offences as an additional ground for refusal.[912] The Commonwealth have also adopted a Scheme in relation to mutual legal assistance in criminal matters,[913] which provides for a wide range of assistance,[914] in respect of criminal proceedings and investigations.[915] The Scheme contains no express prohibition against rendering assistance in respect of fiscal offences, although dual criminality may be required.[916] The final regional MLAT to be considered here is the Inter-American Convention on Mutual Assistance in Criminal Matters.[917] The Convention provides for assistance in investigations, prosecutions and proceedings,[918] in respect of criminal conduct punishable by at least one year of imprisonment in the requesting state.[919] The Convention permits a State to refuse to provide assistance if the request concerns a fiscal offence.[920] The US was opposed to this exception during the course of negotiations,[921] and consequently

[907] Ibid Article 11(1)(g), see also Article 11(3)
[908] The Criminal Justice (European Investigation Order) Regulations 2017, SI2017/730
[909] UNGA Res 45/117 (14 December 1990) UN Doc A/RES/45/117 as amended by UNGA Res 53/112 (9th December 1998) UN Doc A/RES/53/112
[910] Ibid Article 1
[911] Ibid Article 18, originally encompassed in an Optional Protocol to the Model Treaty
[912] Ibid Article 4, fn6
[913] The Commonwealth Secretariat, 'Commonwealth Schemes for International Cooperation in Criminal Matters' (Office of Civil and Criminal Justice Reform, 2017) <http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_13_ROL_Schemes_Int_Cooperation.pdf> 'Revised Scheme Relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth' (Harare Scheme)
[914] Ibid Paragraph 1(5)
[915] Ibid Paragraph 2(3)
[916] Ibid paragraph 10 states that 'Each country is encouraged to render assistance in the absence of dual criminality.' The original version of the Scheme included a discretionary dual criminality provision D McClean, *International Co-operation in Civil and Criminal Matters* (3rd edn, OUP 2012) p.183
[917] Inter-American Convention on Mutual Assistance in Criminal Matters (opened for signature 23 May 1992, entered into force 14 April 1996) OAS TS 75
[918] Ibid Article 2
[919] Ibid Article 6
[920] Yet assistance is provided if the offense is committed by way of an intentionally incorrect statement or the conduct involved forms any other offence detailed in the Convention, ibid Article 9(f)
[921] Testimony of Samuel M Witten, Assistant Legal Adviser for Law Enforcement and Intelligence, U.S. Department of State in Hearings before the Senate Committee on Foreign Relations, S. Hrg. 106-660, 106th Congress 2.d. Sess. (2000) p.9

proposed an Optional Protocol, which removed fiscal offences as a ground for refusal.[922] However, while 28 states have ratified or acceded to the Convention,[923] only seven, including the US, have ratified or acceded to the Protocol.[924]

National Legislation

UK and US domestic legislation enables authorities to request and provide the required assistance under MLATs.[925] However, in both jurisdictions, assistance may be provided to foreign authorities under such legislation, notwithstanding the absence of a MLAT. Both the US and UK courts have a discretionary power[926] to order the production of evidence to fulfil the request of a foreign authority.[927] In the UK, under the Crime (International Co-operation) Act,[928] such a request must be issued by a foreign national or international authority,[929] whereas in the US, 28 U.S.C. §1782 states that the request can be made by a foreign or international tribunal or 'any interested person'.[930] The power of the UK courts to provide assistance is limited to criminal, administrative and clemency proceedings and investigations,[931] whereas the power of the US Courts can be used to obtain evidence 'for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.'[932]

The wide nature of the power contained in §1782 was introduced to encourage international cooperation with the US and to 'invite foreign countries similarly to adjust their procedures.'[933] The UK legislation also aims to encourage reciprocity, but although this is not usually formally

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[922] Optional Protocol Related to the Inter-American Convention on Mutual Assistance in Criminal Matters (opened for signature 11 June 1993, entered into force 7 April 2002) OAS TS 77
[923] Organization of American States, 'Inter-American Convention on Mutual Assistance in Criminal Matters – Signatories and Ratifications' <http://www.oas.org/juridico/english/Sigs/a-55.html> accessed 3rd July 2018
[924] Organization of American States, 'Optional Protocol Related to the Inter-American Convention on Mutual Assistance in Criminal Matters – Signatories and Ratifications' <http://www.oas.org/juridico/english/Sigs/a-59.html> accessed 3rd July 2018
[925] 28 U.S.C. §§ 1781, 1782; 18 U.S.C. § 3512; Federal Rules of Criminal Procedure 15(e); Crime (International Co-operation) Act 2003, s7, s13; Criminal Procedure Rules, Part 32
[926] *In re Premises Located at 840 140th Ave., NE, Bellevue, Wash.*, 634 F.3d 557, 563 (9th Cir. 2011)
[927] 28 U.S.C. § 1782; Crime (International Co-operation) Act 2003, s13
[928] Crime (International Co-operation) Act 2003
[929] Ibid s13(2)
[930] 28 U.S.C. § 1782(a)
[931] Crime (International Co-operation) Act 2003, s14
[932] 28 U.S.C. § 1782(a); The word tribunal is used to ensure that administrative proceedings are encompassed S. Rept. No. 1580, 88th Cong., 2d. Sess., p. 7 (1964) considered in *Intel Corp. v. Advanced Micro Devices, Inc* 542 U.S. 24, 248-9 (2004)
[933] 1964 U.S. Code Cong & Ad. News 3782 at 3783 cited in MH Deutsch, 'Judicial Assistance: Obtaining Evidence in the United States, Under U.S.C. § 1782, for Use in a Foreign or International Tribunal' (1982) 5 B.C. Int'l & Comp. L. Rev. 175, 177

required, a different approach is taken with regards to tax offences.[934] When the request concerns a tax offence, the relevant authority may only arrange for evidence to be obtained if 'the request is from a country which is a member of the Commonwealth or is made pursuant to a treaty to which the UK is a party'[935] or dual criminality is present.[936] In contrast, only the general terms of the statute restrict assistance in regards to tax offences in the US so that, for instance, the authority must prove that the evidence is for use in a proceeding or tribunal.[937] The UK's approach to requiring an MLAT or dual criminality is more likely to ensure reciprocity, reducing UK tax evasion, owing to the binding nature of these agreements.[938] Yet, the US approach is likely to have a broader impact on tax evasion globally.

Overall, the creation of MLATs has made the obtaining of assistance 'relatively straightforward' in criminal tax cases, if such offences are covered by the agreement.[939] This is because they provide a more efficient and compulsory obligation on States than letters rogatory or letters of request.[940] Much progress has been made in ensuring that tax offences are brought within the scope of MLATs. Nevertheless, many of the multilateral MLATs which now provide for such assistance, permit reservations and derogations in respect of this obligation, hindering their effectiveness in combatting tax evasion. Additionally, many of the US and UK's bilateral MLATs, particularly those signed with secrecy jurisdictions, do not extend assistance in tax cases. Moreover, there are still some states with which MLATs have not been signed at all. Thus, more work needs to be done to ensure that tax offences are within the scope of all bilateral and multilateral MLATs.

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[934] Home Office, *Requests for Mutual Legal Assistance in Criminal Matters Guidelines for Authorities Outside of the United Kingdom - 2015* (12th edn, March 2015) p.6
[935] Crime (International Co-operation) Act 2003, s14(4)(a)
[936] Ibid s14(4)(b)
[937] For example, a tax collector effecting a tax assessment process that does not involve adjudicative proceedings may be denied assistance *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F. 2d 1017 (2d Cir. 1967)
[938] *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1291 (11th Cir. 2003) 'Despite the apparent versatility of 28 U.S.C. § 1782, law enforcement authorities found the statute to be an unattractive option in practice because it provided wide discretion in the district court to refuse the request and did not obligate other nations to return the favor that it grants. MLATs, on the other hand, have the desired quality of compulsion.' TM Funk, *Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges* (Federal Judicial Center International Litigation Guide, 2014) p.5
[939] CJ Smith, 'Obtaining Foreign Evidence Outside of the Mutual Legal Assistance Treaty Process' (2007) 55 US Att'ys Bull 27, 27
[940] MK Gyandoh, 'Foreign Evidence Gathering: What Obstacles Stand in the Way of Justice' (2001) 15 Temp. Int'l & Comp. L.J. 81, 89; JP Springer, 'An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases' (1988) 22 Geo Wash J Int'l L & Econ 277, 307

3.12 Conclusion

This chapter has provided an overview of the context within which attempts to secure the provision of information and assistance in respect of tax evasion operates. Of particular concern are states known as secrecy jurisdictions, whose bank secrecy laws, legal structures and services serve to facilitate financial crimes, particularly tax offences. Owing to the intrinsic importance of bank secrecy to the national economies of secrecy jurisdictions, they have fiercely resisted calls to temper obligations of confidentiality for the purposes of assisting other states in the detection and punishment of tax evasion. However, a lack of cooperation in this area was not initially limited to secrecy jurisdictions. Historically, many states have perceived themselves to be bound by an archaic revenue rule, which prevented them from assisting one another in both civil and criminal investigations and proceedings in respect of tax matters.

The strictness of the rule has been tempered in many Common Law jurisdictions, including the UK and US, permitting assistance in relation to, but not direct enforcement of, revenue laws in civil matters. From this point on, international agreements, such as the Hague Conventions, which were designed to facilitate international cooperation in civil matters, could theoretically be used to obtain information and assistance in respect of the assessment and collection of taxes. However, many states perceived fiscal cases to fall outside of their scope, limiting the effectiveness of such agreements. In addition, many jurisdictions began to negotiate measures which overrode the longstanding prohibition in criminal matters, for instance, by including tax offences in extradition treaties and MLATs. Initially, these agreements did not apply to tax offences, yet changing attitudes towards such crimes have begun to lead to their inclusion in more recent agreements. Despite great progress, many countries, particularly secrecy jurisdictions, have not signed bilateral or multilateral agreements that oblige them to render assistance for the investigation or prosecution of tax offences.

This is unfortunate as, on a practical level, international agreements between all States must provide for information, evidence and assistance in respect of tax matters, to ensure that tax evaders cannot escape their responsibilities by taking advantage of gaps in international cooperation. Despite the justifications offered, the failure to include tax offences in such agreements, particularly those providing for cooperation in criminal matters, signals a continued perception of tax evasion as a less serious crime, unworthy of international cooperation. The changing public perceptions of this offence, spurred by the increasing realisation of the harm caused by tax evasion, necessitates the application of measures

providing for assistance in civil and criminal matters to tax cases. With this in mind, the next chapter examines the administrative cooperation agreements which have been specifically developed to provide information and assistance in tax matters and thus, to address the gaps left by the exclusion of tax matters from the judicial cooperation framework.

Chapter 4 - International Cooperation in Tax Matters

4.1 Introduction

The previous chapter highlighted the difficulties states face when attempting to tackle offshore tax evasion. One solution to this problem may be to require secrecy jurisdictions to increase their rates of taxation, removing the incentive to conceal funds in this manner.[941] Yet, this is unlikely to be a complete solution and is at any rate politically unpalatable, as the sovereignty of jurisdictions necessitates domestic control over taxation decisions.[942] The preferred solution must be the exchange of information and assistance between states to enable the effective and accurate administration of tax systems, by providing the ability to detect and address any tax noncompliance. However, the previous chapter also demonstrated the traditional reluctance of states to negotiate agreements to provide information, evidence, and assistance to one another for the purposes of combatting tax evasion. In light of this failure, several international initiatives have been developed to address the gaps left by the exclusion of tax matters from other cooperation frameworks. However, these initiatives go further, providing for a wider level of cooperation. These agreements provide for communication between administrative authorities, circumventing the time consuming diplomatic and judicial channels necessitated by other agreements,[943] and for the exchange of information and assistance for the purposes of the assessment of taxes notwithstanding the initiation of criminal or civil proceedings.[944] The international agreements devoted to providing information and assistance in tax matters have their origins in the work of the League of Nations; work which has since been greatly expanded and developed by the Organisation for Economic Cooperation and Development (OECD).[945]

This chapter discusses the development of the OECD's attempts to promote the exchange of information and assistance in tax matters. This section examines the evolution of the exchange of information from a subsidiary obligation contained in bilateral double taxation treaties, to the development and negotiation of bespoke bilateral and multilateral agreements providing for a wide range of assistance to combat tax evasion. The ability of these agreements to detect and prevent tax evasion will be examined and evaluated. Throughout this chapter, the position

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[941] Ibid at p.82
[942] See for instance, the US reaction to the OECD's Harmful Tax Practices Initiative discussed at p
[943] S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Picciotto 2013) p.253; see Chapter 3 at p.
[944] Ibid at p.272
[945] DR Whittaker, 'An Examination of the OECD and UN Model tax Treaties: History, Provisions and Application to U.S. Foreign Policy' (1982) 8 NC J Int'l L & Com Reg 39, 39

of secrecy jurisdictions will be analysed, as their cooperation is essential to preventing offshore evasion by those subject to UK and US taxation. The following section will consider the implementation of these agreements in the UK and US, alongside the unilateral methods employed by the US to secure evidence and information in tax cases, which arose out of dissatisfaction with the then prevailing OECD models. The research then considers the impact of these methods on the evolution of the exchange of information, from the provision of information on request to the automatic exchange of information (AEOI). The chapter concludes with an analysis of the effectiveness and proportionality of AEOI in tax matters, offering recommendations to improve the efficacy of the international frameworks and their national implementation.

4.2 The Work of the OECD and the Global Forum

4.2.1 Background – The League of Nations

The first attempts to effect the exchange of information between states in relation to tax matters materialised from double taxation treaties. Double taxation treaties aim to prevent economically inefficient double taxation, specifically, where a particular taxpayer or item of income is subject to tax in more than one jurisdiction.[946] The first attempt to provide for a model agreement occurred with the work of the League of Nations, which was tasked with examining the problems of double taxation and tax evasion.[947] In 1927, the League published four model tax conventions,[948] which separately provided for the prevention of double taxation, administrative assistance in tax matters and judicial assistance in the collection of taxes.[949] The model conventions were later combined in the Mexico and London drafts, which included model treaties on both double taxation and administrative assistance.[950] Nevertheless, at this time, very few administrative assistance treaties were concluded. Rather, double taxation treaties took precedence and minimal provisions on assistance in tax matters were included

[946] However, more accurately, these treaties simply allocate taxing rights between jurisdictions. RS Avi-Yonah, 'Double Tax Treaties: An Introduction' in KP Sauvant, LE Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009) 99; JA Becerra, *Interpretation and Application of Tax Treaties in North America* (2nd edn, IBFD 2013) p.40-41

[947] OM Trelles II, 'Double Taxation/Fiscal Evasion and International Tax Treaties' (1979) 12 Ind L Rev 341, 342

[948] *Report presented by the Committee of Technical Experts on Double Taxation and Tax Evasion* (Geneva 1927, League of Nations Doc. C.216M.85 1927 II) available from <https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-216-M-85-1927-II_EN.pdf>

[949] Ibid; see also SA Dean, 'The Incomplete Global Market For Tax Information' (2008) 49 Bos Col L Rev 605, 640

[950] Ibid (Dean) at p.643

within such treaties.[951] The work of the League of Nations was eventually used by the Organization for European Economic Cooperation (OEEC).[952] The OEEC, joined by the US and Canada, later became the OECD,[953] which, in 1963, published a Draft Double Taxation Convention on Income and Capital (DTC).[954]

4.2.2 The OECD Model Double Taxation Convention

Exchange of Information

Like its predecessors, the DTC was designed to prevent double taxation.[955] However, Article 26 of the Convention would become one of the primary legal bases for the exchange of information between states to combat tax evasion.[956] The model DTC was first amended in 1977[957] and has since been updated on a periodic basis.[958] In 1963, Article 26 provided that;

> The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention.[959]

This version of Article 26 was construed to provide for the exchange of information solely to facilitate the implementation of the treaty itself; in other words, Article 26 was only used to prevent those who were not entitled to treaty benefits from receiving them.[960] This has been termed a 'narrow'[961] or 'minor' information clause, where information is not supplied to assist

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[951] S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Picciotto 2013) p.252
[952] OM Trelles II, 'Double Taxation/Fiscal Evasion and International Tax Treaties' (1979) 12 Ind L Rev 341, 344
[953] Ibid citing AJ van den Tempel, *Relief from Double Taxation* (Developments in Taxation Since World War I, No. 7, IBFD 1967) p.11
[954] OECD, *Draft Double Taxation Convention on Income and Capital* (OECD Publishing, 1963)
[955] As evident from the title of the Convention; The purpose ascribed to the Convention may differ depending on who's perspective is considered, namely, that of the taxpayer or tax collector - P Baker, *Double Taxation Agreements and International Tax Law: A Manual on the OECD Model Double Taxation Convention 1977* (Sweet and Maxwell, 1991) p.9
[956] E Fort, P Hondius, J Neugebauer, 'Development of the International Information Exchange and Domestic Implementation' in A Rust, E Fort (eds), *Exchange of Information and Bank Secrecy* (International Tax Conferences of the University of Luxembourg, Wolters Kluwer 2012) p.88
[957] OECD, *Model Double Taxation Convention on Income and on Capital* (OECD Publishing 1977)
[958] In 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010, 2014 and 2017.
[959] OECD, *Draft Double Taxation Convention on Income and Capital* (OECD Publishing, 1963) Art 26; K vaan Raad, *Model Income Tax Treaties: A Comparative Presentation of the Texts of the Model Double Taxation Conventions on Income and Capital of the OECD (1963 and 1977) United Nations (1980) and United States (1981)* (Springer 1983); In 2005, the word 'necessary' was replaced with 'foreseeably relevant'.
[960] C Garbarino, S Gerufi, 'Transparency and Exchange of Information in International Taxation' in A Bianchi, A Peters (eds), *Transparency in International Law* (CUP 2014) p.178
[961] M Widmer, 'Exchange of Information' (1981) 21 European Taxation 162, 164

in the assessment of taxes generally.[962] For that reason, information could also only be supplied in respect of persons covered by the DTC, namely the residents of each state, and was limited to information concerning taxes covered by the DTC.[963] The range of taxes in respect of which information could be exchanged was later expanded to include taxes on estates and inheritances.[964] The DTC was also amended in 1977, with Article 26 revised to provide for a wider scope of information exchange, effectively becoming an 'extensive exchange of information clause.'[965] In contrast to the 1963 model, the 1977 model clearly addressed the issue of tax evasion, paving the way for Article 26 to be used as a tool in detecting and addressing tax noncompliance.[966]

Information can be exchanged under Art 26 in three primary forms.[967] First, information may be exchanged upon request, namely where a contracting state requests information from the other.[968] Second, information may be exchanged automatically, which involves one or both contracting states systematically transmitting information about various sources of income to the other.[969] Third, information may be exchanged spontaneously if one state discovers information that may be of interest to the other state.[970] The form in which information shall be exchanged must be determined by the contracting states.[971] Although these forms of information exchange have the potential to enable states to access information to combat offshore tax evasion, the effectiveness of Article 26 was initially limited by the legal status of the instrument, alongside the drafting of the Article. The DTC is a model agreement to be used

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[962] M Lang, *Introduction to the Law of Double Taxation Conventions* (2nd edn, IBFD, Linde Verlag GmbH 2014) 15.1; see also X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.18

[963] I.e. those imposed on income and capital, ibid.

[964] OECD, *Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Estates and Inheritances* (OECD Publishing 1966); The Convention was updated in 1982 to include gifts, OECD, *Convention for the Avoidance of Double Taxation with respect to Taxes on Estates and Inheritances and on Gifts* (OECD Publishing, 1982)

[965] C Garbarino, S Gerufi, 'Transparency and Exchange of Information in International Taxation' in A Bianchi, A Peters (eds), *Transparency in International Law* (CUP 2014) p.179

[966] OM Trelles II, 'Double Taxation/Fiscal Evasion and International Tax Treaties' (1979) 12 Ind L Rev 341, 363; see also DD Curtin, 'Exchange of Information under the United States Income Tax Treaties' (1986) 12 Brook J Int'l L 35, 42

[967] OECD, *Model Double Taxation Convention on Income and on Capital* (OECD Publishing 1977) Commentary to Art 26, para 9; see also OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Commentary to Art 26(1), para 9

[968] Ibid

[969] Ibid

[970] Ibid. In addition, the Article does not preclude the use of other methods, such as simultaneous examinations, tax examinations abroad and industry-wide exchanges of information.

[971] M Lang, *Introduction to the Law of Double Taxation Conventions* (2nd edn, IBFD, Linde Verlag GmbH 2014) para 527

by states as a basis for negotiation.[972] The model is unenforceable, leaving it subject to interpretation and deviations by states who tailor the model DTC to fit their national circumstances and preferences.[973] For instance, following the 1977 amendment, some states continued to differ on their interpretation of Article 26 in respect of whether a minor or major information exchange clause was to be adopted.[974] Switzerland adopted a minor information exchange clause in bilateral treaties, entering a reservation to Article 26.[975] Conversely, the US adopted a major information exchange clause, covering all taxes and requiring the use of national enforcement powers to provide information.[976] After significant pressure from the OECD and other states, states that initially adopted a minor information clause subsequently agreed to exchange information relevant to the assessment or enforcement of domestic tax law, but only in cases where tax fraud was alleged.[977]

Despite the possibility of several forms of information exchange, the most prevalent was the exchange of information on request.[978] However, the effectiveness of this was hampered by the drafting of Article 26, its commentary and national interpretations. For instance, Article 26 requires the information exchanged to be foreseeably relevant to the administration or enforcement of domestic tax laws. The commentary clarifies that this prohibits 'fishing expeditions', or 'speculative requests that have no apparent nexus to an open inquiry or investigation.'[979] This prohibition would prevent one state from asking for all information concerning funds held by their residents in another state; rather, the requesting state must provide enough information for a particular taxpayer to be identified and provide reasons for the request that demonstrate its relevance.[980] Although the rationale behind this limitation is to

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[972] K Holmes, *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application* (IBFD 2007) p.65

[973] Ibid

[974] Conversely, some states also adopted hybrid or extended information exchange clauses in their agreements R Seer, 'Recent Development in Exchange of Information within the EU for Tax Matters' (2013) 22 EC Tax Review 66, 66

[975] DS Kerzner, DW Chodikoff, *International Tax Evasion in the Global Information Age* (Springer Verlag 2016) p.190 (fn.186)

[976] S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Picciotto 2013) p.275; see also US Model Income Tax Convention of November 15, 2006, Art 26 available from <https://www.irs.gov/pub/irs-trty/model006.pdf>

[977] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.20; see also M Keen, JE Ligthart, 'Information Sharing and International Taxation: A Primer' (2006) 13 International Tax and Public Finance 81, 83

[978] M Lang, *Introduction to the Law of Double Taxation Conventions* (2nd edn, IBFD, Linde Verlag GmbH 2014) para 527

[979] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017), Commentary to Art 26(1), para 5. The phrase 'foreseeably relevant' replaced the term 'necessary' in 2005.

[980] JC Sharman, 'Privacy as Roguery: Personal Financial Information in an Age of Transparency' (2009) 87 Public Administration 717, 723-4

prevent states from being overburdened by numerous expensive, and at times unnecessary, requests,[981] and to protect the privacy of taxpayers,[982] the prohibition severely limited the efficacy of information exchange. This is because states would need to provide evidence that misconduct or noncompliance had taken place in order to make a request, yet would often need to make the request to obtain this information, effectively leaving states in a 'Catch-22' situation.[983] This problem was exacerbated by the interpretation afforded to this requirement by secrecy jurisdictions, such as Switzerland, which required the taxpayer, and often the financial institution holding the information, to be identified with the upmost specificity.[984]

The third paragraph of Article 26 contains several exceptions. A state is not obliged to exchange information when doing so would be 'at variance with the laws and administrative practice of that or of the other Contracting State', where the information was 'not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State' and where supplying information 'would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).'[985] The first two exceptions are aimed at ensuring reciprocity.[986] However, these 'lowest common denominator provisions'[987] can inhibit or frustrate the exchange of information when each state's mechanisms for obtaining information are dissimilar,[988] particularly, when the exceptions are interpreted literally by states.[989] This situation is likely to occur with secrecy jurisdictions, who embrace practical and legal

[981] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.19
[982] JC Sharman, 'Privacy as Roguery: Personal Financial Information in an Age of Transparency' (2009) 87 Public Administration 717, 724
[983] TV Addison, 'Shooting Blanks: The War on Tax Havens' (2009) 16 Ind J Global Legal Studies 703, 718. McIntyre likened the prohibition to requiring that fishermen know the name of a fish, or its identifying tag, before being able to catch it, 'The only reason I can imagine for wanting to put such a ridiculous limitation on fisherman would be to keep them from catching fish.' MJ McIntyre, 'How to End the Charade of Information Exchange' [2009] Tax Notes International 255, 257.
[984] OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Switzerland 2011 - Phase 1: Legal and Regulatory Framework* (OECD Publishing 2011) pp.73-80; see also JR W Fiechter, 'Exchange of Tax Information: The End of Bank Secrecy in Switzerland and Singapore?' [2010] International Tax Journal 55, 61
[985] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Art 26(3)
[986] F Debelva, N Diepvens, 'Exchange of Information. An Analysis of the Scope of Article 26 OECD Model and Its Requirements: In Search for an Efficient but Balanced Procedure' (2016) 44 Intertax 298
[987] Note, 'The IRS Summons Power Under the Lowest Common Denominator Provisions of United States Double Taxation Treaties' (1981) 16 Geo Wash J Int'l L & Econ 143
[988] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Commentary to Art 26(3), para 18; see also SK McCracken, 'Going, Going, Gone… Global: A Canadian Perspective on International Tax Administration Issues in the "Exchange-of-Information Age"' (2002) 50 Canadian Tax Journal 1869, 1883
[989] DD Curtin, 'Exchange of Information under the United States Income Tax Treaties' (1986) 12 Brook J Int'l L 35, 44

impediments to the disclosure of information under domestic law.[990] Several states, including the UK, Ireland and Japan, construed the first two exceptions so as to provide for a domestic interest requirement, refusing to exchange information unless they had a tax interest in obtaining it.[991] These states would only supply information already held by tax authorities and would not use information gathering powers for another state, unless there was a potential liability in terms of the state's own taxation.[992] The third exception aims to provide protection for both the taxpayer and the state in preventing the disclosure of the taxpayer's trade secrets and through preventing the exchange of information that would be contrary to the requested state's public policy.[993] These exceptions should be narrowly construed,[994] yet it is extremely difficult to challenge a state's assertion that information exchange is contrary to public policy or the taxpayer's commercial interests.[995] Ultimately, secrecy jurisdictionsconstrued the exceptions under paragraph three to prevent the disclosure of information protected by bank secrecy laws, frustrating attempts to detect tax evasion.[996]

Further, one of the main problems in achieving effective information exchange was the choice of legal instrument. Including information exchange provisions within double taxation treaties may have had several benefits, including the facilitation of information exchange between pairs of states that would not otherwise have agreed to assist one another in this manner.[997] However, information exchange's 'second-fiddle role' in these treaties restricted the type and number of jurisdictions that were, at this stage, involved in information exchange.[998] In particular, many secrecy jurisdictions had little incentive to enter into comprehensive tax treaties based on the OECD model.[999] Further, the DTC is a bilateral, as opposed to a multilateral, agreement, which slowed the development of the exchange of information, as pairs of states had to separately

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[990] See Chapter 3
[991] M Keen, JE Ligthart, 'Information Sharing and International Taxation: A Primer' (2006) 13 International Tax and Public Finance 81, 90
[992] S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Picciotto 2013) p.276
[993] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Commentary to Art 26(3), para 19-19.5
[994] Ibid
[995] SK McCracken, 'Going, Going, Gone… Global: A Canadian Perspective on International Tax Administration Issues in the "Exchange-of-Information Age"' (2002) 50 Canadian Tax Journal 1869, 1883
[996] As evidenced by the introduction of paragraph 5 to Art 26 in 2005 – 'In no case shall the provisions of paragraph 3 be construed to permit a Contracting Sate to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person.' OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Art 26(5)
[997] SA Dean, 'The Incomplete Global Market For Tax Information' (2008) 49 Bos Col L Rev 605, 645
[998] Ibid at p.649
[999] Ibid at p.650-1

agree to exchange information with one another. For example, it has been suggested that with approximately 52 secrecy jurisdictions and 220 countries worldwide, at least 11,000 treaties would need to be negotiated to provide a full network.[1000] Furthermore, the bilateral nature of these agreements has often prevented developing countries from accessing the benefits of information exchange.[1001]

Assistance in the Recovery of Tax Claims

A related concern is that the DTC only contained an information exchange provision and did not provide for an obligation on states to assist one another in the collection of taxes until 2003.[1002] Rather, administrative assistance in tax collection tended to be included in separate agreements negotiated between states, if agreed to at all.[1003] This initially appears to be a significant oversight, as assistance in collection is the 'next logical step' in tax administration.[1004] This is because, if an information request reveals tax evasion, assistance from the other state will at times be necessary for the first state to recover the unpaid tax.[1005] However, the impact of this oversight is often mitigated by the fact that the tax evader will have assets in the state seeking to recover the tax, which can be used to achieve enforcement, and, in cases of passive income, taxation is often achieved through the imposition of withholding taxes.[1006] Nevertheless, there are still circumstances where assistance from another state will be necessary to recover unpaid tax,[1007] and situations where, although assets may be present in the state seeking to collect tax, assets held in another state could be seized more efficiently.[1008] Despite the limited number of cases where assistance would be necessary or

[1000] N Johannesen, G Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal: Economic Policy 65, 70
[1001] D Wigan, 'Offshore Financial Centres' in D Mügge (ed), *Europe and the Global Governance of Finance* (OUP 2014) p.163
[1002] OECD, *Model Convention on Income and on Capital* (OECD Publishing, 2003), Art.27. Notwithstanding the inclusion of such a provision in the model agreements proffered by the League of Nations, JA Becerra, *Interpretation and Application of Tax Treaties in North America* (2nd edn, IBFD 2013) p.45; For a summary of the advantages and disadvantages of including collection provisions within double taxation agreements considered by the League of Nations see OM Trelles II, 'Double Taxation/Fiscal Evasion and International Tax Treaties' (1979) 12 Ind L Rev 341, 345-9
[1003] OECD, *Model Double Taxation Convention on Income and on Capital* (OECD Publishing 1977) Commentary to Art 26, para 3
[1004] SK McCracken, 'Going, Going, Gone… Global: A Canadian Perspective on International Tax Administration Issues in the "Exchange-of-Information Age"' (2002) 50 Canadian Tax Journal 1869, 1885
[1005] Ibid
[1006] B Mallinak, 'The Revenue Rule: A Common Law Doctrine for the Twenty-First Century' (2006) 16 Duke J Comp & Int'l L 79, 122
[1007] For example, 'a few estate tax cases where the estate consists of fungible assets that are easily transported' (ibid)
[1008] OECD, *Text of the Revised Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol* (OECD Publishing, 2010) p.30

beneficial, assistance in tax collection is necessary for the advancement of a comprehensive system of international cooperation in tax matters. The United Nations drew an analogy with the use of extradition treaties; even if these tools will be seldom used, they should still be available as a last resort to deal with the most egregious of offenders.[1009]

The OECD called on states to 'strengthen, where necessary, their legal, regulatory or administrative provisions and their powers of investigation for the detection and prevention of tax avoidance and evasion.'[1010] However, very few states included assistance in the recovery of tax claims in their double taxation treaties.[1011] Accordingly, the OECD issued a Recommendation for states to provide such assistance,[1012] together with a Model Convention.[1013] However, the impact of this Convention was extremely limited; in 2014, the original Recommendation was abrogated, as not a single OECD member had reported the conclusion of any bilateral agreements based on the model.[1014] Nonetheless, the Convention was influential in the drafting of the joint OECD and Council of Europe (CoE) Convention on Mutual Administrative Assistance in Tax Matters,[1015] considered below. The failure of states to agree to provide assistance in tax collection, may be attributed to the fact that many states believed lending assistance in the recovery of tax claims was a form of extraterritorial intrusion,[1016] and took the stance that the courts' inability to enforce a foreign tax claim must extend also to the tax administration.[1017] As Harris and Oliver note, 'it is not clear why this must necessarily be so',[1018] as the abrogation of the revenue rule has always been possible

[1009] Report Prepared for the Tenth Meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters, Geneva, 10-14 September 2001, ST/SG/AC.8/2001/L.2 <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan001659.pdf> p.10
[1010] OECD, 'Recommendation of the Council on Tax Avoidance and Evasion C(77)149/FINAL' (Adopted on 21/09/1977) <https://legalinstruments.oecd.org/en/instruments/79> Accessed 1 March 2019
[1011] MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003) p.119
[1012] OECD Council, 'Recommendation of the Council concerning Mutual Administrative Assistance in the Recovery of Tax Claims C(80)155/FINAL' (Adopted on 29 January 1981) <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0189> accessed 5 March 2019
[1013] OECD, *Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims* (Report of the OECD Committee on Fiscal Affairs, OECD Publishing 1981)
[1014] OECD Council, 'Abrogation of the Recommendation of the Council Concerning Mutual Administrative Assistance in the Recovery of Tax Claims [C(80)155/FINAL] Doc C(2014)98' (Note by the Secretary General, 2 July 2014) <https://one.oecd.org/document/C(2014)98/en/pdf> accessed 5th March 2019
[1015] Convention on Mutual Administrative Assistance in Tax Matters (opened for signature 25 January 1988; entered into force 1 April 1995) 1966 UNTS 215; AH Qureshi (ed), *The Public International Law of Taxation: Text, Cases and Materials* (Graham & Trotman Ltd 1994) p.349
[1016] Report Prepared for the Tenth Meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters, Geneva, 10-14 September 2001, ST/SG/AC.8/2001/L.2 <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan001659.pdf> p.4
[1017] P Harris, D Oliver, *International Commercial Tax* (CUP 2010) p.465
[1018] ibid

through formal agreements.[1019] Nevertheless, the rationale underpinning the rule proved persuasive and many states refused to include collection provisions in their bilateral treaties due to similar concerns.[1020]

The pervasive influence of the rule can be seen in the US and UK approaches to this issue. Some early US bilateral treaties contained 'general enforcement provisions', namely broad provisions requiring each state to assist one another in the collection of all taxes within the scope of the treaty.[1021] Treaties with Denmark,[1022] France,[1023] the Netherlands,[1024] and Sweden[1025] contained a general enforcement provision. However, the agreements with Denmark, France and the Netherlands did not permit assistance in collection in respect of citizens of the country from which assistance was requested.[1026] Consequently, the utility of the agreements in preventing tax evasion was significantly diminished, as assistance is most commonly required when an individual obtains income in a foreign state and then returns to their home state without paying taxes.[1027] The Swedish treaty went further, with assistance limited only to nationals of the state seeking assistance.[1028] US willingness to provide assistance in collection deteriorated further when the Senate opposed general enforcement

[1019] 'That Rule was always liable to be abrogated by treaty.' *Revenue and Customs Commissioners v Ben Nevis (Holdings) Ltd* [2013] EWCA Civ 578; [2013] STC 1579 at para 53

[1020] Report Prepared for the Tenth Meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters, Geneva, 10-14 September 2001, ST/SG/AC.8/2001/L.2 <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan001659.pdf> p.4

[1021] AR Johnson, L Nirenstein, SE Wells, 'Reciprocal Enforcement of Tax Claims through Tax Treaties' (1979) 33 Tax Law 469, 473

[1022] Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (United States-Denmark) (signed 6 May 1948; entered into force 1 December 1948) 26 UNTS 55

[1023] Convention with Respect to Taxes on Income and Property (United States-France) (signed 28 July 1967, entered into force 11 August 1968) 719 UNTS 31

[1024] Convention with Respect to Taxes on Income and Certain Other Taxes (United States-Netherlands) (signed 29 April 1948; entered into force 1 December 1948) 32 UNTS 167

[1025] Agreement for the Avoidance of Double Taxation and the Establishment of Rules of Reciprocal Administrative Assistance with Respect to Income and Other Taxes (United States - Sweden) (signed 23 March 1939, entered into force 14 November 1939) 54 Stat. 1759, T.S. No. 958

[1026] Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (United States-Denmark) (signed 6 May 1948; entered into force 1 December 1948) 26 UNTS 55, Art.18(4); Convention with Respect to Taxes on Income and Property (United States-France) (signed 28 July 1967, entered into force 11 August 1968) 719 UNTS 31, Art.27(5); Convention with Respect to Taxes on Income and Certain Other Taxes (United States-Netherlands) (signed 29 April 1948; entered into force 1 December 1948) 32 UNTS 167, Art.22(4)

[1027] AR Johnson, L Nirenstein, SE Wells, 'Reciprocal Enforcement of Tax Claims through Tax Treaties' (1979) 33 Tax Law 469, 474

[1028] Agreement for the Avoidance of Double Taxation and the Establishment of Rules of Reciprocal Administrative Assistance with Respect to Income and Other Taxes (United States - Sweden) (signed 23 March 1939, entered into force 14 November 1939) 54 Stat. 1759, T.S. No. 958, Art.27

provisions that were included in treaties with Greece[1029] and South Africa[1030] on the basis that assistance in collection would be contrary to common law precedent, leaving claims unenforceable in US courts.[1031] The Senate asserted that assistance would not be permissible under the Internal Revenue Service (IRS) congressional mandate, without possibility of extension,[1032] and generally, that it was not 'believed wise to have one government collect his taxes which are due another government'.[1033] From this point on, the US did not include general enforcement provisions in its treaties.[1034]

In contrast, the UK has historically not sought to include provisions on assistance in collection in its tax treaties,[1035] and only agreed to provide assistance in tax collection as part of its obligations within the EU.[1036] Even then, for many years these obligations were restricted to providing assistance in the recovery of certain taxes, specifically, those considered relevant to community funding.[1037] Consequently, by 2006, not a single UK bilateral treaty included such a provision.[1038] The UK only changed its position on this issue in 2006, when domestic legislation was enacted to enable the extension of mutual assistance in the recovery of taxes to non-EU countries, which enter into reciprocal agreements with the UK.[1039] The same

[1029] Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on the Estates of Deceased Persons (United States-Greece) (signed 20 February 1950; entered into force 30 December 1953) 196 UNTS 269
[1030] Convention for the Avoidance of Double Taxation and for Establishing Rules of Reciprocal Administrative Assistance with Respect to Taxes on Income (United States-South Africa) (signed 13 December 1946; entered into force 15 July 1952) 167 UNTS 171
[1031] *Conventions with South Africa, New Zealand, Norway, Ireland, Greece and Canada on Double Taxation: Hearings before a Subcomm. Of the Comm. On Foreign Relations,* United States Senate, 82d Cong., 1st Sess. 3709 (1951); RE Smith, 'The Nonrecognition of Foreign Tax Judgments: International Tax Evasion' (1981) U Ill L Rev 241, 261
[1032] Ibid
[1033] 97 Cong. Rec. 11,434 (1951) (remarks of Sen. George); cited in RE Smith, 'The Nonrecognition of Foreign Tax Judgments: International Tax Evasion' (1981) U Ill L Rev 241, 261
[1034] S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Picciotto 2013) p.302. Some treaties did not include any collection provisions at all, whereas others only included limited enforcement provisions, with each state only assisting in the collection of the other's taxes when necessary to ensure that individuals not entitled to treaty benefits do not receive them, AR Johnson, L Nirenstein, SE Wells, 'Reciprocal Enforcement of Tax Claims through Tax Treaties' (1979) 33 Tax Law 469, 474
[1035] A Miller, L Oats, *Principles of International Taxation* (5th edn, Bloomsbury Professional 2016) p.191
[1036] Originating in Council Directive 76/308/EEC of 15 March 1976 on Mutual Assistance for the Recovery of Claims Resulting from Operations Forming Part of the System of Financing the European Agricultural Guidance and Guarantee Fund, and of the Agricultural Levies and Customs Duties [1976] OJ L 73/18
[1037] P Baker, 'Mutual Assistance in the Recovery of Tax Claims: No Government of India in the European Union?' (1999) 1 BTR 14, 15
[1038] HC Deb 10 July 2006, vol 448, col 1632W; R Fraser, JDB Oliver, 'Finance Act Notes: International Tax Enforcement Arrangements – Sections 173-175' (2006) 5 BTR 648, 651
[1039] Finance Act 2006, s.173; RW Maas, *Guide to Taxpayer's Rights and HMRC Powers* (4th edn, Bloomsbury Professional 2016) p.606

legislation enables the UK to provide assistance to other countries.[1040] Therefore, although the US offered assistance in collection at an earlier stage than the UK, the UK presently provides a greater level of cooperation.

A separate article on tax collection was finally included in the OECD's Model DTC in 2003.[1041] It is broad in scope,[1042] applying to both residents and non-residents of the contracting states,[1043] and applying to 'taxes of every kind and description imposed on behalf of the contracting states, or of their political subdivisions or local authorities.'[1044] The term revenue claims may also include administrative penalties and the costs of collection or conservancy relating to the claim.[1045] Both assistance in collection and measures of conservancy are available.[1046] There are a number of limits to the obligation to provide assistance; a request cannot be at variance with the laws of either contracting state[1047] and the measures requested must not be contrary to public policy.[1048] Additionally, the requesting state must have pursued all reasonable measures under domestic law before requesting assistance,[1049] and assistance may be refused where the burden on the requested state would be disproportionate to the benefit received to the requesting state.[1050] Nevertheless, the actual existence, validity, or the amount of a revenue claim cannot be challenged in judicial or administrative proceedings in the requested state,[1051] alleviating one of the concerns thought to justify the revenue rule.[1052]

Although Article 27 is broad and provides for both assistance in collection and measures of conservancy in respect of tax claims, its utility in promoting international cooperation, and in turn combatting tax evasion, is weakened by its discretionary nature. The DTC provides that some states are unable to provide assistance in collection, as this is restricted by national law, policy or administrative considerations.[1053] Accordingly, such states should only include

[1040] Finance Act 2006, s.175
[1041] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017), Art.27
[1042] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.50
[1043] 'This assistance is not restricted by Articles 1 and 2' OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017), Art.27(1), Commentary to Art.27(1), para 4.
[1044] Ibid, Art.27(2).
[1045] Ibid.
[1046] Ibid, Art.27(3), Art.27(4).
[1047] Ibid, Art.27(8)(a)
[1048] Ibid, Art.27(8)(b)
[1049] Ibid, Art.27(8)(c)
[1050] Ibid, Art.27(8)(d)
[1051] Ibid, Art.27(6)
[1052] See Chapter 3
[1053] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017), Art.27(1)

Article 27 when they can agree to provide such assistance.[1054] Moreover, even if Article 27 is included, states are permitted to restrict its scope to a limited collection provision, or in terms of the taxes covered, the residence of the individuals concerned, and/or the countries to which they will provide assistance.[1055]

4.2.3 OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters

Although bilateral tax treaties may have had several benefits, a multilateral treaty would facilitate international cooperation in tax matters at a much faster pace.[1056] In this respect, the OECD and Council of Europe (CoE) approved a Convention on Mutual Administrative Assistance in Tax Matters.[1057] The Convention was heavily inspired by a Nordic Convention,[1058] yet, due to its scope, is often regarded as 'the first multilateral tax treaty of its kind'.[1059] The Convention was opened for signature in 1988 by members of the OECD and CoE, potentially enabling assistance in tax matters between 27 countries.[1060] It entered into force in 1995, following ratification by the requisite five states.[1061]

The Convention provides for administrative assistance in tax matters, alongside assistance by judicial bodies.[1062] The Convention covers assistance in both civil and criminal matters,[1063] although initially it only covered the preparation of criminal proceedings.[1064] In this respect, the Convention initially did not apply after criminal proceedings had been instigated,[1065] and

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[1054] Ibid
[1055] Ibid, Commentary to Art.27, C(27)-1-2
[1056] For the benefits of a multilateral tax treaty generally see V Thuronyi, 'International Tax Cooperation and a Multilateral Treaty' (2001) 26 Brook J Int'l L 1641
[1057] Convention on Mutual Administrative Assistance in Tax Matters (opened for signature 25 January 1988; entered into force 1 April 1995) 1966 UNTS 215
[1058] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.67
[1059] MN Leich, 'Contemporary Practice of the United States Relating to International Law' (1990) 84(1) Am J Int'l L 237, 237
[1060] Australia, Austria, Belgium, Canada, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. KB Brown, 'Allowing Tax Laws to Cross Borders to Defeat International Tax Avoidance: The Convention on Mutual Administrative Assistance in Tax Matters' (1989) 15 Brook J Int'l L 59, 60
[1061]Convention on Mutual Administrative Assistance in Tax Matters (opened for signature 25 January 1988; entered into force 1 April 1995) 1966 UNTS 215, Art.28
[1062]Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1, Art.1; see also AHM Daniels, 'Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters' (1988) 4 Intertax 101, 102
[1063] Ibid
[1064] B Zagaris, 'Exchange of Tax Information Policies at the Millennium: Balancing Enforcement with Due Process and International Human Rights' (2001) 30 Tax Management International Journal 464
[1065] Ibid

permission needed to be sought to use any information obtained in criminal proceedings,[1066] with the aim of avoiding any overlap with the Convention on Mutual Assistance in Criminal Matters.[1067] This was amended by Protocol in 2010;[1068] an important development, considering the Convention may enable assistance when this is prevented under MLATs, for instance, by a dual criminality requirement.[1069] The Convention is wide in scope, applying to non-residents or nationals of the states concerned,[1070] and applying to all taxes, save customs duties.[1071] The Convention was an important development in international cooperation in tax matters, in that it provided for a more extensive array of cooperation than any of the previous agreements; the Convention provides for not only the exchange of information,[1072] but also, assistance in the service of documents,[1073] and the recovery of taxes,[1074] including measures of conservancy.[1075]

Although the information exchange provisions were heavily inspired by Article 26 of the DTC, the Convention sets out the various forms of information exchange with greater clarity, with separate articles providing for the exchange of information on request,[1076] the AEOI,[1077] spontaneous exchange of information,[1078] simultaneous tax examinations[1079] and tax examinations abroad.[1080] Additionally, the Convention attempted to remedy some of the issues which had materialised in the operation of Art 26. For instance, states were prevented from imposing a domestic interest requirement, and if information requested is not currently available the state must take 'all relevant measures to provide the applicant state with the information requested.'[1081] In addition, the Convention states that information should be

[1066] Convention on Mutual Administrative Assistance in Tax Matters (opened for signature 25 January 1988; entered into force 1 April 1995) 1966 UNTS 215, Art.4(2)
[1067] OECD Committee on Fiscal Affairs, *Explanatory Report and Commentary on the Provisions of the Convention* (OECD Publishing, 1986), Commentary on para. 1; European Convention on Mutual Assistance in Criminal Matters (opened for signature 10 April 1959, entered into force 16 June 1962) ETS 30
[1068] Protocol amending the Convention on mutual administrative assistance in tax matters (opened for signature 27 May 2010, entered into force 1 June 2011) 2763 UNTS 6
[1069] AHM Daniels, 'Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters' (1988) 4 Intertax 101, 102
[1070] Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1, Art.1(3)
[1071] Ibid, Art.2
[1072] Ibid, Arts. 4-10.
[1073] Ibid, Art. 17.
[1074] Ibid, Art.11.
[1075] Ibid, Art.12.
[1076] Ibid, Art.5.
[1077] Ibid, Art.6.
[1078] Ibid, Art.7.
[1079] Ibid, Art.8.
[1080] Ibid, Art.9.
[1081] Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1, Art.5(2), see also Art.7(2).

exchanged when it is 'foreseeably relevant',[1082] which was designed to ensure that the exchange of information provisions cannot be reduced to a minor information exchange clause. Moreover, the use of the term 'foreseeably relevant' indicates the intention to provide a more expansive obligation to exchange information than the term former 'necessary'.[1083] Nevertheless, the Convention did not resolve all of the issues encountered in utilising Article 26 of the DTC. Reliance was still placed on the exchange of information on request, with the AEOI only being activated by a separate agreement between the states concerned.[1084] In addition, fishing expeditions are still prohibited, often preventing attempts to obtain information.[1085] Further, the exceptions to the obligation to exchange information in Article 26 of the DTC are largely replicated in Article 21 of the Convention, which may prevent the disclosure of information protected by bank secrecy laws, frustrating attempts to detect tax evasion.[1086]

The novel elements of the Convention include the requirement to provide assistance in the service of documents and assistance in recovery of tax claims. Unlike previous bilateral treaties, tax claims can be recovered against a state's own nationals,[1087] and from assets held by third parties that belong to the tax debtor.[1088] By giving states the option of providing these forms of assistance the Convention was 'the most comprehensive and legally sound regulatory instrument to date'.[1089] However, the value of these measures in promoting international

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[1082] Ibid, Art.4(1).
[1083] A Pross, R Russo, 'The Amended Convention on Mutual Administrative Assistance in Tax Matters: A Powerful Tool To Counter Tax Avoidance and Evasion' (2012) 66 Bulletin for International Taxation 361, 362
[1084] Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1, Art.6; Meinzer notes that by early 2012, there was no evidence that any states had agreed to implement the automatic exchange of information under the convention M Meinzer, 'Analysis of the CoE/OECD Convention on Administrative Assistance in Tax Matters, as amended in 2010' (Tax Justice Briefing, February 2012) <https://taxjustice.net/cms/upload/CoE-OECD-Convention-TJN-Briefing.pdf> accessed 7th June 2019.
[1085] 'The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that the Parties are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given person or ascertainable group or category of persons' OECD and Council of Europe, *Text of the Revised Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters, As Amended by Protocol* (OECD Publishing, 2011) Commentary on Art.4(1); However, the Convention does not require as much information to accompany a request, M Meinzer, 'Analysis of the CoE/OECD Convention on Administrative Assistance in Tax Matters, as amended in 2010' (Tax Justice Briefing, February 2012) <https://taxjustice.net/cms/upload/CoE-OECD-Convention-TJN-Briefing.pdf> accessed 7th June 2019.
[1086] Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1, Art.21.
[1087] Ibid, Art.1(3).
[1088] KB Brown, 'Allowing Tax Laws to Cross Borders to Defeat International Tax Avoidance: The Convention on Mutual Administrative Assistance in Tax Matters' (1989) 15 Brook J Int'l L 59, 78; X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.68.
[1089] MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003) p.123

cooperation in tax matters, and in turn combatting tax evasion, was diminished by their discretionary nature, with states able to enter reservations to providing assistance in the service of documents and recovery.[1090]

The Convention was opposed by the International Chamber of Commerce,[1091] the Business and Industry Advisory Committee of the OECD,[1092] and the Confederation Fiscale Europbenne, among others.[1093] Their opposition centred on the existing availability of assistance under bilateral treaties, the lack of adequate safeguards for the protection of taxpayers, and the power granted to authorities.[1094] Some commentators noted that the Convention may lead to an 'Interfipol' or 'world fiscal police'.[1095] In response, several countries indicated that they would not sign the Convention, including Australia,[1096] Germany, and the UK.[1097] The UK claimed that it already had sufficient levels of cooperation with other states through its double taxation treaties and EU obligations.[1098] However, others point to the UK's commercial motives, highlighting the need to protect offshore investment.[1099] This argument was given credence by the US' interest in signing the Convention, despite its extensive network of double taxation treaties.[1100] After further legal and political developments, the UK eventually signed the Convention in 2007, committing to lend all forms of assistance available.[1101] In contrast, the

[1090] Ibid, Art.30(1)(b) and (d)
[1091] CJM Kochinke, 'International Chamber of Commerce Tears up Draft Tax Convention' (1986) 2 International Enforcement Law Reporter 224; see also B Zagaris, 'OECD Convention on Mutual Assistance Opened for Signature While ICC and Others Oppose Its Ratification' (1987) 3 International Enforcement Law Reporter 337
[1092] OECD Business and Industry Advisory Committee, *Comments on Draft OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters* (OECD Publishing, 1985)
[1093] Confederation Fiscale Europbenne, 'Opinion Statement on the Draft Convention of the Member States of the Council of Europe and the Member Countries of the Organisation for Economic Co-Operation and Development on Mutual Administrative Assistance in Tax Matters' (1986) 14 Intertax 207
[1094] Ibid
[1095] M Penny, 'Implications of the Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters' (1988) 5 Tax Planning International Review 53; The Government of Malta criticised the failure to assess the Convention's compatibility with human rights law, B Zagaris, 'Malta Raises Human Rights Law Issues to OECD Mutual Assistance Convention' (1987) 3 International Enforcement Law Reporter 406
[1096] P Dale 'Taxation Issues in a World of Electronic Commerce' (1999) 2 Journal of Australian Taxation 227, at 3.8.4. Dale notes, 'Another view as to why the Multilateral Convention was not signed is that […] it was premature to contemplate a multilateral level of cooperation until a bilateral cooperation had become fully established.'
[1097] Germany were influenced by political opposition to the Convention, see S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Picciotto 2013) p.256
[1098] B Zagaris, 'Governments Take Divergent Paths on OECD Convention on Administrative Assistance in Tax Matters' (1989) 5 International Enforcement Law Reporter 8, 9
[1099] ibid
[1100] B Zagaris, 'Exchange of Tax Information Policies at the Millennium: Balancing Enforcement with Due Process and International Human Rights' (2001) 30 Tax Management International Journal 464, 478
[1101] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 127: Convention on Mutual Administrative Assistance in Tax Matters' (6th June 2019) <https://www.coe.int/en/web/conventions/full-list/-

US signed the Convention in 1989.[1102] However, the US reserved on the obligations to lend assistance in the service of documents and recovery of tax claims.[1103] The reason for the first reservation is pragmatic; documents tend to be served by post in the US and, consequently, assistance is unnecessary.[1104] In regards to the second reservation, the US claimed that its opposition to providing assistance in recovery stems from the disuse of collection provisions in existing double taxation treaties and the contentious nature of this endeavour.[1105] However, commentators have also drawn attention to protectionist motives in the US.[1106]

Ultimately, many OECD and CoE members were not prepared to provide such extensive levels of cooperation in tax matters.[1107] However, although the political climate meant the Convention had little practical effect,[1108] it was a turning point in providing for international cooperation in tax matters, setting out obligations on a multilateral basis, independently of double taxation considerations. The Convention's practical utility improved after the amendments contained in the 2010 Protocol to the Convention, which enabled non-members to sign,[1109] enabling participation by a wider range of jurisdictions, including secrecy jurisdictions. Moreover, the Protocol aligned the Convention with the 'international tax standard', developed through the initiatives examined below, which dramatically improved states' ability to access information and assistance.[1110] The UK has both signed and ratified the additional Protocol yet, for reasons explored below, the US has signed but not ratified the Protocol.[1111] Nevertheless, the changing political climate, alongside the sustained action taken by the OECD since 1988, encouraged

/conventions/treaty/127/signatures?p_auth=hBAyWDkJ> accessed 6 June 2019; Finance Act 2006, s.173, The International Mutual Administrative Assistance in Tax Matters Order 2007, SI 2007/2126

[1102] Ibid; Treaties are self-executing in the US, Senate Committee on Foreign Relations, Protocol Amending Multilateral Convention on Mutual Administrative Assistance in Tax Matters, S. Exec. Rep. No. 114-8, 114th Congress 2.d. Sess. (2016) p.3

[1103] Ibid

[1104] MN Leich, 'Contemporary Practice of the United States Relating to International Law' (1990) 84(1) Am J Int'l L 237, 237; see also American Bar Association Section of International Law and Practice Reports to the House of Delegates, 'OECD Convention on Mutual Administrative Assistance in Tax Matters'(1990) 24 International Lawyer 872, 879

[1105] B Zagaris, 'Governments Take Divergent Paths on OECD Convention on Administrative Assistance in Tax Matters' (1989) 5 International Enforcement Law Reporter 8, 9

[1106] SD Brunson, 'The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule' (2014) 5 Colum J Tax L 170, 196

[1107] Noting the level of cooperation in international criminal matters at that time, Williams asserts that the unwillingness of states to subscribe to the Convention was likely attributable to its objectives, rather than its procedures, DW Williams, *Trends in International Taxation* (IBFD, 1991) p.89

[1108] MAG Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer Law International 2003) p.123

[1109] Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters (opened for signature 27 May 2010, entered into force 1 June 2011) 2763 UNTS 6, Preamble

[1110] Ibid

[1111] OECD, 'Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters: Status – 13 June 2019' <https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf> Accessed 17 July 2019

many states to sign. Over 129 countries now participate in the Convention, including many secrecy jurisdictions,[1112] creating an information exchange network that would otherwise require the conclusion of over 6,000 bilateral treaties.[1113]

4.2.4 The OECD's Initiative on Harmful Tax Competition

The political and social landscape giving rise to this reluctance changed when the OECD pursued its Harmful Tax Competition (HTC) initiative in 1998.[1114] In 1996, the G7 called on the OECD to 'analyse and develop measures to counter the distorting effects of HTC on investment and financing decisions, and the consequences for national tax bases, and report back in 1998.'[1115] In response, the OECD released the HTC report, which set out criteria for the identification of tax havens and harmful preferential tax regimes.[1116] To tackle harmful tax competition and tax havens, the report set out a number of recommendations relating to domestic legislation, tax treaties and international cooperation.[1117] Although many of the recommendations aim to combat other forms of harmful tax competition, several focus on actions to be taken by states to combat offshore tax evasion. For instance, the recommendations encourage states to ensure that tax authorities have access to bank information, to make greater and more efficient use of exchanges of information and to provide assistance in the recovery of tax claims.[1118] Additionally, the report established a Forum on Harmful Tax Practices, which was tasked with engaging in dialogue with non-member countries regarding the recommendations, and creating a list of tax havens.[1119] OECD members Switzerland and Luxembourg refused to sign the report.[1120]

[1112] 'Including 17 jurisdictions covered by territorial extension' OECD, 'Convention on Mutual Administrative Assistance in Tax Matters' (June 2019) <https://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm> accessed 5 July 2019

[1113] OECD, *OECD Secretary-General Report G20 Finance Ministers and Central Bank Governors – June 2019* (OECD Publishing, 2019) p.25

[1114] In particular, Morriss and Moberg note that the election of Bill Clinton in 1993 and Tony Blair in 1997 gave the OECD allies in restricting the activities of secrecy jurisdictions, which facilitated the development of its work AP Morriss, L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"' (2012) 4 Colum J Tax L 1, 38

[1115] G7, 'Meeting of the Council at Ministerial Level Paris, 21-22 May 1996' (Communiqué', 1996) <http://www.g8.utoronto.ca/oecd/oecd96.htm> accessed 4 July 2019

[1116] OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing, 1998)

[1117] OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing, 1998)

[1118] Ibid

[1119] Ibid p.53-54

[1120] Ibid Annex II; Although interestingly did not veto the project, as they were entitled to do under OECD rules RT Kurdle, 'The OECD's Harmful Tax Competition Initiative and the Tax Havens: From Bombshell to Damp Squib' (2008) 8(1) Global Economy Journal 1, 5

In 2000, the OECD issued another report, in which the Forum identified 35 jurisdictions as tax havens.[1121] Initially, 47 were identified, yet six were dropped [1122] after they made advanced commitments to abide by the principles of the 1998 report.[1123] The jurisdictions identified as tax havens had until July 2001 to commit to eliminating harmful tax practices, with those that failed to comply being placed on a list of 'uncooperative tax havens' and subject to defensive measures by OECD Member Countries.[1124] In this respect, the OECD's HTC Project was original in attempting to coerce states to cooperate with one another to combat harmful tax practices, including practices that facilitate tax evasion. The OECD perceived coercion to be necessary, given secrecy jurisdictions traditional reluctance to enter into agreements to provide cooperation. The blacklists were designed to affect the reputation of secrecy jurisdictions,[1125] and initially appeared to be successful.[1126] However, the HTC and the OECD's blacklisting strategy was severely criticised by representatives of secrecy jurisdictions and other commentators, who accused the OECD of being a 'schoolyard bully'[1127] engaged in 'technocratic tyranny'[1128] or 'fiscal colonialism',[1129] implemented via its 'cartel of wealthy nations'.[1130]

[1121] OECD, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD Publishing 2000) p.17; Namely, Andorra, Anguilla, Antigua and Barbuda, Aruba, Commonwealth of the Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Commonwealth of Dominica, Gibraltar, Grenada, Guernsey/Sark/Alderney, Isle of Man, Jersey, Liberia, The Principality of Liechtenstein, The Republic of the Maldives, The Republic of the Marshall Islands, The Principality of Monaco, Montserrat, The Republic of Nauru, Netherlands Antilles, Niue, Panama, Samoa, The Republic of the Seychelles, St Lucia, The Federation of St. Christopher & Nevis, St. Vincent and the Grenadines, Tonga, Turks & Caicos, US Virgin Islands and The Republic of Vanuatu.

[1122] Sanders notes that the identity of these jurisdictions was never disclosed, he presumes due to political considerations R Sanders, 'The Fight Against Fiscal Colonialism: The OECD and Small Jurisdictions' (2002) 91 The Round Table 325, 328

[1123] Bermuda, Cayman Islands, Cyprus, Malta, Mauritius and San Marino

[1124] OECD, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD Publishing 2000) p.18. Defensive measures are set out on p.25 of the report.

[1125] 'Reputation is seen as one of the most, and probably *the* most, important single factor in determining the competitiveness and viability of the IFC' JC Sharman, PS Mistry, *Considering the Consequences: The Development Implications of Initiatives on Taxation, Anti-money Laundering and Combating the Financing of Terrorism* (Commonwealth Secretariat, 2008) p.164

[1126] As evidenced by the advanced commitments made before the publication of the report, ibid p.174

[1127] A Townsend Jr, 'The Global Schoolyard Bully: The Organisation for Economic Co-operation and Development's Coercive Efforts to Control Tax Competition' (2001) 25 Fordham Int'l LJ 215

[1128] M Atkinson, 'OECD Accused of Tyranny: Caribbean Leader Alleges Double Standards at Tax Haven Talks' (The Guardian, 2001) < https://www.theguardian.com/business/2001/mar/03/4> accessed 5 July 2019

[1129] R Sanders, 'The Fight Against Fiscal Colonialism: The OECD and Small Jurisdictions' (2002) 91 The Round Table 325, 326

[1130] AP Morriss, L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"' (2012) 4 Colum J Tax L 1, 1; Sanders described the OECD initiative as 'the worst form of bullying by big, strong and powerful nations that the world has witnessed since the 19th century', R Sanders,

These criticisms were based on various concerns, including the merits of tax competition,[1131] and the hypocrisy of the OECD, both in terms of OECD members' previous encouragement of secrecy jurisdictions to become tax havens,[1132] and the position of Switzerland and Luxemburg, who refused to cooperate with the initiative.[1133] In addition, the role of the OECD in spearheading the initiative was questioned, with many suggesting that a more representative organisation, such as the UN[1134] or a World Tax Authority,[1135] should instead facilitate cooperation in this area. A connected concern was the OECD's impact on the sovereignty of nations, with taxation considered to be intrinsically connected to a state's sovereignty.[1136] Moreover, secrecy jurisdictions loss of sovereignty in tax matters was likely to have a detrimental effect on one of their main income sources, leaving these jurisdictions reliant on foreign aid.[1137]

Secrecy jurisdictions brought their concerns to the attention of the US, which consequently changed its position; a development attributed to the arrival of the Bush administration.[1138]

'The Fight Against Fiscal Colonialism: The OECD and Small Jurisdictions' (2002) 91 The Round Table 325, 345

[1131] This debate came to a head recently following the publication of a letter signed by over 300 economists claiming that tax havens provide no economic benefit P Wintour, 'Tax Havens Have No Economic Justification, Say Top Economists' (The Guardian, 2016) <https://www.theguardian.com/world/2016/may/09/tax-havens-have-no-economic-justification-say-top-economists> accessed 5 July 2019

[1132] Particularly Britain's encouragement see A Hishikawa, 'The Death of Tax Havens?' (2002) 25 BC Int'l & Comp L Rev 389, 402

[1133] R Woodward, 'A Strange Revolution: Mock Compliance and the Failure of the OECD's International Tax Transparency Regime' In P Dietsch, T Rixen (Eds), *Global Tax Governance What is Wrong with It, and How to Fix It* (ECPR Press, 2016) p.109

[1134] K Carlson, 'When Cows Have Wings: An Analysis of the OECD's Tax Haven Work as It Relates to Globalization, Sovereignty and Privacy' (2002) 35 J Marshall L Rev 163, 186

[1135] AJ Sawyer, 'The OECD's Tax Information Exchange Agreements: An Example of (In)effective Global Governance?' [2011] Journal of Applied Law and Policy 41, 51; However, the OECD's expertise and longstanding role in international taxation arguably makes it the most suitable forum for this endeavour and its more restrictive membership may facilitate the achievement of these goals, A Christians, 'Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20' (2010) 5 Nw J L & Soc Pol'y 19, 38

[1136] VE James, 'Twenty-First Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM Countries of their Tax and Economic Sovereignty' (2002) 34 U Miami Inter-Am L Rev 1, 2

[1137] TM Hoffman, 'Developments: The Future of Offshore Tax Havens' (2001) 2 Chi J Int'l L 511, 513; A Hishikawa, 'The Death of Tax Havens?' (2002) 25 BC Int'l & Comp L Rev 389, 402; The OECD committed to examining the issue of whether these jurisdictions will need financial and other forms of assistance OECD, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD Publishing 2000) p.20. As a result, many have suggested that these jurisdictions should be paid for their cooperation See for instance, SA Dean, 'The Incomplete Global Market For Tax Information' (2008) 49 Bos Col L Rev 605; RS Avi-Yonah, 'Testimony for Hearing on Offshore Tax Evasion, US Senate Committee' (3 May 2007) <https://www.finance.senate.gov/imo/media/doc/050307testra-y1.pdf> accessed 5 July 2019, p.7

[1138] See e.g. JK Jackson, 'The OECD Initiative on Tax Havens' (Congressional Research Service Report for Congress, 11 March 2010) <http://research.policyarchive.org/19418_Previous_Version_2009-07-24.pdf> accessed 5 July 2019; Miller and Oats note that this change also stemmed from the OECD itself with the report OECD, *Improving Access to Bank Information for Tax Purposes* (OECD Publishing, 2000) A Miller, L Oats, *Principles of International Taxation* (5th edn, Bloomsbury Professional 2016) p.614

Then US Treasury Secretary O'Neill, announced that he was 'troubled by the notion that any country, or group of countries, should interfere in any other country's decisions about how to structure its own tax system.'[1139] Consequently, the OECD initiative was refocused away from the issue of HTC to the promotion of transparency and the exchange of information to prevent tax evasion.[1140] In order to comply with the refined initiative, tax havens could make commitments through a press release or by signing the OECD's Memorandum of Understanding,[1141] which 'set out in clear terms the steps that the OECD is asking these jurisdictions to take.'[1142] Although in many ways the initiative appeared to 'lose some of its strength',[1143] from a tax evasion perspective, a refocusing of the myriad international taxation issues into a concrete attempt to facilitate international cooperation to combat this financial crime can only be a positive development.

The OECD's efforts initially appeared to be successful; by April 2002, 31 jurisdictions made formal commitments to implement the standards of transparency and exchange of information.[1144] Consequently, only seven jurisdictions were identified on the list of uncooperative jurisdictions.[1145] Of these, two jurisdictions made commitments in 2003, two in 2007, and the remaining three jurisdictions made commitments in 2009, leaving the blacklist empty.[1146] However, many of these jurisdictions inserted an 'Isle of Man clause',[1147] which conditioned their commitment on Luxembourg, Switzerland and others also committing to

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[1139] US Department of the Treasury, 'Statement of Paul H. O'Neill Before the Senate Committee on Governmental Affairs, Permanent Subcommittee on Investigations, OECD Harmful Tax Practices Initiative' (Press Center, 18 July 2001) <https://www.treasury.gov/press-center/press-releases/Pages/po486.aspx> accessed 5 July 2019

[1140] 'The work of this particular initiative, however, must be refocused on the core element that is our common goal: the need for countries to be able to obtain specific information from other countries upon request in order to prevent the illegal evasion of their tax laws by the dishonest few.' P O'Neill, 'Confronting OECD's 'Harmful' Tax Approach' (Washington Times, 11 May 2001) <http://www.uniset.ca/microstates/oneill.pdf> accessed 5 July 2019

[1141] OECD, *Memorandum of Understanding on Eliminating Harmful Tax Practices* (OECD Publishing, 24 November 2000)

[1142] 'OECD Publishes Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices' (PAC/COM/NEWS(2000)123 Paris, 24 November 2000) <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=PAC/COM/NEWS(2000)123&docLanguage=En> accessed 5 July 2019; The US position also resulted in other concessions for the tax havens, namely, the deadline for making commitments was extended to 28 February 2002 and defensive measures would not be imposed until they would also apply to OECD member countries, G Makhlouf, 'Current Status of OECD's Harmful Tax Practices Initiative: A Statement by the Chairman of the OECD's Committee on Fiscal Affairs Mr Gabriel Makhlouf' <https://www.oecd.org/newsroom/2664423.pdf> accessed 5 July 2019

[1143] M Toumi, Anti-Avoidance and Harmful Tax Competition: From Unilateral to Multilateral Strategies?' in A Lymer, J Hasseldine (eds), *The International Taxation System* (Kluwer Academic Publishers, 2002) p.101

[1144] OECD, 'List of Unco-operative Tax Havens' <https://www.oecd.org/countries/monaco/list-of-unco-operative-tax-havens.htm> accessed 5 July 2019

[1145] Ibid

[1146] Ibid

[1147] The Isle of Man was the first jurisdiction to insert such a clause into its commitment.

transparency and the exchange of information.[1148] The tax havens insistence on this clause stifled the aims of the initiative, as countries such as Switzerland were unlikely to agree to information exchange.[1149] Indeed, following their commitments, many jurisdictions either refused to sign agreements providing for information exchange, or did not ratify them to prevent them taking effect.[1150] The tax haven's commitments were merely 'mock compliance' to avoid defensive measures.[1151] The effect of these conditional commitments meant that, by 2005, the project was 'barely alive'.[1152]

Overall, the OECD's HTC initiative was largely ineffective and often perceived as illegitimate, particularly by the secrecy jurisdictions subject to the OECD's demands. Nevertheless, the initiative was a turning point in the promotion of international cooperation in tax matters, and thus in preventing tax evasion, by attempting to achieve a coordinated and multilateral approach. In order to combat tax evasion, all jurisdictions must agree to participate in the exchange of information and thus, the OECD must be commended for its attempts to instigate a near universal system, although not for the methods by which these aims were achieved.

4.2.5 Tax Information Exchange Agreements

To enable secrecy jurisdictions to implement their commitments under the HTC initiative, the OECD published a model Tax Information Exchange Agreement (TIEA).[1153] The TIEA was created to provide an alternative to the DTC, which was unsuitable for secrecy jurisdictions,[1154] and contained several limitations.[1155] The model TIEA is focused on the exchange of information and became the 'new international standard' for the exchange of information in

[1148] P Emmenegger, 'The Politics of Financial Intransparency: The Case of Swiss Banking Secrecy' (2014) 20 Swiss Political Science Review 146, 157-8
[1149] Ibid; Sharman notes that Tax Havens trusted 'Swiss intransigence' JC Sharman, *Havens in a Storm: The Struggle for Global Tax* Regulation (Cornell University Press, 2006) p.153
[1150] R Woodward, 'A Strange Revolution: Mock Compliance and the Failure of the OECD's International Tax Transparency Regime' In P Dietsch, T Rixen (Eds.), *Global Tax Governance What is Wrong with It, and How to Fix It* (ECPR Press, 2016) p.110
[1151] Ibid
[1152] AP Morriss, L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"' (2012) 4 Colum J Tax L 1, 51
[1153] OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002)
[1154] M Pankiv, 'Tax Information Exchange Agreements' in OC Günther, N Tüchler (Eds.) *Exchange of Information for Tax Purposes* (Series on International Tax Law, Linde Verlag 2013) p.4
[1155] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.56

tax matters.[1156] The model includes both a bilateral and multilateral option.[1157] However, the multilateral option is simply an 'integrated bundle of bilateral treaties' and has been seldom used.[1158] The TIEA requires the exchange of information in both civil and criminal matters,[1159] relating to income, profit, capital, wealth, estate, inheritance or gift taxes.[1160] Under the TIEA, a requested state must provide information in the possession of those within its jurisdiction.[1161] Unlike some DTCs, the obligation to exchange information is not affected by the nationality or residence of the information holder or the subject of the information.[1162] The TIEA requires the exchange of information on request only, yet states are able to additionally agree to automatic or spontaneous exchanges.[1163]

The TIEA attempted to remedy many of the problems encountered in the operation of Article 26 of the DTC. The TIEA provides that a requested state must use information gathering measures to provide a requesting state with information, 'notwithstanding that the requested Party may not need such information for its own tax purposes.'[1164] Therefore, states have a positive obligation to collect information and cannot refuse to supply information simply because it is not already in its possession.[1165] In addition, states cannot impose a domestic interest requirement, which would severely limit the exchange of information with secrecy jurisdictions.[1166] States are also required to exchange information in criminal tax matters as defined under the criminal laws of the *applicant* Party.[1167] Accordingly, there is no dual criminality principle in the TIEA.[1168] This an important development in exchanging information with secrecy jurisdictions, which often do not enact tax offences.[1169] Although the exceptions to the obligation to exchange information under Art 26 of the DTC are largely

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[1156] R Woodward, 'A Strange Revolution: Mock Compliance and the Failure of the OECD's International Tax Transparency Regime' In P Dietsch, T Rixen (Eds), *Global Tax Governance What is Wrong with It, and How to Fix It* (ECPR Press, 2016) p.110
[1157] OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002)
[1158] OECD, 'Promoting Transparency and Exchange of Information for Tax Purposes' (Background Information Brief, 19 January 2010) <http://www.oecd.org/newsroom/44431965.pdf> accessed 7 July 2019, p.7
[1159] OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002) Art 5(1) and Commentary; The TIEA entered into force in 2004 for criminal tax matters and 2006 for all other matters, Art 15
[1160] Ibid, Art 3
[1161] Ibid, Art 2
[1162] Ibid, Commentary on Art 2
[1163] Ibid, Art 5(1) and Commentary
[1164] Ibid, Art 5(2)
[1165] Ibid, Commentary to Art 5(2)
[1166] Ibid
[1167] Ibid, Art 4(1)(o)
[1168] Ibid, Art 5(1)
[1169] AJ Cockfield, 'Protecting Taxpayer Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights' (2010) 42 UBC L Rev 419, 440

replicated in the TIEA,[1170] one important exception is removed, namely, the relief from the obligation to exchange where this would not be permitted under domestic laws or in the normal course of administration,[1171] again facilitating the exchange of information with secrecy jurisdictions.[1172] The TIEA prevents bank secrecy laws from frustrating the exchange,[1173] as well as opacity 'regarding the ownership of companies, partnerships, trusts, foundations, and other persons.'[1174] In addition, the TIEA clarifies that the exception to the obligation to exchange information, on the grounds that it would reveal a trade, business or professional secret,[1175] or would be contrary to a requested state's public policy,[1176] should not be used to refuse a request simply because bank secrecy laws are involved.[1177]

Therefore, the TIEA is an improvement on Article 26 in specifically providing for the exchange of information with secrecy jurisdictions. Nonetheless, the TIEA may not be regarded as wholly effective in combatting offshore tax evasion. This is because the scope of the TIEA is more limited than other international agreements in that it does not apply to any indirect taxes, unless agreed to by the states concerned, and does not provide for other forms of assistance, such as assistance in collection.[1178] In addition, the TIEA is not multilateral in the true sense of the term, hindering the proliferation of the obligations and preventing developing countries from accessing the benefits of information exchange.[1179] Further, requested states may still delay or frustrate information exchange with their domestic laws and procedures.[1180] Moreover, although the TIEA aims to limit the potential of bank secrecy laws to frustrate information exchange, it does not entirely succeed in this aim. Under the TIEA, information must be

[1170] OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002) Art 7
[1171] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Art 26(3)
[1172] As noted above, these 'lowest common denominator provisions' can inhibit or frustrate information exchange when each state's mechanisms for obtaining information are dissimilar. Note, 'The IRS Summons Power Under the Lowest Common Denominator Provisions of United States Double Taxation Treaties' (1981) 16 Geo Wash J Int'l L & Econ 143; OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Commentary to Art 26(3), para 18
[1173] OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002) Art 5(4)(a)
[1174] Ibid, Art 5(4)(b)
[1175] Ibid, Art 7(2)
[1176] Ibid, Art 7(4)
[1177] Ibid, Art 5(4) and Commentary
[1178] For instance, the CoE/OECD Convention applies to a wider range of taxes and provides for assistance in collection Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1, Art.2, Art.11
[1179]Tax Justice Network, 'Tax Information Exchange Agreements' (Tax Justice Briefing, May 2009) <https://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf> accessed 5 July 2019, p.2-3
[1180] AJ Sawyer, 'The OECD's Tax Information Exchange Agreements: An Example of (In)effective Global Governance?' [2011] Journal of Applied Law and Policy 41, 52

exchanged regarding the ownership of certain legal structures,[1181] yet the TIEA does not define what is meant by 'ownership',[1182] potentially enabling continued concealment.[1183]

Nonetheless, the chief impediment to the effective exchange of information was the form of information exchange required under the TIEA, which requires the exchange of information on request that is 'foreseeably relevant to the administration and enforcement of the domestic laws of the requested state'.[1184] The use of the term foreseeably relevant clarifies that fishing expeditions are not permitted, namely, 'speculative requests that have no apparent nexus to an open inquiry or investigation.'[1185] As iscussed above, states have to provide a substantial amount of information in support of a request for information,[1186] which they are often unable to provide.[1187] Therefore, the TIEA may only be used to provide information on a case that has already been developed.[1188] These problems are exacerbated by jurisdictions that strictly interpret this requirement.[1189]

In effect, the TIEA provides for a much more effective exchange of information on request than provided by other international agreements, specifically catering to the problems caused by the domestic laws and policies of secrecy jurisdictions. Indeed, following the publication of the TIEA, both the DTC and the CoE/OECD Multilateral Convention were amended to incorporate these improvements.[1190] Accordingly, the TIEA enhanced UK and US attempts to combat offshore tax evasion. Nonetheless, the TIEA's effectiveness was hindered by the limited scope of the TIEA, with provision made only for the exchange of information on

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[1181] OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002), Art 5(4)(b)
[1182] M Pankiv, 'Tax Information Exchange Agreements' in OC Günther, N Tüchler (Eds.) *Exchange of Information for Tax Purposes* (Series on International Tax Law, Linde Verlag 2013) p.8-9
[1183] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.62
[1184] OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002), Art 1
[1185] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017), Commentary to Art 26(1), para 5
[1186] The information required is set out in OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002), Art 5(5); '[The requesting state] must already know the who, when, what and why of any information it requires' A Miller, L Oats, *Principles of International Taxation* (5th edn, Bloomsbury Professional 2016) p.619
[1187] TV Addison, 'Shooting Blanks: The War on Tax Havens' (2009) 16 Ind J Global Legal Studies 703, 718
[1188] Ibid; see also MJ McIntyre, 'How to End the Charade of Information Exchange' [2009] Tax Notes International 255, 256
[1189] For example, the standard of foreseeable relevance was previously interpreted strictly by Switzerland See, Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Review Report Phase 2: Implementation of the Standard in Practice, Switzerland* (OECD Publishing, 2016) p.112
[1190] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.57; OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017); Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1

request, alongside the imposition of onerous requirements for making requests, which must be followed by states that wish to obtain information in this manner. Conversely, the OECD's efforts to publicise TIEAs may have deterred individuals from evading tax, even if these agreements ultimately proved ineffectual.[1191]

4.2.6 The Impact of the Financial Crisis

Despite the OECD's HTC initiative, following the publication of the TIEA only limited numbers of TIEAs were signed; six in 2002 and 44 between 2002 and 2008.[1192] However, subsequent events served to focus global attention on tax evasion and secrecy jurisdictions, giving a renewed impetus to the OECD's initiative. The financial crisis of 2007/08 prompted national governments to focus on protecting tax revenues[1193] and led to a re-examination of secrecy jurisdictions' impact on both revenues and financial stability.[1194] In addition, several prominent tax scandals, including the facilitation of tax evasion by Swiss bank UBS[1195] and the LGT group in Liechtenstein,[1196] drew attention to the role played by these jurisdictions in enabling tax offences. These developments, coupled with changes in the domestic political environment in many states,[1197] meant that 'for the first time in world history, the opponents of tax haven abuses [had] a genuine opportunity to foster meaningful change.'[1198] Consequently, at a meeting in 2009, the G20 declared that it was prepared 'to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over.'[1199]

[1191] G Schjelderup, 'Secrecy Jurisdictions' (2016) 23 Int Tax Public Finance 168, 177
[1192] R Seer, I Gabert, 'European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements' (2011) 65 Bulletin for International Taxation 88, 88
[1193] P Hardouin, 'The Aftermath of the Financial Crisis' (2011) 18(2) JFC 148, 149
[1194] Secrecy jurisdictions were accused of contributing to the financial crisis by world leaders. See N Morris, 'Brown Leads Global Drive to Close Down Tax Havens' (February 2009, The Independent) <http://www.independent.co.uk/news/uk/politics/brown-leads-global-drive-to-close-down-tax-havens-1625959.html> accessed 7 July 2019
[1195] N Mathiason, 'Tax Scandal Leaves Swiss Giant Reeling' (The Guardian, 29 June 2008) <https://www.theguardian.com/business/2008/jun/29/ubs.banking> accessed 7 July 2019
[1196] The Economist, 'Not So Fine in Liechtenstein: Tension between Germany and Liechtenstein over Tax Evasion' (22 February 2019) <https://www.economist.com/news/2008/02/22/not-so-fine-in-liechtenstein> accessed 7 July 2019
[1197] Including the elections of Barak Obama, Gordon Brown and Nicholas Sarkozy, AP Morriss, L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"' (2012) 4 Colum J Tax L 1, 51-53
[1198] MJ McIntyre, 'How to End the Charade of Information Exchange' [2009] Tax Notes International 255, 256
[1199] G20 Leaders, 'Global Plan for Recovery and Reform' (Statement, 2 April 2009) <http://www.g20.utoronto.ca/2009/2009communique0402.html> accessed 7 July 2019

On the same day, the OECD published a report on the implementation of the 'internationally agreed tax standard',[1200] defined as the ability to obtain and exchange information on request in all tax matters for both the administration and enforcement of tax laws, unaffected by domestic interests and bank secrecy.[1201] The OECD report listed states on a white, black and grey list, depending on their level of commitment and implementation.[1202] In order to appear on the white list, jurisdictions had to sign at least twelve TIEAs.[1203] Following the release of the draft blacklist, Austria, Belgium, Luxembourg and Switzerland agreed to commit to the standard and thus, only appeared on the grey list in the final publication.[1204] By the time the list was published, only four jurisdictions were included on the blacklist.[1205]

The G20 threatened to impose sanctions on noncompliant jurisdictions.[1206] This strategy appeared to be successful as, within a week, all jurisdictions named on the blacklist had agreed to implement the standard,[1207] and within the six months following the announcement, over 150 TIEAs were signed.[1208] To monitor implementation, a more inclusive Global Forum was created and tasked with coordinating peer reviews aimed at ascertaining each jurisdiction's level of compliance.[1209] The peer reviews, which commenced in 2010,[1210] assessed the

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[1200] OECD, 'A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard' (2 April 2009) <https://www.oecd.org/tax/exchange-of-tax-information/42497950.pdf> accessed 7 July 2019. This title has been given as the standard has been endorsed by both the G20 and the UN.

[1201] OECD, 'Promoting Transparency and Exchange of Information for Tax Purposes' (Background Information Brief, 19 January 2010) <http://www.oecd.org/newsroom/44431965.pdf> accessed 7 July 2019, p.4

[1202] Those on the black list had not committed to the standard, those on the grey list had committed to the standard but not implemented it, and those on the white list were considered to have substantially implemented the standard. OECD, 'A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard' (2 April 2009) <https://www.oecd.org/tax/exchange-of-tax-information/42497950.pdf> accessed 7 July 2019

[1203] OECD, 'Countering Offshore Tax Evasion: Some Questions and Answers on the Project' (18 September 2009) <https://www.oecd.org/ctp/exchange-of-tax-information/42469606.pdf> accessed 7 July 2019

[1204] 'The Politics of Financial Intransparency: The Case of Swiss Banking Secrecy' (2014) 20 Swiss Political Science Review 146, 159; In 2005, Switzerland had committed to exchanging information in cases of tax fraud only, but, in 2009, withdrew its reservation to Art 26 of the DTC completely X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.20

[1205] Costa Rica, Malaysia, the Philippines and Uruguay OECD, 'A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard' (2 April 2009) <https://www.oecd.org/tax/exchange-of-tax-information/42497950.pdf> accessed 7 July 2019

[1206] Such as reviewing tax treaty policies, imposing withholding taxes and denying certain deductions. See G20 Leaders, 'Global Plan for Recovery and Reform' (Statement, 2 April 2009) <http://www.g20.utoronto.ca/2009/2009communique0402.html> accessed 7 July 2019

[1207] BBC News, 'OECD Removes Tax Havens from list' (7 April 2009) <http://news.bbc.co.uk/1/hi/business/7987417.stm> accessed 7 July 2019

[1208] G Nicodème, 'On Recent Developments in Fighting Harmful Tax Practices' (2009) 62 National Tax Journal 755, 764

[1209] OECD, *Tax Co-operation 2010: Towards A Level Playing Field. Assessment by the Global Forum on Transparency and Exchange of Information for Tax Purposes* (OECD Publishing 2010) p.9

[1210] Ibid

availability, access and exchange of information in each jurisdiction. The reviews were conducted in two phases.[1211] Under phase one, the legal and regulatory framework in each state was examined,[1212] and, under phase two, the practical implementation of this framework was assessed.[1213] Phase two reviews could only be undertaken after a jurisdiction had achieved all of the elements for an effective exchange of information in phase 1.[1214]

The results of the peer reviews evidenced increasing compliance with the OECD's standard. For instance, the number of TIEAs grew exponentially after the G20's announcement, with 65 TIEAs concluded by April 2009, 364 by December 2009 and 524 by June 2010.[1215] By 2019, over 4,500 exchange of information agreements, including TIEAs and DTCs, were in force.[1216] The peer reviews were completed for all members of the Global Forum by the end of 2016. By this time, 22 jurisdictions were rated by the Global Forum as compliant with the standard, 77 largely compliant, 12 partially compliant and 5 as non-compliant.[1217] Those considered non-compliant were given the opportunity to undergo a fast track review and, by the end of this process, only one jurisdiction was considered to be not in compliance with the standard.[1218] Accordingly, the G20's blacklisting and peer review process appears to have been instrumental in inducing jurisdictions to both commit to and actually implement the exchange of information on request.

However, it is unclear as to what extent the initiative has actually decreased the extent of tax evasion using secrecy jurisdictions. Although most secrecy jurisdictions signed twelve TIEAs, as mandated by the OECD, initially many secrecy jurisdictions simply signed agreements with each other.[1219] In addition, many secrecy jurisdictions initially signed agreements with small, irrelevant countries.[1220] For instance, the Isle of Man, Jersey and Guernsey all signed

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[1211] Ibid, p.13
[1212] Ibid
[1213] ibid
[1214] The second round of reviews in 2016 combined phase 1 and phase 2 OECD, 'Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Reviews' <https://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews_2219469x> accessed 7 July 2019
[1215] OECD, *Tax Co-operation 2010: Towards A Level Playing Field. Assessment by the Global Forum on Transparency and Exchange of Information for Tax Purposes* (OECD Publishing 2010) p.16
[1216] OECD, *OECD Secretary-General Report to G20 Finance Ministers and Central Bank Governors* (OECD Publishing, June 2019) p.7
[1217] Ibid, p.24
[1218] Ibid, Trinidad and Tobago
[1219] N Johannesen, G Zucman, 'The End of Bank Secrecy? An evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal: Economic Policy 65, 70
[1220] Morriss, L Moberg, 'Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"' (2012) 4 Colum J Tax L 1, 55

agreements with Greenland and the Faroe Islands, which has a combined population of just over 100,000.[1221] Further, even if secrecy jurisdictions signed agreements with relevant countries, at first, many were not brought into force.[1222] This led many to conclude that the initiative was little more than a 'numbers game'.[1223] The Global Forum incorporated these considerations into its review criteria,[1224] which appears to have limited the proliferation of useless TIEAs. In 2010, the OECD noted that only around 13% of the TIEAs signed were between jurisdictions that had not implemented the standard.[1225]

Nevertheless, it is unclear whether TIEAs have reduced tax evasion in secrecy jurisdictions. Avi-Yonah asserts that the absence of a decline in tax revenues demonstrates that the initiative had some impact, even if only preventative.[1226] The OECD also claims that TIEAs have enabled jurisdictions to recover evaded tax.[1227] In 2013, Australia and Sweden recovered €326 million and €84 million through TIEAs respectively.[1228] This view is supported by Menkhoff and Miethe who find that TIEAs with tax havens reduce bank deposits in tax havens by 27.5%.[1229] Conversely, Johannesen and Zucman found that, although TIEAs have a 'modest impact' on bank deposits with each new treaty decreasing the deposits held by the others' residents by around 11%,[1230] these funds are often not repatriated, but rather, moved to jurisdictions that have not yet implemented the standard.[1231] This is supported by several studies which illustrate no significant reduction in the total funds held by secrecy jurisdictions

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[1221] Tax Justice Network, 'Tax Information Exchange Agreements' (Tax Justice Briefing, May 2009) <https://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf> accessed 5 July 2019, p.3. Indeed, the Faroe Islands have entered into many agreements with jurisdictions previously identified by the OECD as tax havens, A Miller, L Oats, *Principles of International Taxation* (5th edn, Bloomsbury Professional 2016) p.618.

[1222] Sawyer provides the example of Belgium, which, at the time of writing, had signed 41 agreements, yet had only brought one into force. AJ Sawyer, 'The OECD's Tax Information Exchange Agreements: An Example of (In)effective Global Governance?' [2011] Journal of Applied Law and Policy 41, 48

[1223] Ibid, p.54

[1224] OECD, *Tax Co-operation 2010: Towards A Level Playing Field. Assessment by the Global Forum on Transparency and Exchange of Information for Tax Purposes* (OECD Publishing 2010) p.3-4

[1225] OECD, 'Promoting Transparency and Exchange of Information for Tax Purposes' (Background Information Brief, 19 January 2010) <http://www.oecd.org/newsroom/44431965.pdf> accessed 7 July 2019, p.14; see also K Bilicka, C Fuest, 'With Which Countries Do Tax Havens Share Information?' (Oxford University Centre for Business Taxation WP 12/11, 22 March 2012) <http://eureka.sbs.ox.ac.uk/3204/1/WP_12_11.pdf> accessed 9 July 2019, p.30

[1226] RS Avi-Yonah, 'The OECD Harmful Tax Competition Report: A Retrospective After A Decade' (2009) 34 Brook J Int'l L 783, 792-3

[1227] OECD, *Secretary-General Report to G20 Leaders* (OECD Publishing, November 2014) p.26

[1228] Ibid

[1229] L Menkhoff, J Miethe, 'Tax Evasion in New Disguise? Examining Tax Havens' International Bank Deposits' (DIW Discussion Paper, 2019) <https://www.diw.de/documents/publikationen/73/diw_01.c.574066.de/dp1711.pdf> accessed 9 August 2019

[1230] N Johannesen, G Zucman, 'The End of Bank Secrecy? An evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal: Economic Policy 65, 67

[1231] Ibid, at p.75

and no reduction in tax evasion.[1232] Studies have also shown that the effectiveness of TIEAs has decreased over time.[1233] The limited impact of the TIEA may be attributed to the focus on the exchange of information on request, coupled with the burdensome requirements for making a request. As such, in 2008, the US only made four requests under its TIEA with Jersey,[1234] and, in 2008-9, the UK only made a total of 25 requests to Jersey, Guernsey, the Isle of Man and Monserrat combined; locations where 40,000 people voluntarily disclosed evading taxes in 2007.[1235]

Overall, the OECD's initiative was pivotal in facilitating international cooperation in tax matters. Its use of blacklists and threats of sanctions led to secrecy jurisdictions agreeing to provide a level of cooperation that was previously unthinkable. However, the legal instruments promoted by the OECD remained largely ineffective in combatting offshore tax evasion at this time. Accordingly, states began to look for other methods of obtaining information.[1236]

4.3 US Domestic Attempts to Obtain Information

4.3.1 The Caribbean Basin Economic Recovery Act

The US introduced TIEAs much earlier than the OECD. In 1983, the US enacted the Caribbean Basin Economic Recovery Act, which provided a number of benefits to certain countries that entered into a TIEA with the US.[1237] Specifically, by agreeing to provide the US with information, Americans attending conventions in the TIEA country were entitled to 'North-American treatment' in terms of claiming tax deductions for convention attendance.[1238] Additional benefits included the ability to host foreign sales corporations,[1239] the potential to receive loans under Puerto Rico's §936 programme,[1240] and the ability of persons within its

[1232] Ibid, at p.74; see also DM Kemme, B Parikh, T Steigner, 'Tax Havens, Tax Evasion and Tax Information Exchange Agreements in the OECD' (2017) 23 European Financial Management 519, 537
[1233] L Menkhoff, J Miethe, 'Tax Evasion in New Disguise? Examining Tax Havens' International Bank Deposits' (DIW Discussion Paper, 2019) <https://www.diw.de/documents/publikationen/73/diw_01.c.574066.de/dp1711.pdf> accessed 9 August 2019
[1234] Tax Justice Network, 'Tax Information Exchange Agreements' (Tax Justice Briefing, May 2009) <https://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf> accessed 5 July 2019, p.4
[1235] R Murphy, 'Tax Information Exchange Agreements Really Do Not Deliver' (Financial Transparency Coalition, 28 July 2009) <https://financialtransparency.org/tax-information-exchange-agreements-really-do-not-deliver/> accessed 8 July 2019
[1236] MT Yates, A Hoffman, K Bishop, M Michaels, 'Death of Information-Exchange Agreements?: Part 3' (2011) 22 J Int'l Tax'n 48, 62
[1237] Caribbean Basin Economic Recovery Act of 1983 (Public Law 98-67, 97 Stat. 384), 19 U.S.C. 2701 et seq.
[1238] Ibid, Subtitle B, 26 U.S.C. §274
[1239] Tax Reform Act of 1984 (Public Law 98-369, 98 Stat. 494), Division A, Title VIII, 26 U.S.C. § 927(e)
[1240] Tax Reform Act of 1986 (Public Law 99-514, 100 Stat. 2085), Subtitle D, § 1231(c), 26 U.S.C. § 936(d)(4)

territory to avoid a withholding tax on interest on portfolio investments.[1241] The US approach may be regarded as an innovative development at that time as, for a country to qualify for the stated benefits, the TIEA had to provide for information exchange regardless of the individual's nationality and in a form admissible in US courts.[1242] Further, the TIEA country was obliged to compel the production of tax information and had to ensure that local laws could not prohibit information exchange.[1243] As such, the US attempted to ensure that the exchange of information was not restricted by bank secrecy laws long before the OECD. However, the practical utility of US TIEAs often depended on the actual text of each agreement.[1244] In addition, US TIEAs, like the OECD model, focused on the exchange of information on request, with all of its associated deficiencies.[1245]

The US signed TIEAs with several jurisdictions before the publication of the OECD model.[1246] Yet, many states initially viewed US TIEAs as an affront to their sovereignty and were reluctant to give up certain aspects of bank secrecy, such as bearer shares.[1247] The popularity of US TIEAs increased following the OECD's HTC initiative and the publication of the Model TIEA.[1248] The US must be commended for securing the exchange of information with a number of secrecy jurisdictions, long before other nations. For instance, until 2006, the UK did not sign any TIEAs, preferring to negotiate DTCs, which were restricted by bank secrecy laws at that

[1241] Tax Reform Act of 1984 (Public Law 98-369, 98 Stat. 494), Part II, §127(a)(5), 26 U.S.C. § 871(h)(5), §881(c)(5); see generally, JP Springer, 'An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases' (1988) 22 Geo Wash J Int'l L & Econ 277, 299
[1242] 26 U.S.C. §274(h)(6)(c)(i)
[1243] Ibid
[1244] B Zagaris, 'International Tax and Related Crimes: Gathering Evidence, Comparative Ethics and Related Matters' in RD Atkins (Ed.), *The Alleged Transnational Criminal: The Second Biennial International Criminal Law Seminar* (International Bar Association, Kluwer Academic Publishers 1995) p.319; WM Sharp, WT Harrison III, RA Lunsford, SA Harty, 'U.S. Tax Information Exchange Agreements: A Comparative Analysis' (2002) 28 Tax Notes Int'l 193
[1245] Although some TIEAs also provide for automatic and spontaneous exchanges, the exchange of information on request is the only mandatory obligation, see United States Government Accountability Office, *IRS's Information Exchanges with Other Countries Could Be Improved through Better Performance Information* (GAO-11-730 Report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, September 2011) p.8
[1246] Prior to 2001, the US signed TIEAs with Barbados (1984), Bermuda (1988), Costa Rica (1989) Dominica (1987) Dominican Republic (1989) Grenada (1986), Guyana (1992), Honduras (1990), Marshall Islands (1991), Mexico (1989), Peru (1990), Saint Lucia (1987), Trinidad and Tobago (1989). OECD, 'Exchange of Tax Information Portal: United States' <http://www.eoi-tax.org/jurisdictions/US#agreements> accessed 10 August 2019
[1247] United States International Trade Commission, *Report on the Impact of the Caribbean Basin Economic Recovery Act on U.S. Industries and Consumers: Report to Congress and the President on Investigation No.332-227 Under Section 332(b) of the Tariff Act of 1930* (Seventh Report, 1991) p.11; Moreover, the
[1248] Senate Permanent Subcommittee on Investigations, *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts* (26 February 2014) p.12

time.[1249] However, in order to encourage secrecy jurisdictions to sign TIEAs, the US terminated many of its DTCs with these jurisdictions,[1250] which ultimately led them to abolish income taxes and adopt stricter bank secrecy laws.[1251] Thus, although TIEAs were of benefit to the US, they may have had a long-term adverse impact on other jurisdictions by effectively making secrecy jurisdictions more attractive to tax evaders.

4.3.2 The Qualified Intermediary (QI) Scheme

In an attempt to prevent US citizens using foreign financial institutions (FFIs) to evade taxes, the US enacted two key measures to compel the reporting of information concerning US taxpayers. Since 1970, under the Bank Secrecy Act,[1252] US taxpayers are required to report any foreign account holding in excess of $10,000 annually,[1253] using a Foreign Bank and Account Report (FBAR).[1254] Failure to comply with this provision results in the imposition of onerous civil and criminal penalties.[1255] Nevertheless, because the FBAR relied on self-reporting, it was historically regarded as ineffective.[1256] Subsequently, in 2000, the US enacted the Qualified Intermediary (QI) scheme, which enabled FFIs to voluntarily agree to identify and report the US source income of US customers.[1257] In exchange, FFIs were not obliged to disclose the identities of non-US customers, providing the correct amount of tax was withheld on any US

[1249] OECD, *Tax Co-operation 2007: Towards a Level Playing Field* (2007 Assessment by the Global Forum on Taxation, OECD Publishing) p.50; The divergent approaches may be explained by the difficulty the US often faces in obtaining Senate approval for tax treaties; since TIEAs 'are not treaties, they do not require ratification or Senate oversight or consent.' MJ Langer, 'The Outrageous History of Caribbean Tax Treaties With OECD Member States' [2002] Tax Notes International 1187, 1196

[1250] Following the recommendation of the Gordon Report. RA Gordon, *Tax Havens and Their Use By United States Taxpayers – An Overview: A Report to the Commissioner of Internal Revenue the Assistant Attorney General (Tax Division) and the Assistant Secretary of the Treasury (Tax Policy)* (Publication 1150, 12 January 1981). For instance, the 1945 UK- US treaty, which was extended to apply to 20 of the U.K's overseas territories, Convention for the Avoidance of Double Taxation, (United States-United Kingdom) (16 April 1945) 6 UNTS 189.

[1251] MJ Langer, 'The Outrageous History of Caribbean Tax Treaties With OECD Member States' [2002] Tax Notes International 1187, 1190-1191

[1252] The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970 (also known as the Bank Secrecy Act 1970) Pub. L. No. 91-508, 84 Stat. 1114-2, 31 U.S.C. 5311 et seq

[1253] 31 CFR §§ 103.24,103.27; The Act also requires Reports on exporting and importing monetary instruments if over $10,000 in monetary instruments is transferred in or out of the US, 31 U.S.C. § 5316, 31 CFR § 1010.340

[1254] Financial Crimes Enforcement Network (FinCEN) Form 114

[1255] 31 U.S.C §§ 5321, 5322

[1256] MA Dizdarevic, 'The FATCA Provisions of the HIRE Act: Boldly Going Where No Withholding Has Gone Before' (2011) 79 Fordham L Rev 2967, 2978

[1257] 26 U.S.C §§ 1441, 1442, 31 CFR § 1.1441-1; FFIs had to sign an agreement with the IRS Rev. Proc. 2000-12, available from <http://www.irs.gov/pub/irs-drop/rp-00-12.pdf>; The IRS released an updated QI agreement in Rev. Proc. 2014-39 following FATCA.

source payments made.[1258] However, there were major weaknesses in the QI system, which limited its effectiveness in combatting tax evasion. Specifically, the QI system did not require the reporting of US customers' foreign source income, nor the determination of the beneficial owners (BO) of legal structures,[1259] and only a limited number of accounts and investments were actually held with QIs.[1260] Moreover, even though QIs were audited to maintain honesty,[1261] audits did not examine attempts to defraud the system.[1262]

These weaknesses were exposed in the UBS scandal,[1263] where whistle-blower Bradley Birkenfeld revealed that UBS had assisted its US clients in forming foreign shell companies to hold their accounts at UBS, thereby avoiding reporting and withholding under the QI system.[1264] In response, the US brought criminal charges against UBS that were eventually settled under a Deferred Prosecution Agreement,[1265] where UBS agreed to pay $780 million in fines and penalties as well as disclose the identities of 250 of its US account holders.[1266] The IRS filed and obtained approval of a civil John Doe summons, requesting UBS to disclose the identity of all US customers using UBS to evade tax.[1267] Following IRS action to enforce the summons,[1268] a compromise was reached whereby UBS would disclose the names of around

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[1258] Ibid; FFIs agreed to identify their US customers and seek W-8 or W-9 forms from them. For every US customer who completed a W-9 form, the FFI agreed to file a 1099 Form with the IRS, which included the customer's name, taxpayer identification number and reportable payments. For non-US persons who completed a W-8 or W8BEN Form, the FFI was only required to report the amounts paid into the account and tax withheld in one 1042 Form for all non-US persons. See Senate Permanent Subcommittee on Investigations, *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts* (26 February 2014) p.13-14.

[1259] JR Harvey, 'Offshore Accounts: Insider's Summary of FATCA and Its Potential Future' (2012) 57 Vill L Rev 471, 475

[1260] Ibid; see also US Government Accountability Office, *Tax Compliance: Qualified Intermediary Program Provides Some Assurance That Taxes on Foreign Investors Are Withheld and Reported, but Can Be Improved* (GAO-08-99, December 2007) p.33

[1261] W Byrnes, D Kleinfeld, 'Background and Current Status of FATCA' in WH Byrnes, RJ Munro, *LexisNexis Guide to FATCA & CRS Compliance* (5th ed, LexisNexis 2017) p.9

[1262] JR Harvey, 'Offshore Accounts: Insider's Summary of FATCA and Its Potential Future' (2012) 57 Vill L Rev 471, 476

[1263] *Foreign Bank Account Reporting and Tax Compliance: Hearing before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means,* United States House of Representatives, 111th Cong., 1st Sess. 35 (2009) p.2

[1264] US Senate Permanent Subcommittee on Investigations, *Tax Haven Banks and US Tax Compliance* (July 2008) p.88

[1265] See Chapter 6.

[1266] United States District Court Southern District of Florida, 'Case No.09-60033-CR-COHN United States of America vs. UBS AG: Deferred Prosecution Agreement' (19 February 2009) <https://www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Deferred_Prosecution_Agreement.pdf> accessed 19 July 2019

[1267] US Department of Justice, 'Federal Judge Approves IRS Summons for UBS Swiss Bank Account Records' (1 July 2008) <https://www.justice.gov/archive/tax/txdv08584.htm> accessed 20 July 2019

[1268] 'United States of America v UBS AG: Petition to Enforce John Doe Summons' (US District Court for the Southern District of Florida Miami Division, Civil No. 09-20423)

4,450 of the most fraudulent and wealthy account holders.[1269] As this disclosure was based on the US-Switzerland DTC,[1270] US action against UBS improved the exchange of information on request under the OECD DTC and TIEA, creating a 'new international standard' whereby group requests for information on unidentified individuals could be made, providing the group and facts giving rise to the request were identified with specificity.[1271] Nonetheless, the attention drawn by the UBS scandal to the weaknesses of the QI regime,[1272] and the enormous sums held offshore,[1273] caused the US to look beyond the measures promulgated by the OECD to combat tax evasion by US citizens.

4.3.4 Foreign Account Tax Compliance Act

Introduction

In 2010, Congress enacted a 'more muscular version of the QI program',[1274] the Foreign Account Tax Compliance Act (FATCA).[1275] FATCA was designed to prevent tax evasion by US citizens and its facilitation,[1276] through enhancing information reporting, increasing withholding taxes for FFIs who do not report, and strengthening penalties for noncompliant

<http://online.wsj.com/public/resources/documents/UBSPetitonofJohnDoe20090219.pdf> accessed 20 July 2019

[1269] 'Agreement between the United States of America and the Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America regarding UBS AG, A Corporation Established under the Laws of the Swiss Confederation' (19 August 2009) <https://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf> accessed 20 July 2019

[1270] Convention for the Avoidance of Double Taxation with Respect to Taxes on Income (United States – Switzerland) (signed 2 October 1996, entered into force 19 December 1997) 97 TIAS 1219, Art.26

[1271] F Noseda, 'Article 26 of the OECD Model Tax Convention - Group Requests - The Birth of a New International Standard? Recent Developments in Switzerland and Potential Ramifications for Other Jurisdictions' (2014) 1 BTR 1; see also OECD, *Model Tax Convention on Income and on Capital 2017* (OECD Publishing 2017) Commentary to Art 26(1), para 5.2

[1272] 'Many foreign banks had abused the QI program' SD Michel, HD Rosenbloom, 'FATCA and Foreign Bank Accounts: Has the U.S. Overreached?' [2011] Tax Analysts 709, 710; 'These shortcomings played a role in influencing FATCA's reporting requirements for FFIs and other foreign entities' EK Lunder, CA Pettit, 'Reporting Foreign Financial Assets Under Titles 26 and 31: FATCA and FBAR' (Congressional Research Service R43444, 27 March 2014) <https://fas.org/sgp/crs/misc/R43444.pdf > accessed 20 July 2019, p.6

[1273] 'There is little reason to think that abuses of the QI regime were limited to UBS' JD Blank, R Mason, 'Exporting FATCA' (2014) 142 Tax Notes 1245, 1247; see also R White, 'FATCA: Who Forgot to Attach the Carrot to the Stick? (2018) 10 Geo Mason J Int'l Com L 78, 87

[1274] SD Michel, HD Rosenbloom, 'FATCA and Foreign Bank Accounts: Has the U.S. Overreached?' [2011] Tax Analysts 709, 710

[1275] FATCA provisions are named after the Act they were originally introduced by - Foreign Account Tax Compliance Act, H.R. 3933, 111th Cong. § 101 (2009); They were subsequently enacted in the Hiring Incentives to Restore Employment Act, H.R. 2847, 111th Cong. §§ 501, 511 (2010), which added chapter 4 of Subtitle A s1471-1474 to the US Internal Revenue Code.

[1276] FATCA was designed to '"smoke out" American tax cheats' A Christians, AJ Cockfield, 'Submission to Finance Department on Implementation of FATCA in Canada: Submission on Legislative Proposals Relating to the Canada-United States Enhanced Tax Information Exchange Agreement' (10 March 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407264> accessed 20 July 2019 p.1

taxpayers.[1277] FATCA attempts to achieve these aims by taking a 'two-prong approach', requiring reporting by both FFIs and Non-Financial Foreign Entities (NFFEs), as well as US taxpayers.[1278] FATCA obliges US taxpayers to report to the IRS, if they hold more than $50,000 in 'specified foreign financial assets'.[1279] These obligations supplement, rather than replace, FBAR filing obligations.[1280] In addition, FATCA imposes requirements on FFIs, such as foreign banks, hedge funds and trust companies,[1281] and certain NFFEs, which are any foreign entities that are not classed as FFIs, such as partnerships, trusts and foundations.[1282] FFIs must disclose information to the IRS on their US account holders, or else face a withholding tax on all 'withholdable payments',[1283] namely, US source income, such as interest, dividends and wages.[1284] Most NFFEs do not report directly to the IRS,[1285] but will be subject to the withholding tax unless the NFFE informs the payor of such withholdable payments that it either does not have a 'substantial US owner' or discloses the identity of its US owner(s).[1286] NFFEs are also not subject to withholding if classed as an excepted NFFE[1287] or an exempt BO.[1288] In this respect, the withholding tax is not a traditional withholding tax, but a penalty, designed to encourage FFIs to assist the US in identifying tax evaders.[1289] In

[1277] *Foreign Bank Account Reporting and Tax Compliance: Hearing before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means*, United States House of Representatives, 111th Cong., 1st Sess. 35 (2009) p.7
[1278] J Heiberg, 'FATCA: Toward a Multilateral Automatic Information Reporting Regime' (2012) 69 Wash & Lee L Rev 1685, 1699
[1279] 26 U.S.C § 6038D; see also Hiring Incentives to Restore Employment Act, H.R. 2847, 111th Cong. §511 (2010), see also §§ 521-41
[1280] IRS, 'Comparison of Form 8938 and FBAR Requirements' (27 June 2019) <https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements> accessed 20 July 2019
[1281] 26 U.S.C. §1471(d)(5), 26 CFR § 1.1471-5(e). FFIs fall into four categories - custodial institutions, depository institutions, investment entities and specified insurance companies see N Noked, 'Tax Evasion and Incomplete Tax Transparency' (2018) 7 Laws 31, 33
[1282] 26 U.S.C. §1472(d)
[1283] 26 U.S.C. §1471(a)
[1284] 26 U.S.C. §1473(1)(A) 'The term "withholdable payment" means— (i)any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States, and (ii)any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States.'
[1285] Unless it is a direct reporting NFFE as defined in 26 CFR § 1.1472-1(c)(3)
[1286] 26 CFR § 1.1472-1(b)(1); NFFEs must report the information required in 26 CFR § 1.1474-1(i)(2)
[1287] Including publicly traded corporations, Active NFFEs and certain non-profit organizations 26 CFR § 1.1472-1(c)(1)
[1288] 26 CFR § 1.1472-1(c)(2)
[1289] MA Dizdarevic, 'The FATCA Provisions of the Hire Act: Boldly Going Where No Withholding Has Gone Before' (2011) 79 Fordham L Rev 2967, 2987

effect, the US leveraged the size and importance of its financial markets to create a potent threat against FFIs to force them to comply;[1290] an option likely unique to the US.[1291]

Implementing FATCA

The US' initial attempts to impose FATCA unilaterally caused pronounced indignation and consternation amongst the global financial community,[1292] with many objecting to their new role as 'IRS axillaries'.[1293] In particular, the US' initial unilateral and extraterritorial approach to FATCA was considered 'audacious'[1294] and 'imperialist',[1295] with some even accusing the US of 'behaving like a global economic dictator.'[1296] The US' unilateral approach was unlikely to be workable in practice, as it would require FFIs to violate domestic law, particularly data protection and privacy legislation.[1297] As a result, the US began to enter into Intergovernmental Agreements (IGAs) to implement FATCA. In February 2012, the G5 (France, Germany, Italy, Spain and the UK) announced their intention to cooperate with the US to improve tax compliance and implement FATCA.[1298] This announcement gave rise to the Model 1 IGA, whereby national FFIs would disclose the information required by FATCA to the national tax authority, which would then automatically exchange this information with the IRS, effectively

[1290] 'The entire architecture of FATCA is based on the threat of withholding tax imposed by a nation that continues to play an indispensable role in international financial markets and thus has the ability to penalize noncompliance on a global scale.' E Rahimi-Laridjani, E Hauser, 'The New Global FATCA: An Overview of the OECD's Common Reporting Standard in Relation to FATCA' (2016) 13 J Tax'n Fin Products 9, 13
[1291] D Dharmapala, 'Cross-border Tax Evasion under a Unilateral FATCA Regime' (2016) 141 Journal of Public Economics 29, 31 *cf* Grinberg who, in the context of the Rubik agreements noted 'Germany and the UK are among the few economic and financial centers with sufficient leverage to exert pressure on governments that are the home to important offshore asset managers.' I Grinberg, 'Beyond FATCA: An Evolutionary Moment for the International Tax System' (Georgetown Law Faculty Working Papers, Paper No. 160, 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1996752> accessed 20 July 2019 p.3
[1292] See for instance, Rundheersing Bheenick (Governor of the Bank of Mauritius), 'Keynote Address: Responding to the US FATCA – Complain but Comply?' (Seminar on Foreign Account Tax Compliance Act, Ebène, 14 March 2012) <https://www.bis.org/review/r120319d.pdf> accessed 20 July 2019, p.1
[1293] JN Mukadi, 'FATCA and the Shaping of a New International Tax Order' [2012] Tax Analysts 1227, 1228
[1294] SC Morse, 'Ask for Help, Uncle Sam: The Future of Global Tax Reporting' (2012) 57 Vill L Rev 529, 536; For further criticism see JD Blank, R Mason, 'Exporting FATCA' (2014) 142 Tax Notes 1245, 1248
[1295] A senior Hong Kong executive described FATCA as 'America's most imperialist act since it invaded the Philippine Islands in 1899' SD Michel, HD Rosenbloom, 'FATCA and Foreign Bank Accounts: Has the U.S. Overreached?' [2011] Tax Analysts 709, 711
[1296] J Grant, 'It Is About Control: Progressivism, FATCA and Global Law' (2016) 8(3) Perspectives on Federalism 87, 91
[1297] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.157; Other benefits of IGAs include the simplification of FATCA's practical implementation and a reduction in FFI costs, see US Treasury Department, 'Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA' (7 February 2012) <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf> accessed 22 July 2019
[1298] Ibid

alleviating any conflicts with domestic legislation.[1299] There are two forms of Model 1 IGAs, reciprocal and non-reciprocal.[1300] After the G5's announcement, Japan and Switzerland negotiated with the US leading to the publication of a Model 2 IGA,[1301] which enables national FFIs to conclude agreements and send information directly to the IRS with the permission of their national government.[1302] Model 2 IGAs are not reciprocal.[1303] In this respect, Model 2 IGAs offer greater privacy protections, but impose higher costs, as they require separate agreements between the IRS and each FFI.[1304] Although the legal status of IGAs has been questioned,[1305] IGAs are generally regarded as a positive development as they represent a move away from the US' unilateral approach to implementing FATCA.[1306] The US has signed IGAs with 113 jurisdictions, of which 14 are Model 2 IGAs and 99 are Model 1 IGAs.[1307]

Nevertheless, although some IGAs appear to be reciprocal, they do not achieve reciprocity, as the US receives more information under an IGA than its FATCA partners.[1308] This is attributable to the US' inability to collect the information necessary to reciprocate under its

[1299] See e.g. 'Model 1A IGA Reciprocal, Pre-existing TIEA or DTC: Agreement between the Government of the United States of America and the Government of [FATCA Partner] to Improve International Tax Compliance and to Implement FATCA' (6 June 2014) <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf> accessed 22 July 2014

[1300] In order to be reciprocal, the IGA must be based on an existing TIEA, DTC or the OECD Convention, W Byrnes, D Kleinfeld, 'Background and Current Status of FATCA' in WH Byrnes, RJ Munro, *LexisNexis Guide to FATCA & CRS Compliance* (5th ed, LexisNexis 2017) p.84. US financial institutions are not required to report information regarding interest paid to non-resident alien individuals, if the US does not have an exchange agreement in place with their country of residence, see 26 CFR §§ 1.6049-4, 1.6049-8(a), Rev. Proc. 2017-46.

[1301] CP Tello, 'United States – FATCA: Catalyst for Global Cooperation on Exchange of Tax Information' (2014) 28 Bulletin for International Taxation 88, 93

[1302] See e.g. 'Model 2 IGA Preexisting TIEA or DTC: Agreement between the Government of the United States of America and the Government of [FATCA Partner] for Cooperation to Facilitate the Implementation of FATCA' (November 30, 2014) <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf> accessed 22 July 2019

[1303] Ibid, Art 7

[1304] JS Wisiackas, 'Foreign Account Tax Compliance Act: What it Could Mean for the Future of Financial Privacy' (2017) 31 Emory Int'l L Rev 585, 601

[1305] See A Christians, 'The Dubious Legal Pedigree of IGAs (and Why it Matters)' (2013) 69 Tax Notes Int'l 565 *cf.* SC Morse, 'Why FATCA Intergovermental Agreements Bind the U.S. Government' (2013) 70 Tax Notes Int'l 245; the legality of IGAs has also been challenged in US courts, see *Crawford v. U.S. Dep't of the Treasury*, No. 15-250, 2015 WL 4571443 (S.D. Ohio July 14, 2015)

[1306] J Heiberg, 'FATCA: Toward a Multilateral Automatic Information Reporting Regime' (2012) 69 Wash & Lee L Rev 1685, 1709

[1307] U.S. Department of the Treasury, 'Resource Center: Foreign Account Tax Compliance Act (FATCA)' <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> accessed 27th April 2021.

[1308] A Christians, 'What You Give and What You Get: Reciprocity under a Model 1 Intergovernmental Agreement on FATCA' (2013) Cayman Financial Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292645> accessed 22 July 2019 p.3-4; PA Cotorceanu, 'Hiding in Plain Sight: How Non-US Persons Can *Legally* Avoid Reporting Under Both FATCA and GATCA' (2015) 21 T&T 1050, 1053

domestic law.[1309] This lack of reciprocity creates tax evasion opportunities for residents of other jurisdictions and provides US financial institutions with a competitive advantage.[1310] For instance, owing to this lack of reciprocity, individuals residing in a Model 1 IGA country can avoid FATCA by holding accounts through an entity resident in the US, as information on the controlling persons will not be reported.[1311] This 'American exceptionalism'[1312] has led to the US losing its reputation for being tough on tax evaders and, instead, to gain a reputation as a hypocritical secrecy jurisdiction.[1313] Following the implementation of FATCA, funds appear to be moving from traditional secrecy jurisdictions into the US;[1314] since 2013, cross-border deposits in US banks have increased by around 13%.[1315] The lack of reciprocity under FATCA is to be regretted, as all jurisdictions must participate in effective information sharing in order to combat tax evasion.

Several attempts have been made to enable reciprocal reporting by the US under FATCA. The Obama administration attempted to introduce legislation to achieve reciprocity under FATCA in three successive budget proposals.[1316] However, on each occasion, no action was taken by Congress.[1317] In addition, in 2016, FinCEN published new Customer Due Diligence (CDD) rules, which require US financial institutions to identify the BO of legal entities.[1318] However, the CDD rules may be ineffective in enabling US authorities to identify BOs. This is because

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[1309] SC Morse, 'Why FATCA Intergovermental Agreements Bind the U.S. Government' (2013) 70 Tax Notes Int'l 245, 245

[1310] D Dharmapala, 'Cross-border Tax Evasion under a Unilateral FATCA Regime' (2016) 141 Journal of Public Economics 29, 35

[1311] PA Cotorceanu, 'Hiding in Plain Sight: How Non-US Persons Can *Legally* Avoid Reporting Under Both FATCA and GATCA' (2015) 21 T&T 1050, 1058

[1312] Ibid at 1055

[1313] RE Brinson, 'Is the United States Becoming the "New Switzerland"?: Why the United States' Failure to Adopt the OECD's Common Reporting Standard is Helping it to Become a Tax Haven' (2019) 23 NCBNKI 231, 242; US states such as Delaware, Nevada and Wyoming are often regarding as tax havens, JG Gravelle, *Tax havens: International Tax Avoidance and Evasion* (Congressional Research Service, 2015) p.6-7

[1314] 'Money is said to be flowing in from the Bahamas and Bermuda, as well as from Switzerland.' The Economist, 'Financial Transparency – The Biggest Loophole of All' (20 February 2016) <https://www.economist.com/international/2016/02/20/the-biggest-loophole-of-all> accessed 24 July 2019

[1315] E Casi, S Nenadic, M Dinko Orlic, C Spengel, 'A Call to Action: From Evolution to Revolution on the Common Reporting Standard' (2019) 2 BTR 166, 198; see also the TJN, which notes that 'Between 2015 and 2018 the US increased its market share in offshore financial services by 14%.' Tax Justice Network, 'Financial Secrecy Index 2018: Narrative Report on USA' (2018) <http://www.financialsecrecyindex.com/PDF/USA.pdf> accessed 1 August 2019, p.1

[1316] L Hatten Boyd, 'Are Problems Looming for FATCA and the "Reciprocal" IGA?' (The Tax Adviser, 1 June 2016) <https://www.thetaxadviser.com/issues/2016/jun/problems-looming-for-fatca-and-reciprocal-iga.html> accessed 24 July 2019

[1317] ibid; Thus, it appears as though the US executive wanted to show global leadership on the tax evasion issue, yet was prevented from doing so by domestic constraints, V Bulmer-Thomas, *Empire in Retreat: The Past, Present, and Future of the United States* (Yale University Press 2018) p.331

[1318] Customer Due Diligence Requirements for Financial Institutions: Final Rule (2016) 81 FR 29397; Amending 31 CFR §§1010.230, 1020.210.

the rules only require the financial institution to verify the identity of the BO, rather than their status as a BO.[1319] In addition, senior managers of legal entities may be classed as BOs,[1320] effectively providing loopholes that may be exploited by tax evaders seeking to avoid the reporting regime. The US' inability to effect domestic legislation attracted the attention of the EU Parliament, which called on the 'Council to give a mandate to the Commission to negotiate an agreement with the US to ensure reciprocity in FATCA' and asked the EU institutions to consider imposing countermeasures on the US, such as a withholding tax.[1321] In 2021, the US finally enacted a limited BO register.[1322]

The Impact of FATCA

Despite its laudable aims, FATCA has created a number of problems for national governments, FFIs and US citizens. Due to the US' citizenship-based system of taxation and the resulting broad definition of US persons under FATCA,[1323] a significant number of US persons living abroad have been adversely affected by the burdens imposed under FATCA.[1324] Estimates suggest that between five and seven million US citizens are subject to FATCA requirements,[1325] most of whom are 'benign actors' rather than tax evaders.[1326] US citizens include so-called 'Accidental Americans'[1327] who were born in the US but left at a young

[1319] W Byrnes, D Kleinfeld, 'Background and Current Status of FATCA' in WH Byrnes, RJ Munro, *LexisNexis Guide to FATCA & CRS Compliance* (5th ed, LexisNexis 2017) p.117
[1320] Tax Justice Network, 'Financial Secrecy Index 2018: Narrative Report on USA' (2018) <http://www.financialsecrecyindex.com/PDF/USA.pdf> accessed 1 August 2019, p.5
[1321] European Parliament 'Resolution on Financial Crimes, Tax Evasion and Tax Avoidance' (26 March 2019) <http://www.europarl.europa.eu/doceo/document/TA-8-2019-0240_EN.pdf?redirect> accessed 24 July 2019
[1322] Corporate Transparency Act 2020, enacted as part of the National Defense Authorization Act of 2021, Public Law 116-283, HR 6395—1217, §6401-6403
[1323] 26 U.S.C. §1473(3), 26 CFR § 1.1473-1(c)
[1324] This issue is of pressing concern to Canada, which has strong economic ties to the US and is home to the most US citizens outside of the US. A Christians, AJ Cockfield, 'Submission to Finance Department on Implementation of FATCA in Canada: Submission on Legislative Proposals Relating to the Canada-United States Enhanced Tax Information Exchange Agreement' (10 March 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407264> accessed 20 July 2019 p.5; see also Y Woldeab, 'Americans: We Love You, but We Can't Afford You: How the Costly U.S.-Canada FATCA Agreement Permits Discrimination of Americans in Violation of International Law' (2015) 30 Am U Int'l Rev 611, 646
[1325] National Taxpayer Advocate, '2011 Annual Report to Congress' (31 December 2011) <https://taxpayeradvocate.irs.gov/userfiles/file/2011-annual-report/2011_ARC_MSP%207-12.pdf> accessed 22 July 2019, p.130
[1326] Ibid, p.192
[1327] Defined by the EU Parliament as individuals 'who, by accident of birth, inherited US citizenship, but who maintain no ties to the US, having never lived, worked or studied in the US and who do not hold US social security numbers' European Parliament, 'Resolution on the Adverse Effects of the US Foreign Tax Compliance Act (FATCA) on EU Citizens and in Particular 'Accidental Americans'(5 July 2018) <http://www.europarl.europa.eu/doceo/document/TA-8-2018-0316_EN.html> accessed 23 July 2019

age,[1328] or were born to a US parent, some of whom have never entered the US.[1329] These individuals will be subject to reporting requirements under FATCA, coupled with civil and criminal penalties for non-compliance,[1330] even though they may not realise they are classed as US persons.[1331] Further, although many jurisdictions prohibit discrimination,[1332] there is evidence to suggest that these individuals are being denied access to banking services by FFIs seeking to avoid FATCA's onerous reporting requirements.[1333] A 2014 survey found that one in six Americans living abroad had their financial accounts closed due to FATCA, most of which were ordinary accounts with low balances.[1334] This is a pressing concern, as access to banking services is necessary precondition of participation in modern society and should be considered a fundamental right.[1335] As a result, many US citizens have renounced their US citizenship.[1336] From 2011 through 2016, approvals of renunciations increased by 178%, from

[1328] A common example is Boris Johnson, who renounced his US citizenship in 2016 P Wintour, 'Boris Johnson Among Record Number to Renounce American Citizenship in 2016' (The Guardian, 9 February 2017) <https://www.theguardian.com/politics/2017/feb/08/boris-johnson-renounces-us-citizenship-record-2016-uk-foreign-secretary> accessed 22 July 2019

[1329] BW Bean, AL Wright, 'The U.S. Foreign Account Tax Compliance Act: American Legal Imperialism' (2015) 21 ILSA J Int'l & Comp L 333, 353; also subject to FATCA are those with Lawful Permanent Resident (green card) status M Kaul, 'Too Much FATCA' (2017) 4 CT Uncourt 15, 15

[1330] US persons are exposed to two different penalty regimes implemented by both the IRS and FinCEN 26 USC § 6038D(d); 31 USC § 5321(a)(5); 31 CFR § 1010.840; US Government Accountability Office, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on US Persons Abroad* (GAO-19-180, April 2019) p.25; see also National Taxpayer Advocate, '2011 Annual Report to Congress' (31 December 2011) <https://taxpayeradvocate.irs.gov/userfiles/file/2011-annual-report/2011_ARC_MSP%207-12.pdf> accessed 22 July 2019, p.133-4

[1331] As claimed by the Association of Accidental Americans, who are suing banks in France for discrimination Reuters, ''Accidental Americans' in France File Discrimination Lawsuit' (27 March 2019) <https://uk.reuters.com/article/uk-france-us/accidental-americans-in-france-file-discrimination-lawsuit-idUKKCN1R825E> accessed 22 July 2019

[1332] See e.g. Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the Comparability of Fees Related to Payment Accounts, Payment Account Switching and Access to Payment Accounts with Basic Features [2014] OJ L 257, Art 15; some IGAs also contain anti-discrimination provisions Y Woldeab, 'Americans: We Love You, but We Can't Afford You: How the Costly U.S.-Canada FATCA Agreement Permits Discrimination of Americans in Violation of International Law' (2015) 30 Am U Int'l Rev 611, 626

[1333] Including UK, Dutch and Spanish banks. *Foreign Bank Account Reporting and Tax Compliance: Hearing before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means*, United States House of Representatives, 111th Cong., 1st Sess. 35 (2009) p.83

[1334] Democrats Abroad, '2014 FATCA Research Project – FATCA: Affecting Everyday Americans Every Day' (September 2014) <https://www.finance.senate.gov/imo/media/doc/Att%202%20Democrats%20Abroad%202014%20FATCA%20Research%20Report1.pdf> accessed 22 July 2019 p.4

[1335] Ibid, p.5-6

[1336] L DeSimone, R Lester, K Markle, 'Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (FATCA)' (Stanford Graduate School of Business Working Paper, Paper No. 3744, 1 February 2019) <https://www.gsb.stanford.edu/faculty-research/working-papers/transparency-tax-evasion-evidence-foreign-account-tax-compliance-act> accessed 22 July 2019, p.4

1601 to 4449;[1337] 'the highest number in history.'[1338] However, this is an expensive option only available to certain US citizens, as those wishing to expatriate must pay a fee, all taxes owed and, in some cases, an exit tax.[1339] In addition, a US social security number or TIN is required, which many accidental Americans do not possess.[1340]

In 2018, the EU Parliament approved a Resolution calling on the Commission to open negotiations with the US on an EU-US FATCA agreement, where EU accidental Americans would be able to relinquish their unwanted US citizenship on a 'no-fees, no-filings, no-penalties basis'.[1341] Therefore, FATCA appears to have had a negative impact on many ordinary individuals, who are not evading taxation. To remedy this situation, commentators have suggested that the US should abandon its citizenship-based system of taxation,[1342] or implement an opt-out system for all accidental Americans.[1343] However, even if these solutions were to be employed, FATCA is likely to have a negative impact on Americans, regardless of where they reside.[1344]

Is FATCA Effective in Combatting Tax Evasion?

Theoretically, FATCA should be effective in combatting tax evasion because it represents a move from self-reporting by individuals to third-party reporting, a move which should lead to

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[1337] US Government Accountability Office, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on US Persons Abroad* (GAO-19-180, April 2019) p.38

[1338] Y Woldeab, 'Americans: We Love You, but We Can't Afford You: How the Costly U.S.-Canada FATCA Agreement Permits Discrimination of Americans in Violation of International Law' (2015) 30 Am U Int'l Rev 611, 613

[1339] J Heiberg, 'FATCA: Toward a Multilateral Automatic Information Reporting Regime' (2012) 69 Wash & Lee L Rev 1685, 1703

[1340] European Parliament, 'Resolution on the Adverse Effects of the US Foreign Tax Compliance Act (FATCA) on EU Citizens and in Particular 'Accidental Americans'(5 July 2018) <http://www.europarl.europa.eu/doceo/document/TA-8-2018-0316_EN.html> accessed 23 July 2019

[1341] Ibid

[1342] See e.g. RS Avi-Yonah, 'Constructive Unilateralism: U.S. Leadership and International Taxation' (2016) 42 Int'l Tax J 17, 22 *cf* AC Kossachev, 'Worldwide Taxation and FATCA: A Consitutional Conundrum or the Final Piece of the Tax Evasion Puzzle' (2015) 25 Geo Mason U CR LJ 217, 242; Others have drawn attention to the disparate and harsh international treatment of Eritrea, the only other country to impose citizenship-based taxation, when it attempted to enforce its 'diaspora tax' R White, 'FATCA: Who Forgot to Attach the Carrot to the Stick? (2018) 10 Geo Mason J Int'l Com L 78, 84-5; For the rationale behind citizenship taxation see M Cabezas, 'Reasons for Citizenship-Based Taxation' (2016) 121 Penn St L Rev 101; Most recently, the Tax Fairness for Americans Abroad Act, H.R. 7358, 115th Cong. (2018) has been introduced, which would provide for residency-based taxation for non-resident US citizens.

[1343] EU Parliament Resolution (n.444); A Christians, 'A Global Perspective on Citizenship-Based Taxation' (2017) 38 Mich J Int'l L 193, 241-2

[1344] See generally JS Wisiackas, 'Foreign Account Tax Compliance Act: What it Could Mean for the Future of Financial Privacy' (2017) 31 Emory Int'l L Rev 585

lower levels of tax evasion.[1345] The IRS notes that when third party reporting takes place, there is a 99% likelihood that the individual will report this income on their tax return.[1346] Further, FATCA provides an alternative to the exchange of information on request, which has historically been ineffective in combatting tax evasion. There is some evidence to suggest that FATCA has enabled the collection of evaded tax. FATCA was predicted to raise around $8.7billion over ten years,[1347] yet the IRS managed to recover $10billion from offshore compliance efforts following its inception.[1348] DeSimone *et al* found a reduction in equity investment into the US following FATCA, by around 21.2%, suggesting that US persons moved their assets out of secrecy jurisdictions following its implementation.[1349] Additionally, Omartian suggests that FATCA led to lower levels of incorporation activity by US investors in secrecy jurisdictions.[1350]

Nevertheless, these figures are misleading. Although the IRS has recovered $10billion from offshore compliance activities, this sum is largely attributable to penalties imposed for failing to comply with reporting obligations, such as FBAR, rather than tax evasion.[1351] In addition, the IRS' estimate includes the sums recovered as a result of the offshore voluntary disclosure program, which was passed before FATCA.[1352] Moreover, even if the sums recovered by the IRS were all attributable to tax evasion, this would still be a small sum, considering the vast estimates of untaxed wealth held offshore. When considering the estimated $100 billion the

[1345] J Slemrod, 'Cheating Ourselves: The Economics of Tax Evasion' (2007) 21 Journal of Economic Perspectives 25, 29-30

[1346] K Kuepper, O von Schweinitz, M Orlic, 'How FATCA Will Impact Financial Services in Germany' (12 December 2012) <https://www.internationaltaxreview.com/Article/3130149/How-FATCA-will-impact-financial-services-in-Germany.html?ArticleId=3130149> accessed 25 July 2019

[1347] The Joint Committee on Taxation, 'Estimated Revenue Effects Of The Revenue Provisions Contained In Senate Amendment 3310, The "Hiring Incentives To Restore Employment Act," Under Consideration By The Senate' (23 February 2010, JCX-5-10) <https://www.jct.gov/publications.html?func=startdown&id=3649> accessed 25 July 2019

[1348] IRS, 'Offshore Voluntary Compliance Efforts Top $10 Billion; More Than 100,000 Taxpayers Come Back into Compliance' (21 October 2016, IR-2016-137) <https://www.irs.gov/newsroom/offshore-voluntary-com> accessed 25 July 2019

[1349] The authors also found that 'total equity foreign portfolio investment out of tax havens decreased by 21.0 to 29.0 percent since 2012, suggesting that U.S. citizens also altered their worldwide (not just U.S.) investment strategies' L DeSimone, R Lester, K Markle, 'Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (FATCA)' (Stanford Graduate School of Business Working Paper, Paper No. 3744, 1 February 2019) <https://www.gsb.stanford.edu/faculty-research/working-papers/transparency-tax-evasion-evidence-foreign-account-tax-compliance-act> accessed 22 July 2019, p.3-4

[1350] J Omartian, 'Do Banks Aid and Abet Asset Concealment: Evidence from the Panama Papers' (Working Paper, 23 October 2017) <https://pdfs.semanticscholar.org/5984/f3549302bae7bcef574fa48acd34d0190e29.pdf> accessed 25 July 2019 at p.4

[1351] R White, 'FATCA: Who Forgot to Attach the Carrot to the Stick? (2018) 10 Geo Mason J Int'l Com L 78, 100

[1352] Ibid

US loses each year to offshore tax evasion,[1353] from the outset, FATCA was only expected to recover just over 1% of this sum each year.[1354] Therefore, either initial estimates were grossly inflated, or FATCA has not been very successful thus far in combatting tax evasion. However, it is likely that FATCA has generated other benefits, which are difficult to quantify, such as deterring others from evading tax offshore and increasing taxpayer morale.[1355]

The small gains made by FATCA in combatting tax evasion must also be weighed against the cost of its implementation. Although it is difficult to estimate the true extent of these costs, with current estimates ranging from millions to billions of dollars,[1356] it is clear that they are substantial and likely to outweigh any benefits. In the UK alone, compliance with FATCA was estimated to cost businesses between £1,100 million and £2,000million, with an initial cost to HMRC of around £5 million.[1357] Broderick estimated the worldwide cost of FATCA to be around $8 billion per year,[1358] or ten times the yearly amount raised by FATCA.[1359] In contrast, the Swiss-American Chamber of Commerce estimated that if all FFIs complied with FATCA it would cost around $500-$1000billion worldwide, with running costs of $10-30billion.[1360] If correct, this would mean that the US is only getting around $1 for every $100 spent on FATCA worldwide.[1361] Moreover, the cost of FATCA to the IRS must also be taken away from any revenue generated; an estimated $380million.[1362] Of course, most of these costs are not borne by the US, but by FFIs, which set aside around $1million to comply with FATCA in 2016, with

[1353] US Senate Permanent Subcommittee on Investigations, *Tax Haven Banks and US Tax Compliance* (July 2008) p.1; This statement is repeated in US Senate Subcommittee on Investigations, *Staff Report on Dividend Tax Abuse: How Offshore Entities Dodge Taxes on US Stock Dividends* (September 2008) p.1
[1354] W Byrnes, D Kleinfeld, 'Background and Current Status of FATCA' in WH Byrnes, RJ Munro, *LexisNexis Guide to FATCA & CRS Compliance* (5th ed, LexisNexis 2017) p.4
[1355] I Grinberg, 'Beyond FATCA: An Evolutionary Moment for the International Tax System' (Georgetown Law Faculty Working Papers, Paper No. 160, 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1996752> accessed 20 July 2019 p.40-41
[1356]J Heiberg, 'FATCA: Toward a Multilateral Automatic Information Reporting Regime' (2012) 69 Wash & Lee L Rev 1685, 1705
[1357] HMRC, 'The International Tax Compliance (United States of America) Regulations 2013' (Impact Note, August 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/357543/itc-regs-2013.pdf> accessed 25 July 2019 p.4
[1358] RW Wood, 'FATCA Carries Fat Price Tag' (Forbes, 30 November 2011) <https://www.forbes.com/sites/robertwood/2011/11/30/fatca-carries-fat-price-tag/#654558834ae9> accessed 25 July 2019
[1359] R White, 'FATCA: Who Forgot to Attach the Carrot to the Stick? (2018) 10 Geo Mason J Int'l Com L 78, 101
[1360] Swiss American Chamber of Commerce, 'Some Thoughts on FATCA' (25 July 2011) <https://helveticla.files.wordpress.com/2011/09/thoughts-on-fatca-july-2011.pdf> accessed 25 July 2019
[1361] Ibid, 'Ask the world to pay $100 for the US to get less than $1'
[1362] Treasury Inspector General for Tax Administration, 'Despite Spending Nearly $380 Million, the Internal Revenue Service Is Still Not Prepared to Enforce Compliance With the Foreign Account Tax Compliance Act' (5 July 2018, RN 2018-30-040) <https://www.treasury.gov/tigta/auditreports/2018reports/201830040fr.pdf> accessed 25 July 2019

around 7% setting aside over $10million.[1363] Therefore, the costs of implementing FATCA appear to substantially exceed its benefits in combatting tax evasion. This has led many to conclude that FATCA is simply 'economic nonsense',[1364] or the equivalent of 'going after a beehive with a tactical nuclear weapon'.[1365]

Improving FATCA

Analysing the costs and benefits of FATCA may lead to the conclusion that FATCA should be repealed. Many have asserted that cost benefit analyses are inappropriate in the financial crime context, as potential benefits are often impossible to measure,[1366] and benefits which are quantifiable may not be the best indicators of effectiveness.[1367] However, one of the primary indicators of the effectiveness of tax evasion law and its enforcement is its ability to facilitate the collection of revenue and recover revenue lost through tax offences.[1368] Accordingly, the fact that the cost of implementing FATCA exceeds its quantifiable benefits should be of concern. However, although tax law and enforcement decisions have historically been heavily influenced by economic considerations, in recent times, there has been an increased public appetite to combat tax evasion and prosecute tax evaders, regardless of the cost.[1369] In this respect, if FATCA was an effective tool in combatting tax evasion, its use might be justified notwithstanding the costs borne by financial institutions. Or, conceptualised differently,

[1363] Thomson Reuters, 'FATCA and CRS: How Ready Are You?' (FATCA & CRS Readiness Survey 2016) <https://tax.thomsonreuters.com/site/wp-content/pdf/onesource/fatca-crs-readiness-survey.pdf> Accessed 25 July 2019; As a result, FATCA has on average decreased the profits of compliant FFIs by around 1.2-3.6% (1.2% of assets, 3.6% of equity). A Belnap, J Thornock, B Williams, 'The Long Arm of the U.S. Tax Law: Compliance Rates and Costs Related to FATCA' (Economics, Ethics and Law Seminar, Norwegian School of Economics, 30 August 2018) <https://www.nhh.no/globalassets/departments/accounting-auditing-and-law/seminar-papers/thornock---fatca---august-2018.pdf> p.6

[1364] Brodzka, 'FATCA From The European Union Perspective' (2013) 2 Journal of Governance and Regulation 7, 9

[1365] SD Michel, HD Rosenbloom, 'FATCA and Foreign Bank Accounts: Has the U.S. Overreached?' [2011] Tax Analysts 709, 712; or 'Using a sledgehammer to crack a nut' F Behrens, 'Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand' [2013] Wis L Rev 205

[1366] See M Levi, P Reuter, T Halliday, 'Can the AML System Be Evaluated Without Better Data?' (2018) 69 *Crime, Law and Social Change* 307; J Ferwerda, 'The Effectiveness of Anti-Money Laundering Policy: A Cost-Benefit Perspective' in C King, C Walker, J Gurulé. (Eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave MacMillan, London, 2018) p.317

[1367] For example, the aim of anti-money laundering legislation is to disrupt and prevent crime rather than collect funds for law enforcement agencies M Goldby, 'Anti-Money Laundering Reporting Requirements Imposed by English Law: Measuring Effectiveness and Gauging the Need for Reform' (2013) 4 *Journal of Business Law* 367, 383

[1368] The collection of tax has long been prioritised by HMRC, see HM Revenue & Customs, 'HMRC's Criminal Investigation Policy' (Guidance, 4 September 2018) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 26 April 2019

[1369] See ch.1

unquantifiable benefits, such as tax payer morale, could be afforded a higher priority than quantifiable benefits in such analyses.

For now, it is clear that several amendments could be made to FATCA to improve its effectiveness in detecting tax evasion by eradicating loopholes, including the fact that tax evaders can hold their assets under closely held private investment entities.[1370] If these private trusts and companies are classed as FIs, they are required to report their US account holders.[1371] However, this is akin to self-reporting and, if the owner of the FFI is evading tax, such reporting is unlikely to take place.[1372] Further, tax evaders may hold their assets in entities classified as exempt from FATCA reporting, such as an active NFFE or an exempt FFI.[1373] Conversely, tax evaders may use accounts in FFIs subject to FATCA, but ensure the accounts are emptied before the end of the year to avoid the reporting of high balances,[1374] or may use several different accounts to avoid reaching the $50,000 reporting threshold.[1375] In addition, tax evaders may simply hold assets that are not covered by FATCA, such as, real property, gold, artwork and cryptocurrencies.[1376] Indeed, following FATCA there was increased investment in property in jurisdictions that do not restrict foreign buyers,[1377] as well as an increase in art and antiquities held in Swiss freeports.[1378] If these loopholes were closed, a much larger proportion of evaded taxation is likely to be detected and recovered from offshore. Even some evasion opportunities remain, it is unlikely that FATCA will have a substantial impact on tax evasion.

FATCA may not have led to expected levels of recovery owing to the IRS' lax enforcement efforts. Although the US has taken action against employees of FFIs for not complying with FATCA,[1379] several governmental reports have found that very little enforcement action has been taken against noncompliant taxpayers, whose activities were revealed through

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[1370] N Noked, 'Tax Evasion and Incomplete Tax Transparency' (2018) 7 Laws 31, 36; N Noked, 'FATCA, CRS, and the Wrong Choice of Who to Regulate' (2018) 22 FLTXR 77, 93-98
[1371] Ibid
[1372] Ibid
[1373] N Noked, 'Tax Evasion and Incomplete Tax Transparency' (2018) 7 Laws 31, 36-37
[1374] Ibid, p.37-8
[1375] J Mukadi, 'FATCA: Getting Rid of U.S. Clients Will Not Get You Off The Grid' [2012] Journal of International Taxation 1, 4
[1376] N Noked, 'Tax Evasion and Incomplete Tax Transparency' (2018) 7 Laws 31, 34-5; R White, 'FATCA: Who Forgot to Attach the Carrot to the Stick? (2018) 10 Geo Mason J Int'l Com L 78, 97-98
[1377] L DeSimone, R Lester, K Markle, 'Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (FATCA)' (Stanford Graduate School of Business Working Paper, Paper No. 3744, 1 February 2019) <https://www.gsb.stanford.edu/faculty-research/working-papers/transparency-tax-evasion-evidence-foreign-account-tax-compliance-act> accessed 22 July 2019, p.3
[1378] Ibid, p.4
[1379] *United States v. Robert Bandfield et al*., No. 1:14-CR-00476-ILG, 2017 WL 924789 (E.D.N.Y. Feb. 10, 2017); *United States v. Baron.,* No. 18-CR-102 (S-1), 2018 (E.D.N.Y. 11 September 2018)

FATCA.[1380] The IRS attributes this inaction to the huge volumes of poor quality data received from FFIs.[1381] However, this situation is unacceptable and must be rectified; if the IRS is asking other jurisdictions and their FFIs to expend enormous sums to comply with FATCA, it should be obligated to make use of the information it receives.

Conclusion

FATCA theoretically provides a solution to the problem of offshore tax evasion by US taxpayers by providing an alternative to the ineffective system of exchange of information on request. Although this development would have been inconceivable, the US managed to effect this change by using the strength and size of its financial markets to force compliance. However, FATCA has not led to the detection of many tax evaders, nor the recovery of significant sums of evaded tax. This may be in part attributable to the loopholes inherent in FATCA, or lax enforcement efforts by the IRS. Nonetheless, even if the implementation and enforcement of FATCA were to be improved, a cost benefit analysis of FATCA would lead many to conclude that the benefits stemming from the detection of offshore tax evasion are not worth the astronomical sums involved in FATCA compliance, nor the detrimental impact it has had on many individuals.[1382] This will depend on whether tax evasion is to be treated as a crime like any other, to be prevented at almost any cost, or as an unusual category of criminal offence, where any legislative and enforcement decisions must be based on economic considerations. This will be a debate that needs to take place at the international level. Nevertheless, even if a cost benefit analysis is considered appropriate, unquantifiable benefits must also be considered, such as an increase in deterrence and taxpayer morale, through the visible actions of a government taking a stance against the most egregious instances of this offence.

Nevertheless, although FATCA may have theoretically been a well-conceived solution to the problem of offshore tax evasion, the methods by which it was implemented were fundamentally flawed. In particular the US' imposition of economic sanctions to achieve its domestic policy

[1380] Treasury Inspector General for Tax Administration, 'Despite Spending Nearly $380 Million, the Internal Revenue Service Is Still Not Prepared to Enforce Compliance With the Foreign Account Tax Compliance Act' (5 July 2018, RN 2018-30-040) <https://www.treasury.gov/tigta/auditreports/2018reports/201830040fr.pdf> accessed 25 July 2019, p.5; US Government Accountability Office, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on US Persons Abroad* (GAO-19-180, April 2019) p.14

[1381] Ibid

[1382] 'Just as it is not optimal to station a police officer at each street corner to eliminate robbery and jaywalking completely, it is not optimal to eliminate tax evasion.' J Slemrod, 'Cheating Ourselves: The Economics of Tax Evasion' (2007) 21 Journal of Economic Perspectives 25, 43

goals sets a dangerous precedent in international law.[1383] Avi-Yonah suggests that this may be an example of 'constructive unilateralism' by the US, whereby US global leadership often leads to positive outcomes in the field of international taxation.[1384] To some extent this appears to be correct, as FATCA has led to a proliferation of FATCA-style legislation in other jurisdictions,[1385] alongside the adoption of automatic exchange as the new international tax standard by the OECD and EU.[1386] However, in order for this constructive unilateralism to be acceptable, US action would need to produce a positive result globally, not just for the US. At present, the US' inability to fully reciprocate under FATCA, and refusal to sign up to the OECD's regime,[1387] is hindering global efforts to combat tax evasion.

4.4 The Automatic Exchange of Information

4.4.1 The Common Reporting Standard

Introduction

Following the financial crisis, the OECD encouraged most of the developed world to commit to the system of exchange of information on request. However, states started to become despondent with this system, with it increasingly being perceived as an ineffective tool in combatting tax evasion. Accordingly, states sought other forms of international cooperation to enable them to detect and address tax evasion. In 2003, the EU introduced the first multilateral framework for AEOI through the Savings Tax Directive (EUSD).[1388] Although, the EUSD was

[1383] JS Wisiackas, 'Foreign Account Tax Compliance Act: What it Could Mean for the Future of Financial Privacy' (2017) 31 Emory Int'l L Rev 585, 619

[1384] Reuven S Avi-Yonah, 'Constructive Unilateralism: U.S. Leadership and International Taxation' (2016) 42 Int'l Tax J 17, 17; Cockfield labels this phenomenon 'regulatory emulation' AJ Cockfield, 'Shaping International Tax Law and Policy in Challenging Times' (2018) 54 Stan J Int'l L 223, 234 citing AJ Cockfield, 'Tax Integration Under NAFTA: Resolving the Conflict Between Economic and Sovereignty Interests' (1998) 34 Stan J Int'l L 39, 45-46

[1385] Such as the UK's 'Son of FATCA' legislation, which applies to its crown dependencies and overseas territories and France's 'Mini FATCA' aimed at offshore trusts JD Blank, R Mason, 'Exporting FATCA' (2014) 142 Tax Notes 1245, 1247. The UK's 'Son of FATCA' or the Crown Dependency/Overseas Territory Agreements (CDOT) were implemented via the International Tax Compliance (Crown Dependencies and Gibraltar) Regulations, SI 2014/520. These obligations have now been replaced by those under the Common Reporting Standard (see below).

[1386] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD Publishing 2014)

[1387] OECD, *Automatic Exchange of Information Implementation Report 2018* (OECD Publishing 2018) p.4

[1388] Council Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments [2003] OJ L 157

'riddled with exceptions and loopholes',[1389] leading to its eventual repeal,[1390] it established the AEOI as a viable alternative to the ineffectual system of exchange of information on request.

Additionally, envisaging the global move towards AEOI, in 2009, Switzerland began to develop an alternative, namely, the 'Rubik' model.[1391] Under this model, Switzerland agreed to cooperate with a select number of states to combat tax evasion, namely, Austria, Germany and the UK.[1392] The agreements obliged Swiss paying agents to participate in the regularisation of the contracting state's residents' tax affairs, by deducting at source a withholding payment from the taxpayer's assets to account for past evasion.[1393] The agreements also required Swiss paying agents to deduct a withholding tax on income and gains generated by the asset.[1394] The withheld sums were then transferred to the competent authority of Switzerland, followed by the state of residence of the taxpayer.[1395] Alternatively, the taxpayer could authorise the exchange of information to escape the withholding tax,[1396] or had the option of closing or transferring the account.[1397] The intention of the Rubik model was to frustrate the global acceptance of an AEOI system by presenting a model with greater privacy protections.[1398] However, the Swiss model was largely regarded as ineffective,[1399] as it contained major loopholes and was unlikely to be workable on a global scale.[1400] The UK-Swiss agreement

[1389] M Meinzer, 'Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?' (Tax Justice Network, 27 February 2017) <https://mpra.ub.uni-muenchen.de/77576/1/MPRA_paper_77576.pdf> accessed 9 August 2019, p.7
[1390] Council Directive (EU) 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments [2015] OJ L 301
[1391] JG Song, 'The End of Secret Swiss Accounts: The Impact of the U.S. Foreign Account Tax Compliance Act (FATCA) on Switzerland's Status as a Haven for Offshore Accounts' (2015) 35 NW J Int'l L & Bus 687, 707
[1392] Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Cooperation in the Area of Taxation (signed 6 October 2011, entered into force 1 January 2013) 52812 UNTS 1; Agreement Between the Federal Republic of Germany and the Swiss Confederation on Cooperation in the Area of Taxation and Financial Markets (signed 21 September 2011) <http://www.news.admin.ch/NSBSubscriber/message/attachments/26526.pdf>; Agreement between the Swiss Confederation and the Republic of Austria on Cooperation Concerning Tax Matters and Financial Markets (signed 13 April 2012, entered into force 1 January 2013) 2949 UNTS 211
[1393] E.g. Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Cooperation in the Area of Taxation (signed 6 October 2011, entered into force 1 January 2013) 52812 UNTS 1, Art 5, Art 9
[1394] Ibid, Art 19
[1395] Ibid, Art 9, Art 29
[1396] Ibid, Art 5, Art 10
[1397] Under Art 18, Switzerland agreed to identify the ten most popular jurisdictions for the transfer of assets from Swiss banks.
[1398] 'Its fundamental objective is to ensure that automatic tax information exchange does not take hold' I Grinberg, 'The Battle Over Taxing Offshore Accounts' (2012) 60 UCLA L Rev 304, 339
[1399] Tax Justice Network, 'The UK-Swiss Tax Agreement: Doomed to Fail: Why the Deal will Raise Little, and May Be Revenue-Negative for the UK' (21 October 2011) <https://www.taxjustice.net/cms/upload/pdf/TJN_1110_UK-Swiss_master.pdf> accessed 10 August 2019
[1400] For instance, customers could move their accounts to Swiss bank branches in other jurisdictions, or could use legal structures to conceal their ownership of the account, ibid; In addition, even if withholding was applied,

raised 'significantly less' than originally expected.[1401] The Swiss model was inferior to the AEOI in that it enabled those who had evaded taxation to escape without detection or punishment, potentially damaging taxpayer morale and future levels of compliance.[1402] Nonetheless, the emergence of FATCA precipitated a global movement towards the AEOI, eventually rendering the Swiss approach redundant.[1403]

The Common Reporting Standard

As part of the G5's announcement concerning their intention to implement FATCA, the G5 also committed to 'adapting FATCA in the medium term to a common model for AEOI'.[1404] In 2013, AEOI was endorsed by the G20 Finance Ministers, Central Bank Governors,[1405] and G20 Leaders as the new international tax standard.[1406] As a result, the OECD began to develop the measures that would need to be taken to effect the new standard,[1407] eventually publishing the Common Reporting Standard (CRS) and a Model Competent Authority Agreement (MCAA).[1408] As FATCA was the catalyst for the CRS, the CRS is heavily inspired by FATCA.

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the agreements did not cover changes in principal in foreign accounts, I Grinberg, 'The Battle Over Taxing Offshore Accounts' (2012) 60 UCLA L Rev 304, 348; see also LU Cavelti, 'Automatic Information Exchange versus the Withholding Tax Regime Globalization and Increasing Sovereignty Conflicts in International Taxation' (2013) 5 World Tax Journal 172, 201

[1401] 'The agreement is only forecast to raise £1.9 billion compared to the initial expectation of £5.3 billion' Office for Budget Responsibility, *Economic and Fiscal Outlook* (Cm8966, 2014) p.105. The agreement was initially expected to raise £4-7billion, see HM Revenue & Customs, 'Tax Agreement Between the United Kingdom and Switzerland' (Impact Assessment 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192140/uk_switzerland_tax_agreement.pdf> accessed 10 August 2019

[1402] I Grinberg, 'The Battle Over Taxing Offshore Accounts' (2012) 60 UCLA L Rev 304, 347-371; see also T Johnson, 'The Swiss-UK Tax Agreement: The Fiscal Equivalent of Emmental Cheese' (2011) 64 Tax Notes Int'l 717, 719

[1403] Swiss Federal Council, 'Withholding Tax Agreement with United Kingdom to be Terminated' (14 November 2016) <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64508.html> accessed 10 August 2019

[1404] US Treasury Department, 'Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA' (7 February 2012) <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf> accessed 22 July 2019, p.2

[1405] G20 Finance Ministers and Central Bank Governors, 'Communiqué: G20 Meeting of Finance Ministers and Central Bank Governors' (Washington DC, 19 April 2013) <http://www.g20.utoronto.ca/2013/2013-0419-finance.html> accessed 10 August 2019

[1406] G20, 'G20 Leaders' Declaration' (St Petersburg, 6 September 2013) <http://www.g20.utoronto.ca/2013/2013-0906-declaration.html> accessed 10 August 2019

[1407] OECD, *Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains To Be Done* (OECD Publishing, July 2012); OECD, *A Step Change in Transparency: Delivering a Standardised, Secure and Cost Effective Model of Bilateral Automatic Exchange for the Multilateral Context* (OECD Report for the G8 Summit Lough Erne, Enniskillen, June 2013)

[1408]OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD Publishing, July 2014)

The OECD's aim was to avoid 'a proliferation of different and inconsistent models [which] would potentially impose significant costs on both government and business.'[1409]

Although often referred to simply as the CRS, the AEOI actually requires the following three elements; a common standard on information reporting, due diligence and exchange of information (the CRS), a legal and operational basis for the exchange of information, and common or compatible technical solutions.[1410] States must implement the CRS into domestic law to enable financial institutions to conduct due diligence and report information regarding their foreign account holders to the national competent authority.[1411] The competent authority must then exchange this information with the account holder's country of residence, under the authority of a legal instrument permitting the exchange.[1412] Many of the previous agreements discussed in this chapter provided for, but did not require, AEOI such as the DTC, the TIEA and the CoE/OECD Convention.[1413] Consequently, these agreements may be used as the legal basis for the exchange.[1414] However, the AEOI needs to be activated through a separate agreement between the parties, a bilateral or multilateral Competent Authority Agreement (CAA), which sets out the procedure for the exchange of information.[1415] States must also implement legislation to protect the collection, storage, transmission and confidentiality of data.[1416] The OECD has developed IT solutions to facilitate the secure reporting and exchange of information under the CRS, which must be set up in participating states.[1417] In contrast to FATCA, the CRS does not impose a withholding tax for failure to comply, although states are expected to implement penalties for noncompliance in national law.[1418] Once a CAA is in place, the competent authority must automatically exchange this information with the other

[1409] Ibid, p.11
[1410] Ibid
[1411] Ibid, p.14
[1412] Ibid, p.24 (MCAA, Section 2)
[1413] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Art 26; OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002); Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1, Art 6
[1414] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD Publishing, July 2014) p.13
[1415] Ibid, p.14. See also p.21 (Bilateral CAA), Annex 1 (Multilateral CAA) and Annex 2 (Non-reciprocal CAA)
[1416] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters: Implementation Handbook* (2nd edn, OECD Publishing, April 2018) p.52; See also OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD Publishing, July 2014) MCAA Section 5 and associated commentary.
[1417] Ibid, p. 45-49. See also OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD Publishing, July 2014) MCAA Section 3, paras 5, 6 and associated commentary. These solutions include the CRS XML Schema and Common Transition System.
[1418] Ibid, CRS Section 9

jurisdiction, both annually and on an automatic basis.[1419] Following FATCA, there are several versions of the MCAA; bilateral, multilateral, reciprocal and nonreciprocal.[1420]

Implementation of the CRS

Following the release of the CRS, 49 jurisdictions, including the UK, committed to undertaking AEOI in 2017, and 51 jurisdictions committed to undertaking the AEOI in 2018.[1421] The UK implemented the CRS via the International Tax Compliance Regulations 2015.[1422] All jurisdictions that were asked to commit to the AEOI Standard did so promptly, excluding the US.[1423] The US claims that it does not need to implement the CRS, due to the reciprocal approach to implementing FATCA.[1424] Accordingly, most of the developed world, and all major financial centres, have committed to implementing AEOI. The OECD did not ask developing countries to commit to these implementation dates.[1425] The Global Forum was once again tasked with monitoring implementation. The Global Forum found that by the end of 2018, 94 jurisdictions had the complete domestic legal framework in place and 88 jurisdictions had the complete international legal framework in place for the AEOI.[1426] In 2018 alone, information regarding 47 million financial accounts was exchanged, valued at approximately €4.9trillion.[1427] This increased to €10trillion in 2019.[1428]

Is the CRS Effective in Combatting Tax Evasion?

[1419] Ibid, MCAA Section 2 and Section 3
[1420] Ibid, p.14. See also p.21 (Bilateral CAA), Annex 1 (Multilateral CAA) and Annex 2 (Non-reciprocal CAA)
[1421] OECD, 'AEOI: Status of Commitments' (August 2019) <https://www.oecd.org/tax/transparency/AEOI-commitments.pdf> accessed 11 August 2019
[1422] International Tax Compliance Regulations 2015, SI 2015/878
[1423] OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *Automatic Exchange of Information Implementation Report 2018* (OECD Publishing, November 2018) p.4
[1424] See the OECD's footnote on the US in OECD, 'AEOI: Status of Commitments' (August 2019) <https://www.oecd.org/tax/transparency/AEOI-commitments.pdf> accessed 11 August 2019; However, US publications recognise both the lack of reciprocity in FATCA and its benefits to the US, e.g. US Government Accountability Office, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on US Persons Abroad* (GAO-19-180, April 2019) p.33-34
[1425] However, eight developing countries committed to exchanging information in 2019 or 2020. OECD, 'AEOI: Status of Commitments' (August 2019) <https://www.oecd.org/tax/transparency/AEOI-commitments.pdf> accessed 11 August 2019
[1426] ibid, p.14-16
[1427] OECD, *OECD Secretary-General Report to G20 Finance Ministers and Central Bank Governors* (Fukuoka, Japan, OECD Publishing June 2019) p.7
[1428] OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency and Exchange of Information in Times of Covid-19: 2020 Global Forum Annual Report* (OECD Publishing 2020) p.13

As a system for the AEOI, theoretically, the CRS (like FATCA) should be 'game changer' in combatting offshore tax evasion.[1429] Unlike the previous system for the exchange of information on request, the state concerned does not need to possess any evidence or indication of an individual's noncompliance; rather, it will receive information regarding accounts held by all of its residents offshore on an automatic basis, facilitating both the detection and prevention of tax evasion. Additionally, the OECD has been successful in achieving near-universal commitment to the CRS, which is essential to prevent tax evaders from relocating funds to non-compliant jurisdictions.[1430] Almost all secrecy jurisdictions have committed to the CRS. The rapid uptake of the CRS was likely to have been accelerated by revelations contained in recent scandals, such as the UBS, LGT and HSBC leaks, as well as the Panama Papers.[1431]

The CRS is expected to have a significant impact on the amount of wealth held offshore. For instance, the OECD found that bank deposits in international financial centres decreased by 34%, or $551 billion, over the last ten years with AEOI responsible for 20-25% of that decline.[1432] Casi *et al* found that national implementation of the CRS leads to an 11.9% decrease in cross-border deposits held in offshore countries.[1433] It is unclear as to what extent these funds have been repatriated or recovered by national tax authorities, or otherwise relocated to other jurisdictions. The OECD claims that €95billion in additional revenue has been identified globally following the CRS.[1434] In the UK, HMRC has received 5.67 million records, relating to 3 million UK resident individuals, or entities they control, and since 2010 has raised over £2.9 billion through combatting offshore tax evasion.[1435] However, as with FATCA estimates, it is unlikely that the entire estimated amount is directly attributable to the CRS, as these estimates often include sums raised through other initiatives, such as voluntary

[1429]A Pross, P Kerfs, P Hondius, R Housden, 'Turning Tax Policy into Reality – Global Tax Transparency Goes Live' (2017) 27 Int'l Tax Rev 16, 16
[1430] Ibid at p.17
[1431] For instance, the Panama Papers led to Panama signing the CoE/OECD Convention S Oei, D Ring, 'Leak-Driven Law' (2018) 65 UCLA L Rev 532, 561
[1432] OECD, *OECD Secretary-General Report to G20 Finance Ministers and Central Bank Governors* (Fukuoka, Japan, OECD Publishing June 2019) p.7
[1433] Or 27.9% when excluding EU Member States subject to the EUSD. C Spengel, E Casi, B Stage, 'Cross-Border Tax Evasion after the Common Reporting Standard: Game Over?' (Leibniz Centre for European Economic Research Discussion Paper No.18-036, July 2019) <http://ftp.zew.de/pub/zew-docs/dp/dp18036.pdf> accessed 10 August 2019, p.4
[1434] OECD, *OECD Secretary-General Report to G20 Finance Ministers and Central Bank Governors* (Fukuoka, Japan, OECD Publishing June 2019) p.7
[1435] HM Revenue & Customs, HM Treasury, 'No Safe Havens 2019: HMRC's Strategy for Offshore Tax Compliance' (May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802253/No_safe_havens_report_2019.pdf> accessed 10 August 2019, p.4-5

compliance mechanisms.[1436] Nonetheless, it is clear that the implementation of the CRS in the UK has led to the collection of substantial amounts of revenue, likely in excess of initial predictions of £75 million to £270 million annually.[1437]

If a cost benefit analysis is considered appropriate in this context, these figures must be compared with the costs of CRS implementation. Initially, it was anticipated that CRS implementation would be more expensive than FATCA implementation; at a basic level, it is clearly more expensive for financial institutions and their national governments to collect and disseminate information regarding account holders in multiple jurisdictions, as opposed to the US only,[1438] even though benefits may be diffused more widely.[1439] Despite these concerns, the cost of the CRS to financial institutions appears to be considerably less than FATCA. For instance, KMPG estimated that compliance costs would approximate $125 million for UK global banks,[1440] while HMRC estimated that the total costs to businesses would be between £80 and £227million.[1441] Nonetheless, these lower costs are likely attributable to the fact that CRS implementation draws on measures previously implemented for FATCA purposes.[1442] In this respect, it is incredibly difficult to conduct an accurate cost benefit analysis of the CRS alone.

Improving the CRS

[1436] Ibid
[1437] HM Revenue & Customs, 'Tax Administration: Regulations to Implement the UK's Automatic Exchange of Information Agreements' (Impact Assessment, March 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/413976/TIIN_8148_tax_admin_automatic_exchange.pdf> accessed 10 August 2019, p.3
[1438] D Dharmapala, 'Cross-border Tax Evasion under a Unilateral FATCA Regime' (2016) 141 Journal of Public Economics 29, 36
[1439] J Heiberg, 'FATCA: Toward a Multilateral Automatic Information Reporting Regime' (2012) 69 Wash & Lee L Rev 1685, 1706-7
[1440] KPMG, 'Frontiers in Finance: For Decision-Makers in Financial Services' (December 2015) <https://home.kpmg/content/dam/kpmg/pdf/2016/05/GM-MZ-091_FIF_customization_Finland_V3%20-%20final.pdf> accessed 10 August 2019, at p.15
[1441] HM Revenue & Customs, 'Tax Administration: Regulations to Implement the UK's Automatic Exchange of Information Agreements' (Impact Assessment, March 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/413976/TIIN_8148_tax_admin_automatic_exchange.pdf> accessed 10 August 2019, p.4
[1442] Particularly if financial institutions were able to collect and store information establishing the residence of account holders when these accounts were subject to due diligence procedures under FATCA, as in the UK. HM Revenue & Customs, 'Implementing Agreements under the Global Standard on Automatic Exchange of Information to Improve International Tax Compliance' (Summary of Responses, 26 March 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417635/Implementing_Agreements_under_the_Global_Standard_on_Automatic_Exchange_of_Information_to_Improve_International_Tax_Compliance_-_summary_of_responses.pdf > accessed 10 August 2019, p.12

It is clear that greater amounts of evaded taxation could be detected and recovered if several loopholes in the CRS were closed. The CRS suffers from many of the same deficiencies as FATCA; the CRS does not cover assets such as real property, gold, artwork and cryptocurrencies, which may be used to evade taxation.[1443] In addition, tax evaders may hold their assets in entities exempt from CRS reporting, such as an active NFFE or an exempt FFI,[1444] or entities subject to self-reporting, such as closely held private investment entities.[1445] However, the CRS remedies some of the FATCA loopholes through its wider scope. For example, there is no $50,000 reporting threshold under the CRS.[1446] Yet, secrecy jurisdictions may offer schemes that enable tax evaders to avoid CRS reporting, such as residence or citizenship by investment schemes.[1447] Here, a tax evader may claim that they are a resident of the secrecy jurisdiction only, avoiding CRS reporting to the true jurisdiction.[1448] In many jurisdictions, tax evaders will still be able to exploit legal structures to conceal their identity as the BOs of funds or assets.[1449] In some instances, the BOs of these structures will not need to be identified due to their account balances and income structure.[1450] Further, even when BOs must be identified under the CRS, the FATF's high threshold of BO is used.[1451] Moreover, the CRS does not contain a penalty for noncompliance such as FATCA's imposition of a withholding tax, this being a matter for domestic law.[1452] However, this perpetuates divergent

[1443] N Noked, 'Tax Evasion and Incomplete Tax Transparency' (2018) 7 Laws 31, 34-5; R White, 'FATCA: Who Forgot to Attach the Carrot to the Stick? (2018) 10 Geo Mason J Int'l Com L 78, 97-98
[1444] For instance, Hong Kong's Occupational Retirement Scheme see The Economist, 'How Becoming a Hong Kong Pensioner Can Save You Tax' (25 May 2017) <https://www.economist.com/finance-and-economics/2017/05/25/how-becoming-a-hong-kong-pensioner-can-save-you-tax> accessed 10 August 2019
[1445] N Noked, 'Tax Evasion and Incomplete Tax Transparency' (2018) 7 Laws 31, 36; N Noked, 'FATCA, CRS, and the Wrong Choice of Who to Regulate' (2018) 22 FLTXR 77, 93-98
[1446] J Mukadi, 'FATCA: Getting Rid of U.S. Clients Will Not Get You Off The Grid' [2012] Journal of International Taxation 1, 4
[1447] Including Antigua and Barbuda, Bahamas, Bahrain, Barbados, Cyprus, Dominica, Grenada, Malaysia, Malta, Qatar, Saint Kitts and Nevis, Saint Lucia, Seychelles, Turks and Caicos Islands, United Arab Emirates and Vanuatu. OECD, 'Residence/Citizenship by Investment Schemes' (20 November 2018) <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/> accessed 10 August 2019
[1448] A Knobel, 'Passports and Residency for Sale: The OECD Is Sitting on Its Hands. Here's How to Fix the Problem…' (Tax Justice Network, 13 November 2018) <https://www.taxjustice.net/2018/11/13/passports-and-residency-for-sale-the-oecd-is-sitting-on-its-hands-heres-how-to-fix-the-problem/> accessed 10 August 2019
[1449] AJ Cockfield, 'Shaping International Tax Law and Policy in Challenging Times' (2018) 54 Stan J Int'l L 223, 230
[1450] M Meinzer, 'Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?' (Tax Justice Network, 27 February 2017) <https://mpra.ub.uni-muenchen.de/77576/1/MPRA_paper_77576.pdf> accessed 9 August 2019, p.21
[1451] Ibid
[1452] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD Publishing 2014) p.61

enforcement practices.[1453] This is problematic because if penalties for noncompliance are set too low, financial institutions may regard the benefits of not reporting to be worth the potential risk and consequences if caught.[1454] In particular, secrecy jurisdictions may be prone to lax enforcement.[1455]

Nevertheless, 'the biggest loophole of all' is the US' refusal to participate in the CRS.[1456] The US has declined to participate in the CRS because of its reciprocal approach to implementing FATCA,[1457] yet FATCA is not truly reciprocal.[1458] Consequently, tax evaders can hold assets in the US and avoid both FATCA and CRS reporting.[1459] As discussed in the next chapter, this problem is exacerbated by the fact that several US States regularly permit individuals to set up legal structures without identifying the BOs.[1460] In fact, the US has been rated as the second most secretive jurisdiction in the world,[1461] and research has found that the US is one of the easiest places to set up a shell company and anonymous bank account.[1462] Indeed, Casi *et al* found that, following the introduction of the CRS, cross-border deposits located in the US were 10.9% higher than those held in other countries.[1463] Recently the US has reiterated its

[1453] For example, national financial penalties range from $762 to $2.5billion. E Casi, S Nenadic, M Dinko Orlic, C Spengel, 'A Call to Action: From Evolution to Revolution on the Common Reporting Standard' (2019) 2 BTR 166, 185-187
[1454] Ibid
[1455] As Meinzer notes, 'the administrations of many secrecy jurisdictions are unlikely to strictly enforce laws which they may have only grudgingly accepted.' M Meinzer, 'Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?' (Tax Justice Network, 27 February 2017) <https://mpra.ub.uni-muenchen.de/77576/1/MPRA_paper_77576.pdf> accessed 9 August 2019, p.21
[1456] The Economist, 'Financial Transparency – The Biggest Loophole of All' (20 February 2016) <https://www.economist.com/international/2016/02/20/the-biggest-loophole-of-all> accessed 24 July 2019
[1457] See the OECD's footnote on the US in OECD, 'AEOI: Status of Commitments' (August 2019) <https://www.oecd.org/tax/transparency/AEOI-commitments.pdf> accessed 11 August 2019
[1458] A Christians, 'What You Give and What You Get: Reciprocity under a Model 1 Intergovernmental Agreement on FATCA' (2013) Cayman Financial Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292645> accessed 22 July 2019 p.3-4; PA Cotorceanu, 'Hiding in Plain Sight: How Non-US Persons Can *Legally* Avoid Reporting Under Both FATCA and GATCA' (2015) 21 T&T 1050, 1053
[1459] Ibid
[1460] AJ Cockfield, 'Shaping International Tax Law and Policy in Challenging Times' (2018) 54 Stan J Int'l L 223, 238-9
[1461] Tax Justice Network, 'Financial Secrecy Index 2018: Narrative Report on USA' (2018) <http://www.financialsecrecyindex.com/PDF/USA.pdf> accessed 1 August 2019, p.1
[1462] JC Sharman, 'Shopping for Anonymous Shell Companies: An Audit Study of Anonymity and Crime in the International Financial System' (2010) 24 Journal of Economic Perspectives 127; see also MG Findley, DL Nielson, JC Sharman, *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism* (Cambridge Studies in International Relations, CUP 2014) p.61
[1463] C Spengel, E Casi, B Stage, 'Cross-Border Tax Evasion after the Common Reporting Standard: Game Over?' (Leibniz Centre for European Economic Research Discussion Paper No.18-036, July 2019) <http://ftp.zew.de/pub/zew-docs/dp/dp18036.pdf> accessed 10 August 2019, p.4

opposition to implementing the CRS in lieu of FATCA, noting that it would provide no additional benefit to the IRS and would generate additional unknown costs.[1464]

Accordingly, action needs to be taken to address these loopholes in order to preserve the effectiveness of the CRS. The OECD has introduced a facility enabling the disclosure of information concerning CRS avoidance schemes,[1465] and introduced Model New Disclosure Rules requiring professionals to inform national tax authorities of any schemes they implement for their clients.[1466] Nonetheless, much will depend on both the states' and the OECD's responses to the schemes identified.[1467] The OECD is unlikely to take action against the US, as it is the largest contributor to its budget.[1468] However, it is imperative that the OECD encourages or forces the US to implement either the CRS, or a truly reciprocal approach to FATCA, to ensure that tax evaders cannot simply move their investments and assets to the US. In this respect, it is positive to see that the US has finally enacted a limited BO register.[1469]

Conclusion

The CRS, like FATCA, theoretically provides a solution to the problem of offshore tax evasion by providing an alternative to the ineffective system of exchange of information on request. Significant sums have already been recovered as a result of CRS implementation. In many ways, the CRS is likely to be more effective than FATCA, most notably due to its global reach. However, the imposition of a withholding penalty under FATCA may ensure greater global compliance with its provisions, rendering it more effective in practice. In addition, the OECD and Global Forum will need to adequately monitor and enforce the implementation of the standard so that they may detect and take steps to address any loopholes or enforcement

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[1464] US Government Accountability Office, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on US Persons Abroad* (GAO-19-180, April 2019) p.33-34

[1465] OECD, 'Common Reporting Standard: Share Your Insight on CRS Avoidance Schemes With Us' <https://survey2018.oecd.org/Survey.aspx?s=57ad7d6ff41d4b89a7435e6cceb9bec7 > accessed 10 August 2019

[1466] OECD, *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures* (OECD Publishing 2018); OECD, *International Exchange Framework for Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures* (OECD Publishing 2019)

[1467] For instance, the TJN has lamented the OECD's solution to the citizenship/residence by investment schemes. A Knobel, 'Passports and Residency for Sale: The OECD Is Sitting on Its Hands. Here's How to Fix the Problem…' (Tax Justice Network, 13 November 2018) <https://www.taxjustice.net/2018/11/13/passports-and-residency-for-sale-the-oecd-is-sitting-on-its-hands-heres-how-to-fix-the-problem/> accessed 10 August 2019

[1468] The US provides 20% of the OECD's entire budget, or more than double the contribution made by other OECD countries. OECD, 'Member Countries' Budget Contributions for 2017' (2017) <https://www.oecd.org/about/budget/member-countries-budget-contributions.htm> accessed 10 August 2019

[1469] See chapter 5.

weaknesses, which will be exploited by tax evaders. One of the main loopholes that will need to be addressed is the US' refusal to provide full reciprocity.

Nevertheless, both the CRS and FATCA raise questions over the appropriateness of taking such drastic measures to combat tax evasion. Both systems for the AEOI are expensive for states and their financial institutions to implement and it may be questioned whether the potential revenue at stake is worth these costs. Unfortunately, it is difficult to conduct an accurate cost benefit analysis of the CRS, as FATCA implementation reduced many of the costs attributable to the CRS. Nevertheless, some may view a cost benefit analysis as inappropriate, as it may be considered necessary to combat the inequality and unfairness engendered by tax evasion, regardless of the cost. As noted above, this needs to be a debate that takes place at the international level. Even if a cost benefit analysis is deemed appropriate, unquantifiable benefits of the AEOI must be taken into account, such as deterrence and an increase in tax morale, alongside unquantifiable costs, such as risks to data protection and rights to privacy.

4.4.2 Risks of the Automatic Exchange of Information

FATCA and the CRS's adoption of a 'generalized basis of information exchange' has been considered to pose a grave risk to privacy and data protection.[1470] These initiatives require the collection and periodic exchange of vast amounts of personal information, which can reveal intimate facts about an individual's personal life.[1471] Indeed, more information is now provided on taxpayers' offshore assets than is often collected on domestic assets in the state concerned.[1472] AEOI may lead to an increased risk of both psychological and physical harm to individuals.[1473] There are fears that FATCA and CRS information will be transferred to corrupt governments,[1474] which may use the information for inappropriate, self-interested purposes,[1475] or may fail to protect the information leaving individuals at risk of extortion and kidnapping.[1476]

[1470] F Noseda, 'Common reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection of Privacy and Data Protection' (2017) 23 Trusts & Trustees 404, 404

[1471] JC Sharman, 'Privacy as Roguery: Personal Financial Information in an Age of Transparency' (2009) 87 Public Administration 717, 719

[1472] R Hay, 'Tax Data Transparency: UK' (2017) 23 Trusts & Trustees 139, 139

[1473] KW Lotmore, 'The Decline of Financial Privacy and its Costs to Society' (2017) 23 Trusts & Trustees 944, 952

[1474] Commentators often point to CRS jurisdictions' status on Transparency International, 'Corruption Perceptions Index' (2018) <https://www.transparency.org/cpi2018> accessed 10 August 2019

[1475] KW Lotmore, 'The Decline of Financial Privacy and its Costs to Society' (2017) 23 Trusts & Trustees 944, 951

[1476] IJ Mosquera Valderrama, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism' (2015) 7 World Tax Journal 1, 20

Moreover, data generated by the CRS and FATCA may be used for inappropriate and unfair data profiling purposes.[1477] In this respect, the AEOI has been rushed into by the US, and later the OECD, following the revelations contained in a number of high-profile tax scandals, without due consideration being paid to the risks of this measure.[1478]

Within the EU rights to privacy and data protection are contained in the European Convention on Human Rights,[1479] the Charter of Fundamental Rights of the European Union,[1480] and the General Data Protection Regulation.[1481] States may be able to restrict the application of these rights in accordance with the law, providing such interference is necessary in a democratic society, in the interests of the economic well-being of the country and proportionate to the aim pursued.[1482] In this respect, the exchange of information on request has been held to be a necessary and proportionate interference with the right to privacy and data protection.[1483] However, it is questionable whether the AEOI whereby reporting is automatic and not based on indications of tax non-compliance, let alone tax evasion, can be considered be a necessary and proportionate interference.[1484] These concerns have been raised by the Article 29 Working

[1477] E Politou, E Alepis, C Patsakis, 'Profiling Tax and Financial Behaviour with Big Data under the GDPR' (2019) 35 Computer Law & Security Review 306, 311
[1478] An example of 'leak-driven law', S Oei, D Ring, 'Leak-Driven Law' (2018) 65 UCLA L Rev 532, 601-8
[1479] Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR), Art 8
[1480] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EU Charter), Art 7, Art 8
[1481] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1 (GDPR); see also Article 16(1) of the Treaty on the Functioning of the European Union [2012] OJ C 326/01; Tax data was considered personal data for the purposes of the General Data Protection Directive Case C-201/14 *Smaranda Bara and Others v Casa Naţională de Asigurări de Sănătate and Others* [2015] ECR 1-638
[1482] ECHR (n 650), Art 8(2); EU Charter (n 651), Art 52; GDPR (n 652) Art 23
[1483] *FS v Germany* App no 30128/96 (European Commission on Human Rights, 27 November 1996); *Othyma Investments BV v the Netherlands* App no 75292/10 (ECtHR, 16 June 2015); *G.S.B. v. Switzerland* App no 28601/11 (ECtHR, 22 December 2015)
[1484] F Noseda, 'Common reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection of Privacy and Data Protection' (2017) 23 Trusts & Trustees 404, 404

Party,[1485] the European Data Protection Supervisor,[1486] the European Commission's AEFI Group,[1487] the Council of Europe's Consultative Committee[1488] and the Petition Committee of the European Parliament.[1489]

The CRS requires member states to protect confidentiality through its legal framework, comprising of the relevant international agreement and domestic legislation, information security management, and monitoring compliance.[1490] The relevant international agreements for the CRS and FATCA require information to be kept confidential in accordance with domestic law,[1491] and provide exceptions to the obligation to exchange information, which may protect taxpayers.[1492] Under the CRS, information should not be exchanged with countries that

[1485] Article 29 Working Party, 'Letter addressed to Mr. Zourek, Director General of Taxation and Customs Union regarding Foreign Account Tax Compliance Act (FATCA)' (21 June 2012) < https://ec.europa.eu/justice/article-29/documentation/other-document/files/2012/20120621_letter_to_taxud_fatca_en.pdf> accessed 10 August 2019; Article 29 Working Party, 'Letter addressed to Mr. Zourek, Director General of Taxation and Customs Union, regarding Foreign Account Tax Compliance Act (FATCA) and Model II Agreements' (1 October 2012) <https://ec.europa.eu/justice/article-29/documentation/other-document/files/2012/20121001_letter_to_taxud_fatca_en.pdf> accessed 10 August 2019; Article 29 Working Party, 'Letter to OECD, G20, European Commission, European Parliament, Council of the European Union on OECD Common Reporting Standard' (18 September 2014) <https://ec.europa.eu/justice/article-29/documentation/other-document/files/2014/20140918_letter_on_oecd_common_reporting_standard.pdf.pdf> accessed 10 August 2019

[1486] European Data Protection Supervisor, 'Opinion 2 /2015 Opinion of the EDPS on the EU-Switzerland Agreement on the Automatic Exchange of Tax Information' (8 July 2015) <https://edps.europa.eu/sites/edp/files/publication/15-07-08_eu_switzerland_en.pdf> accessed 10 August 2019

[1487] European Commission, 'First Report of the Commission AEFI Expert Group on the Implementation of Directive 2014/107/EU for Automatic Exchange of Financial Account Information' (March 2015) <http://blog.cubeiq.gr/files/EC_First_Report_ExpertGroup_Automatic-Exchange-Financial-Information.pdf> accessed 10 August 2019, p.7-8

[1488] Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data [ETS No. 108] (T-PD), 'Opinion on the Implications for Data Protection of Mechanisms for Automatic Inter-State Exchanges of Data for Administrative and Tax Purposes' (4 June 2014) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806945a0> accessed 10 August 2019

[1489] C Garbarino, 'FATCA Legislation and its Application at International and EU Level' (Study for the PETI Committee, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament 2018) <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604967/IPOL_STU(2018)604967_EN.pdf> accessed 10 August 2019

[1490] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD Publishing 2014) Commentary on Section 5 (p.81)

[1491] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2017) Art 26(2); Convention on Mutual Administrative Assistance in Tax Matters, as Amended by the 2010 Protocol (entered into force 1 June 2011) 3013 UNTS 1, Art 22; OCED, *Agreement on Exchange of Information in Tax Matters* (OECD Publishing, 2002) Art 8; FATCA Model 1 IGAs refer to the confidentiality provisions in the relevant international agreement, often the OECD DTC – see Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland to Improve International Tax Compliance and to Implement FATCA' (12 September 2012) <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-UK-9-12-2012.pdf> accessed 10 August 2019, Art 3(7)

[1492] See, for example, the exceptions contained in Art 26(3) of the OECD DTC, discussed at p. ; X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.220

do not observe common privacy and data protection guidelines.[1493] Nevertheless, the provision of vast amounts of personal information to an array of countries with divergent standards renders it questionable whether purely domestic safeguards are sufficient in practice. For example, many revenue collection authorities have illustrated their inability to prevent data leaks.[1494]

The need to reform FATCA and the CRS to better protect rights of privacy and data protection will depend on whether such measures are considered proportionate to the aim pursued. If the CRS is considered too costly in human and financial terms, it may need to be abolished. This would necessitate a return to the former international tax standard, the exchange of information on request, which has widely been regarded as ineffective. However, perhaps the increasing acceptance of the standard, along with the recognition of group requests shortly before the CRS was developed, would have enabled the on request system to work effectively, had it not been replaced.[1495] Although this arrangement would not catch as many instances of tax evasion as the CRS, infringements of privacy and data protection are more likely to be proportionate when there is at least a suspicion that an offence has been committed.[1496] Nevertheless, the resources expended on FATCA and the CRS and the benefits they have provided thus far, mean that abolishing the AEOI system in its entirety is unlikely to be a feasible option. Avi-Yonah and Mazzoni advocate restricting the AEOI system to the highest risk accounts, identified using 'red flag indicators' similar to those provided under AML legislation.[1497] This appears to be a sensible solution to the competing interests of preventing tax evasion and protecting rights to privacy and data protection.

4.4.3 Implementation in the European Union

The EU has long provided for administrative assistance in tax matters having enacted the first administrative assistance Directive relating to direct taxation in 1977.[1498] Over time, the scope

[1493] OECD, *Automatic Exchange of Information Implementation Report 2018* (OECD Publishing 2018) p.7; See also OECD, *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes* (OECD Publishing 2012) p.7
[1494] In 2014/15 alone, HMRC recorded over 6,000 data breaches, National Audit Office, *Protecting Information Across Government* (HC 625-I, 2016-17) p.22
[1495] F Noseda, 'Trusts and Privacy: A New Battle Front' (2017) 23 Trusts & Trustees 301, 302-303
[1496] Here, the limitation on the right to privacy and data protection is more likely to be 'limited to what is strictly necessary' ibid
[1497] RS Avi-Yonah, G Mazzoni, 'Taxation and Human Rights: A Delicate Balance' in PG Alston, NR Reisch, *Tax, Inequality, and Human Rights* (OUP 2019) p.260
[1498] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation [1977] OJ L 336

of the Directive was extended to cover VAT,[1499] excise duties,[1500] and taxes on insurance premiums.[1501] The Directive provided for the exchange of information on request,[1502] the spontaneous exchange of information, which was required in five circumstances,[1503] and the AEOI,[1504] with the latter form being subject to a separate agreement between the Member States concerned.[1505] However, Member States made insufficient use of the Directive,[1506] perhaps because the exchange of information on request suffered from the same deficiencies as Article 26, and information exchange was often too slow due to the lack of clear time limits.[1507] Accordingly, a new Directive on Administrative Cooperation (DAC) was enacted.[1508] The DAC provided for the spontaneous exchange of information,[1509] and the exchange of information on request,[1510] incorporating the OECD's revisions to the standard and setting clear time limits for the exchanges.[1511] The DAC also provided for the AEOI on five categories of income, namely, income from employment, director's fees, certain life insurance products, pensions and income from immovable property, but only if such information was available in the Member State.[1512]

Cooperation in the taxation of savings interest was an important aim for the EU following the introduction of the free movement of capital,[1513] to prevent individuals from secretly investing

[1499] Council Directive 79/1070/EEC of 6 December 1979 amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation [1979] OJ L 331
[1500] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [1992] OJ L 76
[1501] Council Directive 2003/93/EC of 7 October 2003 amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation [2003] OJ L 264
[1502] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation [1977] OJ L 336, Art 2
[1503] Ibid, Art 4
[1504] Ibid, Art 3
[1505] Ibid, 'for categories of cases which they shall determine under the consultation procedure laid down in Article 9.'
[1506] Commission, 'Communication to the Council, the European Parliament and the European Economic and Social Committee Concerning the Need to Develop a Co-ordinated Strategy to Improve the Fight Against Fiscal Fraud' (Communication) COM(2006) 254 final, p.5
[1507] A Muñoz Forner, 'The Council Directive on Administrative Cooperation in the Field of Taxation (2011/16/EU)' in OC Günther, N Tüchler (Eds.) *Exchange of Information for Tax Purposes* (Series on International Tax Law, Linde Verlag 2013) p.277
[1508] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64
[1509] Ibid, Art 9
[1510] Ibid, Art 5
[1511] X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.106
[1512] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64, Art 8
[1513] Treaty on the Functioning of the European Union [2012] OJ C 326/01, Art 63

savings offshore.[1514] Accordingly, following two failed proposals,[1515] the EU Savings Directive (EUSD) was adopted in 2003.[1516] The EUSD required Member States to automatically exchange information on interest payments paid by their paying agents to BOs resident in another Member State, with the Member State of residence of the payee on an annual basis.[1517] Exception was made for Austria, Belgium and Luxembourg, who were permitted to apply a withholding tax system on interest paid to individuals in other Member States,[1518] at a rate of 15% for the first three years, 20% for the following three years and 35% thereafter.[1519] 75% of the sums withheld were required to be transferred to the Member State of residence and 25% was permitted to be retained by the withholding country.[1520] The EU also entered into agreements with third countries to apply the EUSD, specifically, the dependent and associated territories of the Member States and Switzerland, Liechtenstein, San Marino, Monaco and Andorra.[1521] The EU originally intended to secure an agreement with the US, but the US refused to cooperate.[1522]

The EUSD was the first example of a multilateral system for the AEOI. In many ways, the EUSD was somewhat successful in combatting tax evasion on interest payments, as it enabled the exchange of information relating to transactions worth billions of euros, as well as the receipt of withholding tax revenues totalling over €700million in 2008 alone.[1523] Nevertheless, the EUSD contained several shortcomings.[1524] The chief deficiencies centred on the restricted

[1514] See the preamble to Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments [2003] OJ L 157; see also X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar, 2015) p.80
[1515] Commission, 'Proposal for a Council Directive Amending Directive 77/799/EEC Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Value-Added Tax' (Proposal) Com(89) 60 final; The proposal was withdrawn because the UK and the Netherlands opposed the fact that the withholding tax would have enabled source, rather than residence, based taxation of interest payments, E Ros, *EU Citizenship and Direct Taxation* (Kluwer Law 2017) 3.4.2; Commission, 'Proposal for a Council Directive Ensuring A Minimum of Effective Taxation of Savings Income in the Form of Interest Payments within the Community' (Proposal) Com(1998) 295 final
[1516] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments [2003] OJ L 157
[1517] Ibid, Art 1, Art 8, Art 9
[1518] Ibid, Art 10
[1519] Ibid, Art 11
[1520] Ibid, Art 12
[1521] Ibid, Preamble para 24; For the texts of the agreements see European Commission, 'Taxation and Customs Union: The 2004 EC Agreements' <https://ec.europa.eu/taxation_customs/individuals/personal-taxation/taxation-savings-income/2004-ec-agreements_en> accessed 10 August 2019
[1522] After the US' refusal, the Member States agreed that the US had adopted 'equivalent measures'. However, this was simply not true. JC Sharman, 'Regional Deals and the Global Imperative: The External Dimension of the European Union Savings Tax Directive' (2008) 46 JCMS 1049, 1062
[1523] Commission, 'Report in Accordance with Article 18 of Council Directive 2003/48/EC on taxation of savings income in the form of interest payments' (Report) Com(2012) 65 final, p.5
[1524] ibid, p.12

territorial scope of the Directive, which enabled individuals to escape the EUSD by investing in secrecy jurisdictions, the definition of BO, which referred to individuals and consequently enabled the use of legal entities to conceal ownership of interest payments, and the definition of interest income, which enabled individuals to evade reporting or withholding by saving using innovative financial products.[1525] Consequently, although the EUSD caused some reduction in the amount of bank deposits held by EU residents offshore, the funds in accounts were often not repatriated, but rather moved to accounts in secrecy jurisdictions or accounts owned by legal entities.[1526] To address these concerns, the EUSD was amended in 2014.[1527]

In the meantime, the US enacted FATCA, prompting individual Member States and the European Council to advocate a system for the AEOI.[1528] The Directive on Admnistrative Cooperation (DAC1),[1529] was amended in 2014 to incorporate the CRS (DAC2).[1530] As DAC2 provided for a wider scope of AEOI, the EUSD was repealed.[1531]

As DAC2 incorporates the CRS into EU law, the evaluation of the effectiveness of the CRS above applies equally to DAC2. The first report on DAC2 found that from September 2017 to March 2018, information relating to 8.7 million accounts was exchanged, with end-of-year account balances amounting to €2,919 billion in total.[1532] The implementation of DAC1 and

[1525] T Hemmelgarn, G Nicodème, 'Tax Co-ordination in Europe: Assessing the First Years of the EU-Savings Taxation Directive (European Commission Taxation Paper No.18, 2009) <https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_18.pdf> accessed 10 August 2019, p.7-8; see also AM Jiménez, 'Loopholes in the EU Savings Tax Directive' [2006] IBFD Bulletin 480

[1526] Johannesen found that deposits in Swiss banks owned by EU residents declined by 30–40% around the time the EUSD was introduced, but this is likely due to the transfer of funds to secrecy jurisdictions unaffected by the EUSD and/or to offshore shell companies, see N Johannesen, 'Tax Evasion and Swiss Bank Deposits' (2014) 111 Journal of Public Economics 46, 47; similarly Johannesen and Zucman find evidence of deposit shifting to countries, which did not implement the EUSD, N Johannesen, G Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6 American Economic Journal: Economic Policy 65, 79-80; Omartian found that incorporations of shell companies increased by 73% prior to the role out of the EUSD J Omartian, 'Do Banks Aid and Abet Asset Concealment: Evidence from the Panama Papers' (Working Paper, 23 October 2017) <https://pdfs.semanticscholar.org/5984/f3549302bae7bcef574fa48acd34d0190e29.pdf> accessed 25 July 2019 at p.4

[1527] Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments [2014] OJ L 111

[1528] European Commission, 'Automatic Exchange of Information: Frequently Asked Questions' (Memo, 12 June 2013) <https://europa.eu/rapid/press-release_MEMO-13-533_en.htm> accessed 10 August 2019

[1529] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64, Art 19

[1530] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2014] OJ L 359, Preamble

[1531] Council Directive (EU) 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments [2015] OJ L 301

[1532] Commission, 'Report to the European Parliament and the Council on Overview and Assessment of the Statistics and Information on the Automatic Exchanges in the Field of Direct Taxation' (Report) Com(2018) 844 final, p.8

DAC2 cost Member States around €112 million for the period 2012-2017, with DAC2 responsible for €45.4 million of this sum.[1533] Unfortunately, limited information was provided by Member States on the benefits of DAC2.[1534] Yet, of the five Member States able to report information, four had reported benefits far exceeding the costs of implementation.[1535] However, these estimates only consider the costs to Member States and do not include one-off costs for financial institutions of €340 million and annual costs of €120 million.[1536] Moreover, as with the CRS, it is difficult to conduct an accurate cost benefit analysis of DAC2 as DAC2 draws on measures implemented for the CRS, likely reducing its cost. Overall, it appears that DAC2 has had a positive impact on Member States' ability to detect tax evasion, although the true costs and benefits are unknown.

The EU has also adopted separate Regulations governing administrative assistance in relation to VAT,[1537] and excise duties[1538] with the aim of improving cooperation in these areas. The EU has also adopted a Directive concerning the recovery of taxes.[1539] Although the Directive initially only applied to taxes connected to community funding,[1540] it now permits the recovery of 'all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions.'[1541] The EU appears to have a comprehensive network of legal instruments providing for international cooperation in tax matters, covering virtually all taxes and forms of assistance.

4.5 UK and US Comparison

Historically, the US has provided more extensive levels of cooperation in tax matters than the UK, gaining a reputation as a leader in this area. For instance, from the outset, the US

[1533] Ibid, p.11-12
[1534] Ibid, p.13
[1535] Ibid, p.14
[1536] Ibid, p.12
[1537] Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L 268 (as amended)
[1538] Council Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004 [2012] OJ L 121 (as amended)
[1539] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L 84
[1540] I.e. certain refunds, agricultural levies and customs duties, Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties [1976] OJ L 73, Art 2; see also P Baker, 'Mutual Assistance in the Recovery of Tax Claims: No Government of India in the European Union?' (1999) 1 BTR 14, 15
[1541] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L 84, Art 2

interpreted Article 26 of the DTC as providing for the exchange of information to assist in the administration of taxes generally, and the repression of tax evasion in particular.[1542] In contrast, the UK initially viewed Article 26 of the DTC as imposing a domestic interest requirement, often frustrating other states' attempts to obtain information to combat tax evasion.[1543] However, although the US often agreed to provide assistance earlier than the UK, it tended to provide lower levels of cooperation. For instance, although the US provided assistance in collection from the late 1930s,[1544] the scope of this obligation was reduced over time, with later treaties either omitting the provision, or only containing a limited enforcement provision.[1545] Conversely, the UK did not agree to provide assistance in collection until over 70 years after the US, but now readily provides this assistance to any state that agrees to reciprocate.[1546] Similarly, while the US signed the CoE/OECD Convention much earlier than the UK, it agreed to provide lower levels of cooperation and later refused to sign the Additional Protocol.[1547]

The US has also sought to move beyond the measures promulgated by the OECD, designing and implementing often ground-breaking initiatives to combat tax evasion. These include the US' use of TIEAs to facilitate the exchange of information notwithstanding the presence of bank secrecy laws, and the introduction of FATCA to gather information on US citizens on an automatic basis, considering the deficiencies of the exchange of information on request. While the UK has not been particularly innovative in designing its own agreements, it has readily implemented initiatives designed by others, including the CRS. Therefore, the US has widely been perceived as a leader in international tax cooperation,[1548] while the UK may be regarded as a follower. Indeed, the US' creation of FATCA and its ability to force its implementation inspired a more effective system for the AEOI globally. However, the US' refusal to implement the CRS, or a truly reciprocal version of FATCA, has seen the US begin to lose its reputation

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[1542] S Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Picciotto 2013) p.275

[1543] Ibid, p.276; see also M Keen, JE Ligthart, 'Information Sharing and International Taxation: A Primer' (2006) 13 International Tax and Public Finance 81, 90

[1544] See e.g. Agreement for the Avoidance of Double Taxation and the Establishment of Rules of Reciprocal Administrative Assistance with Respect to Income and Other Taxes (United States - Sweden) (signed 23 March 1939, entered into force 14 November 1939) 54 Stat. 1759, T.S. No. 958

[1545] AR Johnson, L Nirenstein, SE Wells, 'Reciprocal Enforcement of Tax Claims through Tax Treaties' (1979) 33 Tax Law 469, 474

[1546] Finance Act 2006, s.173; RW Maas, *Guide to Taxpayer's Rights and HMRC Powers* (4th edn, Bloomsbury Professional 2016) p.606

[1547] OECD, 'Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters: Status – 13 June 2019' <https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf> Accessed 17 July 2019

[1548] AJ Cockfield, 'Shaping International Tax Law in Challenging Times' (2018) 54 Stanford Journal of International Law 223, 234; RS Avi-Yonah, 'Constructive Unilateralism: U.S. Leadership and International Taxation' (2016) 42 Int'l Tax J 17, 17

as a leader in the creation of international tax rules and norms,[1549] and specifically, in the fight against tax evasion. This is a regrettable, as although the US has constructed a regime whereby it is able to detect and address the evasion of its own citizens, its concomitant abstention from global cooperation efforts creates enormous costs for other states and their financial institutions, alongside evasion opportunities for their residents. In contrast, the UK has implemented both FATCA and the CRS on a reciprocal basis, and until recently benefitted from the multilateral approach to implementing the OECD's initiatives within the EU.[1550]

In consequence, the UK presently has a vast network of agreements providing for the exchange of information with 166 jurisdictions.[1551] Only 6 of these agreements are not in force and only 13 do not meet the international tax standard.[1552] In contrast, the US has a smaller network of agreements covering 129 jurisdictions.[1553] Agreements with 38 of these jurisdictions are not in force and 6 do not meet the standard.[1554] This is largely attributable to the fact that the US has not ratified any agreements since 2010, including the CoE/OECD Convention.[1555] Thus, despite the US' historic leadership role, the UK is currently able to obtain information from more states than the US, leaving fewer havens for tax evaders. It is unclear whether FATCA or the CRS is superior in combatting tax evasion; although FATCA has a clear penalty for noncompliance, facilitating its proper implementation, the CRS removes some of the potential loopholes under FATCA and incorporates a process whereby further loopholes may be detected and addressed. Nonetheless, by implementing FATCA or the CRS, both jurisdictions have made significant progress in obtaining information offshore, particularly from secrecy jurisdictions, in order to combat tax evasion.

4.6 Conclusion

This chapter examined international initiatives specifically developed to provide information and assistance in tax matters and thus, to address the gaps left by the exclusion of tax matters from the international legal assistance framework. The OECD has been instrumental in designing and promoting these agreements. At first, the treaties were largely ineffective in

[1549] The US 'does not appear to want to play its traditional role as a leader in this area.' Ibid (Cockfield), p.226
[1550] The International Tax Compliance Regulations 2015, SI 2015/878
[1551] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Review Report on the Exchange of Information on Request: United Kingdom 2018 (Second Round)* (OECD Publishing 2018) p.110
[1552] Ibid, p.118
[1553] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Review Report on the Exchange of Information on Request: United States 2018 (Second Round)* (OECD Publishing 2018) p.93
[1554] Ibid, p.106
[1555] Ibid, p.93-4

combatting tax evasion because of a slow uptake by states, particularly secrecy jurisdictions. However, following the financial crisis, the OECD coerced secrecy jurisdictions into concluding such treaties, ultimately leading to a near global system of assistance in tax matters. Nevertheless, the deficiencies inherent in the exchange of information on request led the US to impose AEOI on other states via FATCA. In turn, FATCA encouraged the EU and the OECD to create a similar system for the AEOI. Therefore, the international tax system has moved from the widespread acceptance of the revenue rule, where one state must not interfere in the tax affairs of another, to widespread cooperation in tax matters on an automatic basis. The near-global adoption of the AEOI has been facilitated by both the OECD, the US, and high-profile tax scandals, all of which have drawn attention to the enormous sums evaded offshore.

Theoretically, the move from self-reporting by taxpayers with offshore assets to a system of automatic reporting by third parties concerning assets located offshore, should ensure almost near eradication of offshore tax evasion, at least through offshore bank accounts. Indeed, significant sums have already been recovered under FATCA and the CRS. However, both measures have the potential to affect the rights of individuals, by infringing privacy and data protection norms. In addition, both measures have, and will continue to, generate significant costs for financial institutions. Consequently, it is debatable whether these measures are worth the human and financial costs they impose. Many of these measures have been hastily developed following a crisis or scandal, without much consideration being paid to their impact on compliant individuals. However, it is imperative that such an evaluation takes place, particularly now that initial evidence on the impact of FATCA and the CRS is available. For now, the success of the measures will depend on how well the rules are enforced and monitored, with any loopholes being eradicated. The next chapter will consider the anti-money laundering framework's application to tax evasion, and attempts to eradicate some of the loopholes in FATCA and the CRS via this framework.

Chapter 5 - The Anti-Money Laundering Legal Framework and its Application to Tax Evasion Offences

5.1 Introduction

This chapter explores the evolution of the international anti-money laundering (AML) framework, from countering laundering of proceeds derived from drug trafficking offences, to the laundering of the proceeds of organised crime, the financing of terrorism and tax offences. This section considers the tools and offences within the international AML framework and their potential utility in detecting and combatting tax evasion, and recovering property associated with this crime. Additionally, UK and US AML legislation is evaluated and compared.. Throughout this assessment, the aim of both legal frameworks of achieving transparency is highlighted, with particular attention drawn to recent innovations, such as beneficial ownership (BO) registers. The chapter offers recommendations to improve the efficacy of the frameworks and their implementation. This chapter argues that the US fails to comply with several aspects of the international AML framework, such as the inclusion of tax evasion as a predicate offence. However, it is questionable whether tax evasion should be addressed via AML legislation. Therefore, this chapter concludes that, while the US is again an outlier in failing to implement international measures designed to combat tax evasion, in this context, US reticence is in part justifiable.

5.2 The Relationship between Money Laundering and Tax Evasion

During the latter half of the 20th century, the international framework AML framework emerged.[1556] Throughout the development of the framework, the definition of money laundering has altered and states have taken divergent interpretations.[1557] These differences often centre on the predicate offences to laundering, or the underlying offences that generate the illicit proceeds;[1558] while some take an all-crime approach to defining money

[1556] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95; United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209

[1557] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Countering Money Laundering by Criminal Law' (Proposal) COM (2016) 826 final

[1558] 'The Achilles heel in defining money laundering', B Unger, 'Money Laundering Regulation: From Al Capone to Al Qaeda' in B Unger, D van der Linde (Eds) *Research Handbook on Money Laundering* (Edward Elgar 2013) 23

laundering,[1559] others specify the predicate crimes whose proceeds are capable of constituting laundering offences.[1560] A key point of contention is whether tax offences should be included as predicate offences.

On the one hand, if tax evasion is a crime like any other, why should legislatures not criminalise the laundering of the proceeds of this particular offence? In this respect, affording tax evasion equal treatment in AML legislation confirms and reinforces the serious nature of this offence. This argument is strengthened by the significant parallels in the methods used to launder money and evade taxation,[1561] and the consequent recognition that the tools provided by the AML framework can be used to detect and recover the proceeds of tax offences.[1562] Moreover, in applying AML legislation to tax evasion offences, facilitators of tax crimes may be detected and potentially charged with laundering offences.[1563] Conversely, conceptual difficulties arise in criminalising the laundering of criminal proceeds derived from tax evasion. Tax evasion is a distinct crime; whereas money laundering refers to the process of concealing the origin of illegally obtained income, tax evasion concerns the illegal concealment of legally obtained income.[1564] Therefore, the laundering of the funds is a core element of the offence itself,[1565] so it may be regarded as inappropriate to use the same legal framework as a form of 'uncritical over-criminalization'.[1566] Further, although it may be straightforward to identify criminal property where an individual has obtained a tax rebate through fraud,[1567] the crime of tax evasion often fails to produce any identifiable proceeds but rather, the 'deferral of a debt',[1568]

[1559] Such as the UK, Proceeds of Crime Act 2002, s.340
[1560] Such as the US, 18 U.S.C § 1956(c)(7)
[1561] R Tavares, 'Thematic Paper on Money Laundering: Relationship between Money Laundering, Tax Evasion and Tax Havens' (European Parliament Special Committee on Organised Crime, Corruption and Money Laundering, January 2013) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/crim/dv/tavares_ml_/tavares_ml_en.pdf > Accessed 2 December 2019, p.6
[1562] OECD, 'Improving Co-operation between Tax and Anti-Money Laundering Authorities: Access by Tax Administrations to Information Held by Financial Intelligence Units for Criminal and Civil Purposes' (September 2015) <https://www.oecd.org/ctp/crime/report-improving-cooperation-between-tax-anti-money-laundering-authorities.pdf> accessed 2 December 2019
[1563] See generally J Davies, 'Using the AML Framework for Enablers of Tax Evasion: Some Practical Considerations' (2016) 37(12) Comp Law 372
[1564] KE Oliver, 'International Taxation: Tax Evasion as a Predicate Offense to Money Laundering' (2002) 27 Int'l Legal Prac 55, 60.
[1565] M Levi, P Reuter, 'Money Laundering' (2006) 34 Crime and Just 289, 292. Van Duyne refers to this as 'canned laundering', PC van Duyne, 'Money Laundering Policy: Fears and Facts' in PC van Duyne, K von Lampe, JL Newell (eds.), *Criminal Finances and Organising Crime in Europe* (Wolf Legal Publishers, 2003) p.72
[1566] V Mitsilegas, N Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23 MJ 261, 267.
[1567] J Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' (2010) 3 BTR 235, 243-4.
[1568] P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 364.

or ‘cost savings’.[1569] Therefore, it is difficult to identify the criminal property involved as distinct from other legitimately earned funds, leading to difficulties in applying the offences and tools contained within the AML framework. Both sides of this debate are considered through the UK and US comparison.

5.3 The International AML Framework

5.3.1 The United Nations

The international AML framework was heavily influenced by the US, which developed AML controls as part of efforts to combat tax evasion through foreign financial institutions (FIs).[1570] The US enacted additional AML legislation as part of its ‘War on Drugs’, with the aim of denying criminals the proceeds of their crimes.[1571] Soon after, a combination of US political influence and international concern around drug trafficking led drug money laundering to become part of the United Nations’ (UN) international agenda,[1572] itself resulting in the adoption of the Vienna Convention.[1573] This required states to criminalise money laundering,[1574] to ensure jurisdiction over money laundering offences,[1575] to confiscate the proceeds of drug offences,[1576] to extradite offenders,[1577] and to provide mutual legal assistance (MLA) in respect of these offences.[1578] The Vienna Convention was innovative in requiring states to ensure that bank secrecy could not frustrate these goals.[1579] The Convention is widely

[1569] RC Alexander, ‘“Cost Savings” As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom’ (2011) 45 Int'l Law 749.
[1570] The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970 (also known as the Bank Secrecy Act 1970), 31 U.S.C. 5311 et seq.; M Levi, P Reuter, ‘Money Laundering’ (2006) 34 Crime and Just 289, 290.
[1571] B Unger, ‘Money Laundering and Tax Evasion’ (COFFERS EU Horizon 2020 Project, 31 October 2017) <http://coffers.eu/wp-content/uploads/2019/11/D6.2-Working-Paper.pdf> accessed 3 December 2019 at p.7
[1572] PC van Duyne, JH Harvey, LY Gelemerova, *The Critical Handbook of Money Laundering Policy: Analysis and Myths* (Palgrave Macmillan 2018) p.4
[1573] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95
[1574] Ibid, Article 3
[1575] Ibid, Article 4
[1576] Ibid, Article 5
[1577] Ibid, Article 6
[1578] Ibid, Article 7
[1579] Ibid, Article 5(3), Article 7(5); D W Sproule and P St-Denis, ‘The UN Drug Trafficking Convention: An Ambitious Step’ (1989) 27 Can YB Int'l L 263, 281-2

accepted, with 191 parties as of 2021.[1580] However, the scope of the Convention is restricted to the laundering of drug proceeds.[1581]

Consequently, the UN adopted the Palermo Convention.[1582] As of 2021, 190 states are parties to this Convention.[1583] This Convention retained the key provisions of the Vienna Convention,[1584] yet it also introduced additional obligations, such as the requirement for states to ensure that FIs assist in detecting and deterring money laundering by carrying out customer identification, record keeping and the reporting of suspicious transactions.[1585] Additionally, the Palermo Convention expanded the scope of money laundering offences,[1586] applying offences to the proceeds of 'serious crime'.[1587] Both the Palermo Convention,[1588] and the UN Convention against Corruption encourage states to expand the scope of money laundering offences to the widest range of predicate offences.[1589] Therefore, the Palermo Convention potentially applies to the proceeds of any offence,[1590] enablingtax offences to be included as a predicate offence to laundering for the first time within the international AML framework.[1591] This development potentially obliged states to provide MLA and extradition for tax offences if

[1580] UNTC, 'United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Vienna, 20 December 1988: Status as of April 2021' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en> accessed 26th April 2021.

[1581]United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95, Article 3; G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge Studies in International and Comparative Law, CUP 2004) p.23

[1582] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209

[1583] UNTC 'United Nations Convention against Transnational Organized Crime, 15 November 2000: Status as of April 2021' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en> accessed 26th April 2021.

[1584] Ibid, Article 6 (Criminalisation), Article 12 (Confiscation and Seizure), Article 15 (Jurisdiction), Article 16 (Extradition), Article 18 (Mutual Legal Assistance).

[1585] Ibid, Article 7

[1586] R Booth, S Farrell, G Bastable, N Yeo, *Money Laundering Law and Regulation: A Practical Guide* (OUP 2011) p.11

[1587] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, Article 6(2)(b). defined as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty', ibid, Article 2(b).

[1588] Ibid, Article 6(2)(a)

[1589] United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41, Article 23(2)(a); N Ryder, *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge 2012) p.27

[1590] G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge Studies in International and Comparative Law, CUP 2004) p.23

[1591] R Durrieu, *Rethinking Money Laundering and Financing of Terrorism in International Law: Towards A New Global Legal Order* (Martinus Nijhoff 2013) p.296

both states included tax offences within the definition of money laundering.[1592] Following the Convention, many states began to include tax evasion as a predicate offence to laundering.[1593] However, without a strict obligation, others refused to do so.[1594]

5.3.2 The Financial Action Task Force

The Financial Action Task Force (FATF) was established in 1989,[1595] with the aim of setting standards and promoting 'measures for combating money laundering, terrorist financing and other related threats.'[1596] In 1990, FATF released its first set of Recommendations to combat money laundering[1597] and is now the 'world standard setter in the fight against money laundering'.[1598] The UN endorses the Recommendations,[1599] which are not legally binding and are considered to be 'soft law'.[1600] The FATF initially secured compliance with its Recommendations by drawing up a blacklist of Non-cooperative Countries and Territories (NCCTs).[1601] Although the FATF considered this to be a successful tool to ensure diffusion of

[1592] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, Article 6(1), Article 18(9)
[1593] Ibid.
[1594] Ibid. The reluctance of states to include tax offences is demonstrated by the need for the Palermo Convention to deny the possibility of refusing mutual legal assistance or extradition on the grounds that the offence also concerns tax offences, see Article 16(15) and Article 18(22).
[1595] G7, 'Economic Declaration' (16 July 1989) <http://www.g8.utoronto.ca/summit/1989paris/communique/index.html> accessed 4 December 2019
[1596] FATF, 'Who We Are' <https://www.fatf-gafi.org/about/whoweare/> accessed 4 December 2019; The FATF currently has 37 member jurisdictions and two regional organisations, as well as nine associate members, comprised of FATF-style regional bodies, see FATF, 'FATF Members and Observers' <https://www.fatf-gafi.org/about/membersandobservers/> accessed 4 December 2019
[1597] Hereinafter 'The Recommendations. FATF, 'The Forty Recommendations of the Financial Action Task Force on Money Laundering (April 1990) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf> accessed 4 December 2019. Hereinafter, 'The Recommendations'.
[1598] A Damais, 'The Financial Action Task Force' in WH Muller, CH Kälin, JG Goldsworth (Eds), *Anti-Money Laundering: International Law and Practice* (John Wiley & Sons 2007) p.71. The Recommendations were updated in 1996, 2003, and 2012. FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 4 December 2019
[1599] UNSC Res 1617 (29 July 2005) UN Doc S/RES/1617; UNGA Res 60/288 (8 September 2006) UN Doc A/RES/60/288
[1600] KS Blazejewski, 'The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks' (2008) 22 Temp Int'l & Comp LJ 1, 10; 'The crown jewel of soft law' G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge Studies in International and Comparative Law, CUP 2004) p.21
[1601] In total, 23 jurisdictions were identified as NCCTs, namely, Bahamas, Cayman Island, Cook Islands, Dominica, Egypt, Grenada, Guatemala, Hungary, Indonesia, Israel, Lebanon, Liechtenstein, Marshall Islands, Myanmar, Nauru, Nigeria, Niue, Panama, Philippines, Russia, St Kitts and Nevis, St Vincent and the Grenadines, Ukraine. See WN Shahin, 'De-listing from NCCTs and Money Laundering Control Measures: A Banking Regulation Perspective' (2005) 8(4) JMLC 320, 321

its Recommendations,[1602] others lamented the blacklisting approach,[1603] particularly the FATF's reluctance to list its own members.[1604] The FATF's approach was even stricter than that of the OECD,[1605] and the process was ultimately discontinued.[1606] However, in 2009,[1607] the FATF renewed its attempts to assess states' compliance with its Recommendations.[1608] Presently, the FATF identifies jurisdictions with strategic AML/Counter-Terrorist Financing (CTF) deficiencies,[1609] and calls on members and non-members to apply counter-measures or enhanced due diligence measures.[1610] Members of the FATF are subject to a peer-review process, with Mutual Evaluation Reports (MERs) recording the level of compliance.[1611] Accordingly, the categorisation of the Recommendations as soft law is 'erroneous',[1612] as most states feel obliged to comply with the Recommendations to prevent their government and FIs

[1602] P Alldridge, 'Money Laundering and Globalisation' (2008) 35(4) Journal of Law and Society 437, 444, citing FATF, *Annual and Overall Review of Non-Co-operative Countries and Territories* (2005).
[1603] See for instance, T Doyle, 'Cleaning up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law' (2001) 24 Hous J Int'l L 279; D Drezner, 'The Hidden Hand of Economic Coercion' (2003) 57 International Organisations 643.
[1604] N Ryder, *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge 2012) p.17
[1605] G Stessens, 'The FATF 'Black List' of Non-Cooperative Countries or Territories' 14 LJIL 199, 206
[1606] 'A total of 23 were listed as NCCTs—15 in 2000 and 8 in 2001.' FATF, 'About the Non-Cooperative Countries and Territories (NCCT) Initiative' <www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/aboutthenon-cooperativecountriesandterritoriesncctinitiative.html?hf=10&b=0&s=desc(fatf_releasedate)> accessed 4 December 2019; The IMF and World Bank required the FATF to give up its practice of blacklisting in return for their cooperation, B Unger, 'Money Laundering Regulation: From Al Capone to Al Qaeda' in B Unger, D van der Linde (Eds) *Research Handbook on Money Laundering* (Edward Elgar 2013) 27.
[1607] Following a request by the G20, 'Global Plan Annex: Declaration on Strengthening the Financial System: Statement Issued by the G20 Leaders' (2 April 2009) <www.g20.utoronto.ca/2009/2009ifi.html> accessed 4 December 2019
[1608] GW Sutton, 'The New FATF Standards' (2012) 4 Geo Mason J Int'l Com L 68, 70
[1609] FATF, 'Topic: High-risk and Other Monitored Jurisdictions' <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)> accessed 4 December 2019.
[1610] Depending on the severity of the deficiencies. In separate statements, the FATF also identifies countries or jurisdictions with strategic weaknesses in their AML/CFT measures, but which have committed to an FATF Action Plan, ibid. See also, Recommendation 19 of the FATF Recommendations. FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 4 December 2019
[1611] The MERs are conducted using FATF, 'Methodology For Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CTF Systems' (Updated October 2019) <www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> accessed 4 December 2019
[1612] PC van Duyne, JH Harvey, LY Gelemerova, *The Critical Handbook of Money Laundering Policy: Analysis and Myths* (Palgrave Macmillan 2018) p.54

from being excluded or priced out of the international financial system.[1613] Indeed, by 2004, the FATF had achieved near global acceptance of its Recommendations.[1614]

5.3.3 The FATF Recommendations

The first set of Recommendations replicated the Vienna Convention,[1615] only requiring states to criminalise drug money laundering.[1616] However, the FATF encouraged states to extend the offence to other crimes that are associated with narcotics, or to criminalise the laundering of the proceeds of all serious offences.[1617] In 1996, this became an obligation, with states required to ensure that the offence of drug money laundering was extended to the proceeds of serious offences.[1618] The FATF required states to ensure that bank secrecy laws could not frustrate or impede the implementation of the Recommendations.[1619] In 2001, the FATF extended its Recommendations to include the financing of terrorism,[1620] as amended in 2004.[1621] This development is attributable to the al Qaeda terrorist attacks on 11 September 2001,[1622] and the Recommendations largely emulate subsequent US CTF legislation.[1623]

[1613] R Durrieu, *Rethinking Money Laundering and Financing of Terrorism in International Law: Towards A New Global Legal Order* (Martinus Nijhoff 2013) p.125

[1614] With the exception of Iran and North Korea, see PC van Duyne, JH Harvey, LY Gelemerova, *The Critical Handbook of Money Laundering Policy: Analysis and Myths* (Palgrave Macmillan 2018) p.60. It is important to note that several other international organisations actively work with the FATF in developing, promoting, and facilitating the operation of the AML framework, but fall outside the scope of this chapter. These organisations include the Basel Committee on Banking Supervision, which promotes AML controls in setting standards for the regulation and supervision of banks, the Egmont Group of Financial Intelligence Units, which aims to increase cooperation among FIUs globally, and the International Monetary Fund and the World Bank, which have provided various forms of assistance to countries in implementing and evaluating national AML frameworks.

[1615] D Hopton, *Money Laundering: A Concise Guide for All Business* (2nd edn, Routledge 2016) p.22

[1616] FATF, 'The Forty Recommendations of the Financial Action Task Force on Money Laundering 1990' <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf> accessed 31 December 2019, Recommendation 4

[1617] Ibid, Recommendation 5

[1618] Although states were at that time free to determine which offences were to be considered serious, FATF, 'Financial Action Task Force on Money Laundering: The Forty Recommendations' (1996) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201996.pdf> accessed 5 December 2019, Recommendation 4

[1619] Ibid, Recommendation 2.

[1620] J Gurulé, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Edward Elgar 2008) p.155

[1621] FATF, 'FATF Standards: FATF IX Special Recommendations' (October 2001, incorporating all subsequent amendments until February 2008) <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf> accessed 5 December 2019

[1622] J Gurulé, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Edward Elgar 2008) p.155

[1623] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, 107 P.L. 56, 115 Stat. 272. L White, 'The Anti-Money Laundering Complex in the Modern Era' (2016) 133(10) The Banking Law Journal 1, 31. The suitability of combatting terrorist financing through AML legislation has been heavily doubted, see for instance, I Roberge, 'Misguided

The FATF initially declined to address tax matters because of possible 'negative reactions' and belief it required 'a different methodological approach'.[1624] However, the FATF was concerned by reports of money launderers informing FIs that their arrangements concerned attempts to escape taxation in order to avoid the application of Recommendation 20.[1625] Therefore, FATF added an interpretative note to clarify that suspicious activities should be reported by institutions, regardless of whether tax matters were involved.[1626] In 2003, the FATF added smuggling to the list of predicate offences, covering the resultant evasion of taxes.[1627] The Recommendations also prohibited states from refusing to provide MLA on the basis that the offence involved fiscal matters.[1628] In 1998, the G7 went further, by not only requiring the removal of these deficiencies, but also, agreeing to permit both national and overseas tax authorities to have access to suspicious activity reports (SARs), paving the way for the AML framework to be used in combatting tax offences.[1629]

It was not until 2012 that the FATF required tax crimes to be a predicate offence to money laundering.[1630] The Recommendations now require states to apply the crime of money laundering to the widest range of predicate offences,[1631] including tax offences.[1632] The FATF's intention was to remove the distinction between tax fraud and evasion, as only the former

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Policies in the War on Terror? The Case for Disentangling Terrorist Financing from Money Laundering' (2007) 27 Politics 196; C King, C Walker, 'Counter Terrorism Financing: A Redundant Fragmentation?' (2015) 6 NJECL 372; F Compin, 'Terrorism Financing and Money Laundering: Two Sides of the Same Coin?' (2018) 25 JFC 962; N Ryder, 'Is It Time to Reform the Counter-Terrorist Financing Reporting Obligations? A Critical and Comparative Assessment of the Counter-Terrorist Financing Reporting Obligations in the European Union and the United Kingdom' (2018) 19(5) German Law Review 1169. However, framing the Recommendations as a way to prevent terrorism tended to suppress opposition to AML obligations and greatly assisted in their diffusion, M Levi, 'Combating the Financing of Terrorism: A History and Assessment of the Control of 'Threat Finance' (2010) 50 Brit J Criminol 650, 655; L White, 'The Anti-Money Laundering Complex in the Modern Era' (2016) 133(10) The Banking Law Journal 1, 31.

[1624] M Menkes, 'The Divine Comedy of Governance in Tax Matters. Or Not?' (2015) 30(6) JIBLR 325, 327

[1625] Recommendation 20 provides for the reporting of suspicious activities. Formerly Recommendation 15. P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 361.

[1626] Ibid, p.362.

[1627] IMF Legal Department, 'Revisions to the Financial Action Task Force (FATF) Standard—Information Note to the Executive Board' (17 July 2012) <https://www.imf.org/external/np/pp/eng/2012/071712a.pdf> accessed 6 December 2019, p.10.

[1628] FATF, 'Financial Action Task Force on Money Laundering: The Forty Recommendations' (20 June 2003) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf> accessed 5 December 2019, Recommendation 36.

[1629] G7, 'G7 Initiative on Harmful Tax Competition' (Birmingham Summit, 15-17 May 1998) <www.g8.utoronto.ca/summit/1998birmingham/harmfultax.html> accessed 5 December 2019

[1630] FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 4 December 2019

[1631] Ibid, Recommendation 3.

[1632] Tax offences are specifically identified as a designated category of offence, Ibid, Interpretative Note to Recommendation 3 at p.32.

tended to be included within national AML legislation as part of the predicate offence of fraud, if at all.[1633] The term 'tax crimes' must now be taken to encompass offences related to both direct and indirect taxes,[1634] and must apply to tax offences committed in another country.[1635] The Recommendations do not provide a clear definition of the term 'tax crimes' to provide states flexibility,[1636] but, in assessing compliance, the FATF will consider whether the state has a significantly broad coverage of tax offences as predicate offences.[1637] The failure to define 'tax crimes' is a significant oversight; the lack of a clear definition engenders difficulties for professionals in applying the Recommendations, particularly to foreign tax offences, and may frustrate the international cooperation envisaged, as states have widely differing perceptions of tax crimes.[1638]

The FATF Recommendations require states to assess their money laundering risks and to adopt a risk-based approach.[1639] States must criminalise money laundering and adopt measures to enable the confiscation of the proceeds of crime.[1640] Therefore, the inclusion of tax evasion as a predicate offence may provide another instrument for addressing this crime and its facilitation. The Recommendations require states to provide international cooperation, including MLA and extradition for related criminal offences.[1641] This cooperation should be offered regardless of whether a fiscal offence is involved or dual criminality is present, and

[1633] B Unger, 'Can Money Laundering Decrease?' (2013) 41(5) Public Finance Review 658, 660
[1634] FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 4 December 2019, p.116.
[1635] Ibid, Interpretative Note to Recommendation 3 at p.32.
[1636] FATF, 'FATF's Response to the Public Consultation on the Revision of the FATF Recommendations' (2012) <http://www.fatf-gafi.org/media/fatf/documents/publicconsultation/FATF%20Response%20to%20the%20public%20consultation%20on%20the%20revision%20of%20the%20FATF%20Recommendations.pdf> accessed 6 December 2019, p.3
[1637] IMF Legal Department, 'Revisions to the Financial Action Task Force (FATF) Standard—Information Note to the Executive Board' (17 July 2012) <https://www.imf.org/external/np/pp/eng/2012/071712a.pdf> accessed 6 December 2019, p.9
[1638] Unger notes that the European Parliament (Panama Committee) tried to research Member States' understanding of terms such as tax evasion and tax crime, receiving widely diverging responses. B Unger, 'Money Laundering and Tax Evasion' (COFFERS EU Horizon 2020 Project, 31 October 2017) <http://coffers.eu/wp-content/uploads/2019/11/D6.2-Working-Paper.pdf> accessed 3 December 2019 at p.29.
[1639] FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 4 December 2019, Recommendation 1 and 2.
[1640] Ibid, Recommendation 3 and 4. States must also criminalise terrorist financing and take measures to suppress it (Recommendations 5-8), yet these measures are not relevant in combatting tax evasion and will not be discussed here.
[1641] Ibid, Part G, Recommendations 36-40.

notwithstanding the presence of bank secrecy legislation.[1642] The Recommendations provide more effective international cooperation in criminal tax matters than the treaties discussed in chapter three, particularly when considering their extensive diffusion and rigorous enforcement.

Under the Recommendations, those who enter into transactions and arrangements within the jurisdiction must be identifiable, bearer shares must not be misused, and measures must be taken to ensure the availability of accurate and timely information on the BOs of legal entities and arrangements.[1643] The Recommendations also suggests states undertake preventative measures to combat money laundering, such as requiring its FIs and designated non-financial businesses and professions (DNFBPs),[1644] to act as the 'watchmen' of the financial system.[1645] States must oblige FIs and DNFBPs to report suspicions that a customers' funds are the proceeds of a criminal activity to a Financial Intelligence Unit (FIU).[1646] FIs and DNFBPs should also be obliged to conduct customer due diligence (CDD) measures,[1647] and enhanced measures when dealing with specific customers or risks.[1648] FIs and DNFBPs should be supervised to ensure their compliance.[1649]

Therefore, the Recommendations provide states with another tool to identify tax evasion, by requiring the identification of those who enter into transactions, or operate through legal entities and arrangements within the jurisdiction; structures which, due to their secretive nature, are often misused to commit tax crimes.[1650] The inclusion of tax evasion as a predicate offence to laundering enables SARs to be submitted in respect of tax offences, potentially providing tax authorities with indications of these crimes and their facilitators. It is unsurprising that the FATF claimed that the inclusion of tax evasion as a predicate offence will 'provide a better

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[1642] Ibid
[1643] Ibid, Recommendation 24 and 25.
[1644] Such as casinos, real estate agents, and lawyers, ibid, Recommendation 22 and 23.
[1645] L Gelemerova, 'On the Frontline against Money-Laundering: The Regulatory Minefield' (2008) 52(1) Crime, Law and Social Change 33, 36
[1646] FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 4 December 2019, Recommendation 20 and 21, Recommendation 23. A FIU should be set up to receive and analyse SARs, Recommendation 29.
[1647]Namely, the identification of customers, including beneficial owners, the intended nature of the business relationship and the nature of transactions entered into by the customer. Ibid, Recommendation 10 and 11, Recommendation 22.
[1648] Such as politically exposed persons, Recommendation 12, correspondent banking relationships, Recommendation 13, and persons or transactions with higher risk countries, Recommendations 19 and 23.
[1649] Ibid, Recommendations 26-28.
[1650] See Chapter 3

foundation for international cooperation against tax crimes and tax evasion.'[1651] However, as will be seen below, it is often difficult for states and FIs to apply several of the Recommendations to tax crimes, with negative impacts for those concerned in application and enforcement.

5.3.4 The European Union

The first international instrument concentrating solely on money laundering was the Strasbourg Convention, promulgated by the Council of Europe (CoE).[1652] The Convention was open to both members and non-members[1653] and 49 states are currently parties.[1654] The Strasbourg Convention encouraged states to criminalise money laundering with a wide range of predicate offences, potentially introducing an all-crime approach.[1655] However, the Convention enabled states to restrict the predicate crimes,[1656] and a state could refuse to provide cooperation when the request concerned a fiscal offence.[1657] These exceptions were retained when the Convention was updated to cover the financing of terrorism.[1658] In 1991, the first European Union (EU) Directive was introduced (1MLD).[1659] Several Directives have been enacted since, with each implementing the latest version of the Recommendations.[1660] In this respect, the EU has tended to be a follower rather than a leader in this field.[1661] 1MLD replicated the preventative measures

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[1651] BS Aamo, 'FATF President's Speech at the APG Annual Meeting July 2012' (17 July 2012) <http://www.fatf-gafi.org/documents/documents/fatfpresidentsspeechattheapgannualmeetingjuly2012.html> Accessed 5 December 2019; AM Maugeri, 'Self-laundering the Proceeds of Tax Evasion in Comparative Law: Between Effectiveness and Safeguards' (2018) 9(1) NJECL 83, 85.

[1652] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (adopted 8 November 1990, entered into force 1 September 1993) 1862 UNTS 69; the Convention followed the Council of Europe, 'Recommendation No. R (80) 10 of the Committee of Ministers to Member States on Measures against the Transfer and the Safekeeping of Funds of Criminal Origin' (27 June 1980) <https://ms.hmb.gov.tr/uploads/sites/2/2019/04/R8010.pdf> accessed 7 December 2019

[1653] Ibid, Article 36 and 37

[1654] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 141' (Status as of 26th April 2021) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141/signatures?p_auth=lcoRbuQ7> accessed 26th April 2021.

[1655] European Union Committee, *Money Laundering and the Financing of Terrorism* (HL 2008-9, 132-II) p.195; G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge Studies in International and Comparative Law, CUP 2004) p.23

[1656] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (adopted 8 November 1990, entered into force 1 September 1993) 1862 UNTS 69, Article 6(4)

[1657] Ibid, Article 18(1)(d)

[1658] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (adopted 16 May 2005, entered into force 1 May 2008) 2569 UNTS 91

[1659] Council Directive of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering [1991] OJ L 166/77

[1660] C Tyre, 'Anti-Money Laundering Legislation: Implementation of the FATF Forty Recommendations in the European Union' [2010] J Prof Law 69, 70

[1661] B Unger, 'Offshore Activities and Money Laundering: Recent Findings and Challenges' (European Parliament Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, Study for the PANA Committee)

contained in the Recommendations, such as the obligation for credit and FIs to identify their customers,[1662] to keep records,[1663] and submit SARs.[1664] The Directive also required Member States to prohibit drug money laundering,[1665] although Member States could include a wider range of criminal activity if desired.[1666] In 2001, a Framework Decision was adopted to encourage Member States to refrain from making reservations under the CoE Convention in respect of the predicate offences and to apply money laundering offences to the proceeds of serious crime.[1667] However, the Decision explicitly permitted Member States to exclude fiscal offences.[1668] The EU later introduced Framework Decisions providing for mutual recognition of freezing[1669] and confiscation orders,[1670] which did not specifically include or exclude tax offences.[1671] A similar position was adopted by the Regulation replacing the Decisions,[1672] as well as the latest Directive in this area,[1673] which aims to expand and harmonise definitions of

<http://www.europarl.europa.eu/RegData/etudes/STUD/2017/595371/IPOL_STU(2017)595371_EN.pdf > Accessed 3 January 2020 at p.11

[1662] Council Directive of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering [1991] OJ L 166/77, Article 3

[1663] Ibid, Article 4

[1664] Ibid, Article 6 and 7

[1665] In line with the Vienna Convention. The Directive required Member States to prohibit, rather than criminalise, money laundering due to its contested legal basis. As such, the Directive was supplemented by a statement from the Member States agreeing to criminalise money laundering, Statement by the Representatives of the Governments of the Member States Meeting within the Council [1991] OJ L166/83. See JL Quillen, 'The International Attack on Money Laundering: European Initiatives' (1991) 1 Duke J Comp & Int'l L 213, 219; G Stessens, 'Money Laundering' 77 International Review of Penal Law 201, 204

[1666] Council Directive of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering [1991] OJ L 166/77, Article 1 and 2

[1667] Council Framework Decision of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime [2001] OJ L182/1; V Mitsilegas, B Gilmore, 'The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards' (2007) 56(1) ICLQ 119, 121

[1668] Ibid, Article 1(a); as did, Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property OJ L68/49, Article 2(2).

[1669] Council Framework Decision 2003/577/JHA of 22 July 2003 on the Execution in the European Union of Orders Freezing Property or Evidence [2003] OJ L 196/45

[1670] Council Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders [2006] OJ L 328/59; see also Council Framework Decision 2007/845/JHA of 6 December 2007 Concerning Cooperation between Asset Recovery Offices of the Member States in the Field of Tracing and Identification of Proceeds From, or Other Property Related to Crime [2007] OJ L332/103.

[1671] Tax offences are not specifically identified in Article 3(2) of Decision 2003/577/JHA or Article 6 Decision 2003/577/JHA. However, tax offences are often characterised as fraud or money laundering offences, and/or other offences may be committed in furtherance of the tax offence. In addition, although the executing state may refuse assistance where an order relates to an offence the proceeds of which cannot be confiscated in that state, they may not do so on the sole basis that a different kind of tax or duty is involved, see Articles 7(1)(d) and 8(2)(b) respectively.

[1672] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the Mutual Recognition of Freezing Orders and Confiscation Orders [2018] OJ L 303/1; The Regulation was introduced to remedy the deficiencies in the existing framework, see M Simonato, 'Confiscation and Fundamental Rights Across Criminal and Non-Criminal Domains' (2017) 18 ERA Forum 365, 367

[1673] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union [2014] OJ L127/39

criminal property and forms of confiscation.[1674] 2MLD followed a revision of the FATF Recommendations,[1675] which extended the AML obligations to DNFBPs,[1676] and extended the predicate offences to include the proceeds of 'serious crime'.[1677] However, at this time, it was unlikely that all tax offences fell within the definition of serious crime,[1678] this decision being left to Member States.[1679]

3MLD criminalised both money laundering and terrorist financing,[1680] and renovated CDD requirements, including the adoption of a risk-based approach.[1681] 3MLD also expanded the range of predicate offences to encompass 'any kind of criminal involvement in the commission of a serious crime'.[1682] Therefore, if tax offences were punishable by more than one year by Member States, these offences constituted predicate offences under 3MLD.[1683] With the adoption of4MLD, the inclusion of tax evasion as a predicate offence was beyond doubt, with tax crimes relating to both direct and indirect taxes explicitly included within the definition of criminal activity.[1684] 4MLD does not provide a definition of tax offences, as the EU did not

[1674] Ibid, Preamble; see also M Fernandez-Bertier, 'The Confiscation and Recovery of Criminal Property: A European Union State of the Art' (2016) 17 ERA Forum 323, 333-337.
[1675] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering [2001] OJ L344/76
[1676] Such as, tax advisers, estate agents and casinos. Ibid, Article 2
[1677] Ibid, Article 1. Serious crimes must include any of the offences in Article 3(1)(a) of the Vienna Convention, the activities of criminal organisations, fraud, corruption, or 'an offence which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State'.
[1678] J Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' (2010) 3 BTR 235, 243-4
[1679] Indeed, the European banking community campaigned against the inclusion of tax offences within 2MLD, KE Oliver, 'International Taxation: Tax Evasion as a Predicate Offence to Money Laundering' (2002) 27 Int'l Legal Prac 55, 60-61
[1680] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing [2005] OJ L309/15, Article 1.
[1681] V Mitsilegas, B Gilmore, 'The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards' (2007) 56(1) ICLQ 119, 125
[1682] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing [2005] OJ L309/15, Article 3(4). with 'serious crime' itself defined according to a set list of offences, or as 'all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year. Or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.' Ibid, Article 3(5).
[1683] J Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' (2010) 3 BTR 235, 245
[1684] As long as they are punishable 'by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.' 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

wish to harmonise the definitions of tax crimes.[1685] However, harmonisation is unnecessary; a point recognised by the Commission in its impact assessment, where it proposed enacting 'detailed rules for the circumstances in which the offence is committed.'[1686] Ultimately, this proposal was dismissed as it would 'entail substantial delays due to political difficulties in agreeing a common list of types of tax evasion.'[1687] This is regrettable, as spending time formulating a common understanding of tax offences across the EU, and in turn identifying which offences should be within scope of the AML regime, would enable a more principled approach to be taken to the inclusion of tax offences within the AML framework, easing the burden placed on those tasked with fulfilling AML obligations.[1688]

As well as including tax evasion as a predicate offence, triggering the potential use of traditional AML tools, 4MLD introduced a range of additional measures that may be useful in combatting tax offences. 4MLD provides for increased cooperation among FIUs, which must exchange, any information related to money laundering or terrorist financing,[1689] via secure communication channels, or the EU's decentralised computer network, 'FIU.net'.[1690] This information must be exchanged regardless of the FIU's organisational status,[1691] and irrespective of distinctions in national approaches to defining tax crimes.[1692] In effect, 4MLD

2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73, Article 3(4)(f), see also Recital 11.

[1685] Ibid, Recital 11.

[1686] Commission Staff Working Document, 'Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the Prevention of the use of the Financial System for the Purpose of Money Laundering, Including Terrorist Financing and Proposal for a Regulation of the European Parliament and of the Council on Information Accompanying Transfers of Funds' (Impact Assessment) SWD (2013) 21 final at pp.35-36

[1687] Despite the Commission noting that this option would provide greater coherence and 'would facilitate a more efficient environment for crossborder businesses,' ibid; V Mitsilegas, N Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23(2) MJ 261, 270

[1688] See for instance the position of the European Banking Federation. 'If the definition of serious tax crimes is left to the Member States competence, the default of harmonization may lead to serious difficulties as banks will have to verify if there is or not a tax crime in the account of each client according to the applicable law of his country of origin.' European Banking Federation, 'EBF Position on the Report form the European Commission to the European Parliament and the Council on the Application of the Directive 2005/60/EC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing' (12 June 2012) <http://www.ebf-fbe.eu/uploads/D1027C-2012-EBF%20position%20on%20EC%20report%20on%203rd%20AMLD.pdf> accessed 4 January 2020

[1689] Either spontaneously or upon request, 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 [2015] OJ L141/73, Article 53

[1690] Ibid, Article 56

[1691] Ibid, Article 52

[1692] Ibid, Article 57

provides for another form of international cooperation in criminal tax matters, although not on an automatic basis,[1693] but rather, according to indications of criminal activity reported to the FIU.

Additionally, 4MLD requires legal entities to 'hold adequate, accurate and current information on their BO', which should be stored in a central register in the Member State.[1694] Similarly, trustees of any express trust must hold information on BO regarding the trust and this information must be stored in a central register when the trust generates tax consequences.[1695] With regards to legal entities, a BO is 'any natural person(s) who ultimately owns or controls the customer' through 'direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity'.[1696] A direct owner is a natural person with 'a shareholding of 25% plus one share or an ownership interest of more than 25% in the customer.'[1697] For the purposes of trusts, a BO is the settlor, the trustee(s), the protector, if any, the beneficiaries of the trust or the class of beneficiaries and 'any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means'.[1698] 4MLD provided that the register of legal entities must be accessible to FIUs, competent authorities, obliged entities, and any person or organisation that can demonstrate a legitimate interest,[1699] while the register of trusts must be available to FIUs and competent authorities.[1700]

[1693] As with the OECD's Common Reporting Standard, discussed in Chapter 4.
[1694] 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 [2015] OJ L141/73, Article 30
[1695] Ibid, Article 31
[1696] Ibid, Article 3(6)(a)
[1697] Ibid
[1698] Ibid, Article 3(6)(b)
[1699] Ibid, Article 30(5)
[1700] Ibid, Article 31(3)

Owing to the lax implementation of the FATF Recommendations,[1701] 4MLD goes further by requiring Member States to set up central registers containing BO information.[1702] Accordingly, central registers provide authorities with previously inaccessible information on the ultimate owners of legal entities and structures, which, due to their potentially opaque nature, may be used to evade taxation.[1703] Aditionally, tax authorities' ability to access this information will enable them to monitor the implementation of the CRS, which depends heavily on BO information collected and maintained for AML purposes.[1704] The lack of a global standard may restrict authorities' ability to access BO information in non-EU countries,[1705] and may hinder the competitiveness of financial centres,[1706] but, if the registers enable the increased detection of tax evasion, other countries may be persuaded to follow the EU's lead.

However, detection is unlikely because the threshold of BO for legal entities is too high; the more than 25% shareholding requirement is easily capable of circumvention by tax evaders,[1707]

[1701] With many countries failing to ensure that beneficial ownership information is accessible to central authorities, FATF, 'FATF Report to the G20 Finance Ministers and Central Bank Governors' (July 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Report-G20-FM-CBG-July-2018.pdf> accessed 5 January 2020, at p.5; 'Failure to identify the client's beneficial owner appears to be the main weakness affecting [the DNFBP] sector' Commission, 'Report from the Commission to the European Parliament and the Council on the Assessment of the Risk of Money Laundering and Terrorist Financing Affecting the Internal Market and Relating to Cross-Border Activities' COM(2019) 370 final at p.3; '27 out of 34 OECD countries perform below expectations on beneficial ownership of corporate vehicles and trusts' OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (2014) <https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf> accessed 5 January 2020, p.1; see also MG Findley, DL Nielson, JC Sharman, *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism* (CUP 2014) p.72

[1702] J Hatchard, 'Money Laundering, Public Beneficial Ownership Registers and the British Overseas Territories: The Impact of the Sanctions and Money Laundering Act 2018' (2018) 30 Denning LJ 185, 190

[1703] See chapter 3

[1704] Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as Regards Access to Anti-Money-Laundering Information by Tax Authorities [2016] OJ L 342/1; AD Nugroho, 'Central Register as a Model Instrument to Unveil Beneficial Owners for Tax Purposes' (2017) 26(5) EC Tax Review 274, 278

[1705] D Nougayrède, 'After the Panama Papers: A Private Law Critique of Shell Companies' (2019) 52 Int'l Law 327, 328

[1706] This argument has been most fiercely advanced by the UK's Crown Dependencies and Overseas Territories, which have been subjected to considerable pressure by the UK Government to adopt beneficial ownership registers. For instance, the BVI's legal challenge to the Sanctions and Anti-Money Laundering Act 2018 on the basis that public registers raise 'serious constitutional and human rights issues' and do not currently constitute 'a global standard'. 'BVI Mounts Legal Challenge to Public Registers of Beneficial Ownership' (2018) 1403 Tax J 3, 3. See also, the statement released by the Caribbean Community, 'we are deeply concerned about the potential impact on their economies by any impositions that would go against the spirit of democracy and diminish their standard of living.' CARICOM, 'Statement by CARICOM' (28 April 2018) <https://caricom.org/media-center/communications/press-releases/statement-by-caricom> accessed 8 January 2020.

[1707] 'For example, a company equally owned by two parents and two children, or by four friends, would have zero beneficial owners identified because everyone would have 25 per cent but not more than 25 per cent of ownership.' A Knobel, 'Beneficial Ownership Verification: Ensuring the Truthfulness and Accuracy of Registered Ownership Information' (Tax Justice Network, 22 January 2019) <https://www.taxjustice.net/wp-

having a negative impact on both domestic and offshore tax evasion investigations.[1708] This was recognised by the Commission,[1709] which proposed lowering the threshold for passive non-financial entities,[1710] yet the proposal was not adopted.[1711] Additionally, the Directive does not circumscribe how shareholding interests should be identified and evidenced, nor how national authorities should verify information.[1712] This may create a situation whereby Member States fail to, or insufficiently, verify information contained in the register, leading to the inclusion of inaccurate and unreliable information that is of little use to tax authorities.[1713] Indeed, those wishing to evade taxation are likely to move their structures to countries with the lowest levels of verification and enforcement.[1714] Therefore, the threshold must be lowered and the EU should provide further guidance.

5MLD was introduced largely in response to the Panama Papers and terrorist attacks.[1715] 5MLD addresses new methods of money laundering and terrorist financing,[1716] and expands the scope

content/uploads/2019/01/Beneficial-ownership-verification_Tax-Justice-Network_Jan-2019.pdf> accessed 5 January 2020 at p.19

[1708] Commission Staff Working Document, 'Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and the Council Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing and Amending Directive 2009/101/EC' (Impact Assessment) SWD(2016) 223 final at p.91

[1709] Ibid at p.94

[1710] Commission, 'Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing and Amending Directive 2009/101/EC' (Proposal) COM (2016) 450 final, Article 1

[1711] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43, Article 1

[1712] O Vondráček, D Ondráčka, 'Ownership Structures and Beneficial Ownership: Registering and Investigating the Unknown' (2019) 44(3) EL Rev 401, 408

[1713] Ibid; This is one of the major weaknesses of the UK's beneficial ownership register, see Department for Business, Energy & Industrial Strategy, 'Corporate Transparency and Register Reform: Consultation on Options to Enhance the Role of Companies House and Increase the Transparency of UK Corporate Entities' (May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819994/Corporate_transparency_and_register_reform.pdf> accessed 5 January 2020 at p.14

[1714] Commission, 'Report from the Commission to the European Parliament and the Council on the Assessment of the Risk of Money Laundering and Terrorist Financing Affecting the Internal Market and Relating to Cross-Border Activities' COM(2019) 370 final at p.7

[1715] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43; 'The Panama Papers and the recent terrorist attacks have shown that we urgently need better Anti-Money Laundering rules.' European Commission, 'Strengthened EU Rules to Prevent Money Laundering and Terrorism Financing' (15 December 2017) <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=610991> accessed 8 January 2019

[1716] Such as, the use of virtual currencies to launder money, ibid; PG Silva, 'Recent Developments in EU Legislation on Anti-Money Laundering and Terrorist Financing' (2019) 10(1) New Journal of European Criminal Law 57, 61

of DNFBPs covered by the framework.[1717] Furthermore, 5MLD introduces a number of amendments to the BO registers. For instance, it partly addresses the lack of guidance on Member States' obligations to ensure information is 'adequate, accurate and current', by requiring obliged entities to report any inaccuracies identified.[1718] However, while this may be a useful tool, this guidance is insufficient as the onus must lie on the competent authorities to ensure the reliability of the information included from the outset. Additionally, 5MLD expands the range of trusts to be included within the register to all resident express trusts and any non-resident trusts, when the trustee enters into a business relationship or acquires real estate for the trust.[1719] This will expand the number of trusts included,[1720] in turn enabling tax authorities to discover the existence of trusts for which tax returns have never been submitted.[1721] 5MLD also provides for two additional registers; central bank account registries or central electronic data retrieval systems, which enable the holders and controllers of payment accounts and bank accounts to be identified,[1722] as well as registers, or retrieval systems, of the BOs of real estate.[1723] 5MLD provides for the interconnection of all BO registers across the EU via the European Central Platform.[1724]

5MLD expands access to BO information, as registers of the BOs of legal entities must be made available to the public,[1725] and the register of trusts must be accessible to obliged entities

[1717] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43, Article 1(1), replacing point (3) of Article 2(1) of Directive (EU) 2015/849.
[1718] Ibid, Article 1(15)(b), replacing Article 30(4) of Directive (EU) 2015/849.
[1719] Ibid, Article 1(16)(c), adding Article 31(3a) to Directive (EU) 2015/849.
[1720] 'The Association of Taxation Technicians estimates that about 200,000 trusts are currently registrable under the 4MLD, but these changes could increase the number of trusts that need to register to as much as two million.' A Slater-Brooks, 'Mistrustful of the Trusts Register' (2019) 183(4697) Taxation 12, 13
[1721] Ibid, p.14
[1722] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43, Article 1(19), inserting Article 32a into Directive (EU) 2015/849.
[1723] Ibid, Article 1(20), inserting Article 32b into Directive (EU) 2015/849.
[1724] The interconnection of the registers of legal entities and trusts must be achieved by 10 March 2021. Ibid, Recital 53, Article 1(15)(g) amending Article 30(9) and (10) of Directive (EU) 2015/849, Article 1(16)(j) replacing Article 31(9) of Directive (EU) 2015/849; The Commission is tasked submitting a report on the interconnection of bank account registries by 26 June 2020. Ibid, Article 1(19), inserting Article 32a into Directive (EU) 2015/849; The Commission must also assess the need for the interconnection of real estate registers by 31 December 2020. Ibid, Article 1(20)(2), inserting Article 32b into Directive (EU) 2015/849. The European Central Platform was established by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 Relating to Certain Aspects of Company Law [2017] OJ L 169/46, Article 22
[1725] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43, Article 1(15)(c), replacing Article 30(5) of Directive (EU) 2015/849.

and any person who can demonstrate a legitimate interest.[1726] These amendments clearly infringe upon rights to privacy and data protection,[1727] and the open nature of the registers has been extensively criticised as lacking in proportionality,[1728] and for potentially subjecting BOs to a risk of physical harm.[1729] The Commission attempted to mitigate this possibility by obliging Member States to restrict access to this information when the individual concerned is at 'disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the BO is a minor or otherwise legally incapable',[1730] but it may be difficult for an individual to demonstrate this risk in advance.[1731] It is questionable whether the registers need to be accessible to the public. The Commission believed that expanding access to the registers would lead to 'greater scrutiny of information by civil society',[1732] as seen in the Panama Papers[1733] and in Member States that have already introduced such registers.[1734]

[1726] Ibid, Article 1(16)(d), replacing Article 31(4) of Directive (EU) 2015/849.
[1727] See for instance, F Noseda, 'Common reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection of Privacy and Data Protection' (2017) 23 T&T 404; F Noseda, 'CRS and Beneficial Ownership Registers—What Serious Newspapers and Tabloids Have in Common: The Improbable Story of a Private Client Lawyer Turned Human Rights Activist' (2017) 23(6) T&T 601; F Noseda, 'CRS and Beneficial Ownership Registers—A Call to Action' (2017) 23(5) T&T 496; HSH Prince Michael von und zu Liechtenstein, 'Public Register: A Populist Tool to Control the Citizen' (2017) 23(6) T&T 693
[1728] The French Constitutional Court (Conseil Constitutionnel) declared the French Public Register of Trusts to be unconstitutional on this basis, see A Tailfer, A Auféril, 'Register of Trusts and Privacy: French Case Law in Perspective with the Fifth Anti-Money Laundering Directive Register' (2018) 24(10) T&T 968, 970. The European Data Protection Supervisor has criticised the lack of proportionality, Summary of the Opinion of the European Data Protection Supervisor on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC: Access to Beneficial Ownership Information and Data Protection Implications [2017] OJ C 85/3.
[1729] J Niegel, 'En Route to Nineteen Eighty-Four? Are the Tunes of Orwell's Nineteen Eighty-Four Echoed in Twenty-Seventeen?' (2017) 23(6) T&T 587, 593
[1730] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43, Article 1(15)(g), replacing Article 30(9) and (10) of Directive (EU) 2015/849, Article 1(16)(h), inserting Article 31(7a) into Directive (EU) 2015/849.
[1731] J Niegel, '(Where) Have You Already Been Registered?' (2016) 22(6) T&T 585, 591; The exemptions are considered to be a 'flimsy attempt to rebalance transparency and individual rights' PG Silva, 'Recent Developments in EU Legislation on Anti-Money Laundering and Terrorist Financing' (2019) 10(1) New Journal of European Criminal Law 57, 62
[1732] Commission, 'Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing and Amending Directive 2009/101/EC' (Proposal) COM (2016) 450 final at p.11
[1733] Where the ICIJ and over 100 media partners investigated and disseminated 11.5million files to expose financial crimes, such as money laundering and tax evasion. ICIJ, 'Panama Papers: About the Investigation' <https://www.icij.org/investigations/panama-papers/pages/panama-papers-about-the-investigation/> Accessed 8 January 2019
[1734] See for instance, Global Witness' investigations into the UK's People with Significant Control Register. Global Witness, 'Getting the UK's House in Order: Failure to Check Key Information and Enforce Rules on the UK Company Register Enables Criminals and the Corrupt to use UK Companies to Store Cash' (6 May 2019) <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/getting-uks-house-order/> Accessed 8 January 2020

However, this is a weak justification, as scrutiny by civil society organisations would largely be unnecessary if countries fulfilled this role satisfactorily.

6MLD addresses money laundering using the criminal law,[1735] requiring the enactment of laundering offences,[1736] and providing for the liability of legal persons when money laundering offences are committed for their benefit by leaders of the company.[1737] Tax evasion, including evasion of both direct and indirect taxes, is designated as a predicate offence.[1738] Laundering the proceeds of VAT fraud is not included, as it is criminalised by the PIF Directive.[1739] Although 6LMD defines the scope of certain crimes by reference to offences contained in other pieces of EU legislation, tax evasion is undefined, with reference made to national law.[1740] The EU's unwillingness to define tax evasion is problematic and does not sit well with the ambition of achieving a consistent approach to predicate offences.[1741] The EU has shown that it is able to offer a clear definition of tax crime in defining VAT fraud,[1742] and corresponding efforts should be made to define tax evasion. Nevertheless, this omission is due to the lack of international consensus surrounding tax crimes and how they should be addressed; a point evidenced by the lack of an international convention dedicated solely to combatting tax evasion, in contrast to international efforts against terrorist financing and bribery.[1743] 6MLD raises definitional concerns regarding its mandatory prohibition of self-laundering for certain money laundering offences, or the concealment of the proceeds of one's own criminal activities.[1744] As will be examined below, the inclusion of self-laundering offences, where tax

[1735] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law [2018] OJ L 284/22
[1736] Ibid, Article 3
[1737] Ibid, Article 7
[1738] Ibid, Article 2(1)(q)
[1739] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law [2017] OJ L 198/29, Article 4(1)
[1740] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law [2018] OJ L 284/22, Article 2(1)
[1741] Ibid, Recital 5
[1742] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law [2017] OJ L 198/29, Article 3(2)(c).
[1743] For instance, International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197, Article 2; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997, entered into force 15 February 1999) 2802 UNTS 225, Article 1
[1744] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law [2018] OJ L 284/22, Article 3(5). The FATF has pressured countries, such as Germany, to criminalise self-laundering, see PC van Duyne, JH Harvey, LY Gelemerova, *The Critical Handbook of Money Laundering Policy: Analysis and Myths* (Palgrave Macmillan 2018) p.101

evasion is the predicate offence, may be disproportionate and infringe fundamental principles of the criminal law.[1745]

5.3.5 The OECD

The OECD has worked with FATF to improve cooperation between tax and AML authorities,[1746] assessing the extent to which member countries use the AML framework to combat tax offences and the possible benefits of this approach.[1747] The OECD advocates a 'whole of government approach', whereby it is recognised that both tax and AML authorities may benefit from increased cooperation and access to information.[1748] This approach recognises that, tax authorities and professionals may be well placed to detect financial crimes,[1749] while tax authorities may be able to detect tax offences through the AML framework and cooperation with AML authorities.[1750] The OECD has issued Recommendations to facilitate cooperation between tax and AML authorities,[1751] including by amending the wording of exchange of information provisions in bilateral tax treaties to allow this information to be shared.[1752] Furthermore, the OECD has issued guidance on how to improve tax authorities'

[1745] AM Maugeri, 'Self-Laundering of the Proceeds of Tax Evasion in Comparative Law: Between Effectiveness and Safeguards' (2018) 9(1) New Journal of European Criminal Law 83, 97; V Mitsilegas, N Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23 MJ 261, 271.

[1746] FATF, 'Organisation for Economic Cooperation and Development (OECD)' <https://www.fatf-gafi.org/pages/organisationforeconomiccooperationanddevelopmentoecd.html> accessed 10 January 2020; OECD, *Access for Tax Authorities to Information Gathered by Anti-Money Laundering Authorities* (OECD Publishing, 2007); OECD, *Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes* (3rd edn, OECD Publishing 2017) p.6

[1747] OECD, *Access for Tax Authorities to Information Gathered by Anti-Money Laundering Authorities* (OECD Publishing, 2007)

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[1749] OECD, *Money Laundering and Terrorist Financing Awareness Handbook for Tax Examiners and Tax Auditors* (OECD Publishing 2019) p.27; The importance of cooperation in this area was recently illustrated by allegations that HMRC did not cooperate sufficiently with intelligence services allowing the proceeds of VAT and benefit fraud to be channelled to terrorists. SE Williams, '£80m of British Taxpayers' Money 'Funnelled to Al-Qaeda' in Decades-Long Scam' (The Telegraph, 31 March 2019) <https://www.telegraph.co.uk/news/2019/03/31/80m-british-taxpayers-money-funnelled-al-qaeda-decades-long/> accessed 10 January 2019

[1750] OECD, *Improving Co-operation Between Tax and Anti-Money Laundering Authorities: Access by Tax Administrations to Information Held by Financial Intelligence Units for Criminal and Civil Tax Purposes* (OECD Publishing 2015) p.8

[1751] OECD Council, 'Recommendation of the Council to Facilitate Co-operation between Tax and Other Law Enforcement Authorities to Combat Serious Crimes' (14 October 2010 - C(2010)119) <https://www.oecd.org/tax/crime/2010-recommendation.pdf> accessed 10 January 2020; OECD Council, 'Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (25 May 2009 - C(2009)64) <http://www.oecd.org/tax/crime/2009-recommendation.pdf> accessed 10 January 2020

[1752] Ibid. The OECD has also released guidance for tax examiners and auditors in detecting financial crimes, OECD, *Money Laundering and Terrorist Financing Awareness Handbook for Tax Examiners and Tax Auditors* (OECD Publishing 2019).

access to information held by AML authorities,[1753] including guidance on how to achieve effective cooperation.[1754] As such, the OECD does not play a central role, but rather, aims to complement the work of the FATF.[1755]

5.3.6 Conclusion

The international AML framework has moved from an attempt to counter the laundering of proceeds derived from drug trafficking offences, to the proceeds of serious crime, the financing of terrorism and, most recently, tax offences.[1756] Experts argue that the evolution of the AML framework represents a thinly-veiled attempt to generate support for anti-tax evasion measures under the guise of legislation to combat drugs and terrorism,[1757] yte it is more likely that the developments considered in the previous chapter generated a political environment that was more conducive to tackling this financial crime, enabling the expansion of this framework. However, it is questionable whether the AML framework is suitable for this purpose, and accordingly, whether continued expansion of the international AML framework is a positive development. To answer this question, the next section considers the implementation of these obligations in the UK and US.

5.4 The UK AML Framework

5.4.1 Introduction

The UK has adopted 'an aggressive stance towards money laundering',[1758] criminalising money laundering and providing for the recovery of the proceeds of criminal activity.[1759] The

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[1753] OECD, *Improving Co-operation Between Tax and Anti-Money Laundering Authorities: Access by Tax Administrations to Information Held by Financial Intelligence Units for Criminal and Civil Tax Purposes* (OECD Publishing 2015)
[1754] OECD, *Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes* (3rd edn, OECD Publishing 2017)
[1755] OECD Centre for Tax Policy and Administration, 'About Tax and Crime' <https://www.oecd.org/ctp/crime/about-tax-and-crime.htm> accessed 10 January 2020
[1756] In this respect, we have arguably moved full circle 'from Al Capone to Al Qaeda', and back to Al Capone again. B Unger, 'Money Laundering Regulation: From Al Capone to Al Qaeda' in B Unger, D van der Linde (Eds) *Research Handbook on Money Laundering* (Edward Elgar 2013)
[1757] See e.g. ME Beare, 'Searching for Wayward Dollars: Money Laundering or Tax Evasion – Which Dollars are We Really After?' (2002) 9(3) JFC 259, 259; 'It inevitably gives rise to suspicion that behind the façade of combating organised crime and terrorism the reality is a target of minimising illegal tax evasion.' A Haynes, 'Money Laundering: From Failure to Absurdity' (2008) 11(4) JMLC 303, 304
[1758] N Ryder, *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge 2012) p.73
[1759] G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge Studies in International and Comparative Law, CUP 2004) p.5

UK has ratified the Vienna and Palermo Conventions,[1760] and is considered compliant with the Recommendations.[1761] The UK has also transposed all of the EU Directives adopted during its membership.[1762] The UK Government has implemented 5MLD, notwithstanding the UK's decision to withdraw.[1763] The only Directive the UK has declined to implement is 6MLD.[1764] Nevertheless, in the UK, tax offences were included as predicate offences long before that obligation was imposed globally.[1765] Although authorities initially made little use of this framework to tackle tax offences,[1766] since then, the UK's AML framework has become 'an increasingly valuable revenue gathering tool'.[1767]

This section briefly examines the evolution of the UK's AML framework, from the proceeds of drug offences,[1768] to the proceeds of any criminal offence, or conduct which would otherwise be an offence in the UK.[1769] This section examines laundering offences and the recovery of the proceeds of crime, examining the effectiveness of this legislation in detecting, addressing and recovering the proceeds of tax offences. The section will also examine the introduction of BO registers in the UK, assessing their impact.

[1760] FATF, 'Third Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism: The United Kingdom of Great Britain and Northern Ireland' (29 June 2007) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UK%20FULL.pdf> accessed 11 January 2020, at p.11

[1761] The UK is considered to be compliant with 23 Recommendations, largely compliant with 15 Recommendations, and partially compliant with 2 Recommendations. FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 11 January 2020, at p.242-245

[1762] Ibid at p.23; Money Laundering Regulations 1993, SI 1993/1933; Money Laundering Regulations 2003, SI 2003/3075; Money Laundering Regulations SI 2007/2157; Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692

[1763] Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511; HM Treasury, 'Transposition of the Fifth Money Laundering Directive: Consultation' (April 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795670/20190415_Consultation_on_the_Transposition_of_5MLD__web.pdf> accessed 9 January 2019, p.4.

[1764] As the Directive relates to the area of freedom, security and justice, the UK would need to opt-in to its provisions, but has declined to do so. Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law [2018] OJ L 284/22, Recital 23. This was because the UK believes it is largely compliant with its measures and in many aspects exceeds them Home Office, Ministry of Justice, *Eighth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the Union (TFEU) in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2016 – 30 November 2017)* (Cm 9580, 2018) p.7.

[1765] Criminal Justice Act 1988, s93A(7) (as amended by Criminal Justice Act 1993, s29-31)

[1766] A UK Treasury official and the British Banker's Association initially gave assurances that the framework did not encompass tax offences M Bridges, 'Tax Evasion – A Crime in Itself: The Relationship with Money Laundering' (1996) 4 JFC 161, 164.

[1767] J Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' (2010) 3 BTR 235, 235.

[1768] Drug Trafficking Offences Act 1986, s24.

[1769] Criminal Justice Act 1988, s93A(7) (as amended by Criminal Justice Act 1993, s29-31); the relevant provision is now contained in the Proceeds of Crime Act 2002, s340.

5.4.2 Money Laundering

Background

The UK criminalised drug money laundering in 1986,[1770] and compelled courts to confiscate the proceeds of such offences.[1771] The Criminal Justice Act 1988 introduced a power for the courts to make confiscation orders in respect of all indictable offences, enabling confiscation of the proceeds of all serious tax offences.[1772] In 1993, the Act was updated to apply money laundering offences to the proceeds of all criminal conduct.[1773] These amendments made all indictable offences a predicate offence to laundering, in turn enabling both domestic and foreign tax evasion offences to be predicate offences to laundering for the first time.[1774] In this respect, the UK's AML legislation was far more expansive than the EU Directive,[1775] and it was the first Member State to enact all-crime AML legislation, including tax evasion.[1776]

There was an initial perception that tax crimes were not included within this framework; tax offences were considered distinct,[1777] there was no indication that parliament intended to extend the framework to this offence,[1778] and a Treasury Official gave assurances that the Act

[1770] Drug Trafficking Offences Act 1986, s24. The Act was updated by the Drug Trafficking Act 1994. R Alexander, 'Criminal Liability of Employees of Financial Intermediaries for Money Laundering: A British Perspective' in A Adamski (Ed), *Economic Crime in Polish and European Union Perspectives* (TNOiK 2003) p.319

[1771] Ibid, s1. The Act was introduced in response to the decision in *R v Cuthbertson* [1981] AC 470 (HL), where the court decided that forfeiture powers under the Misuse of Drugs Act 1971 were restricted to 'physical items used to commit the offence', and the consequent report of the Hodgson Committee which recommended the introduction of broader confiscation powers. See N Ryder, 'To Confiscate or not to Confiscate? A Comparative Analysis of the Confiscation of the Proceeds of Crime Legislation in the United States and the United Kingdom' [2013] 8 JBL 767, 786

[1772] Criminal Justice Act 1988, s71. P Alldridge, 'Are Tax Offences Predicate Offences for Money-Laundering Offences?' (2001) 4(4) JMLC 350, 352; Confiscation became mandatory following the introduction of the Proceeds of Crime Act 1995, s1 which amended Criminal Justice Act 1988, s71. See N Clark, 'The Impact of Recent Money Laundering Legislation on Financial Intermediaries' (1996) 14(3) Dickinson Journal of International Law 467, 473

[1773] Criminal Justice Act 1993, s29-31 inserting s93A, 93B and 93C into the Criminal Justice Act 1988. M Brindle QC, 'Money Laundering, Tax and the Criminal Law' [1999] 19 Amicus Curiae 4, 4. Criminal conduct was defined as 'conduct which constitutes an offence to which this Part of this Act applies or would constitute such an offence if it had occurred in England and Wales', ibid s29, inserting s93A(7) into the Criminal Justice Act 1988.

[1774] MJ Bridges, P Green, 'Tax Evasion and Money Laundering – An Open and Shut Case?' (1999) 3(1) JMLC 51, 51

[1775] The first EU Directive, considered at p. above. M Brindle QC, 'Trust Design, Tax Planning and Money Laundering: Part 1' (1997) PCB 252, 253

[1776] RCH Alexander, *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Ashgate 2007) p.143

[1777] MJ Bridges, P Green, 'Tax Evasion and Money Laundering – An Open and Shut Case?' (1999) 3(1) JMLC 51, 51

[1778] M Brindle QC, 'Money Laundering, Tax and the Criminal Law' [1999] 19 Amicus Curiae 4, 6

did not capture tax offences.[1779] Although the definition of criminal conduct potentially enabled the inclusion of foreign tax evasion offences, many argued that the Revenue Rule would prevent such a result, as this would be tantamount to permitting the indirect enforcement of foreign revenue laws.[1780] Moreover, the 'geographic deeming provision' within the definition of criminal conduct would require the transposition of the foreign revenue authority in place of HMRC as the victim, which was not provided for.[1781] However, this argument was considered largely theoretical, as those who evade tax tend to commit other forms of criminal activity, where the identity of the victim is irrelevant.[1782] In addition, the modern version of the Revenue Rule appears to be confined to civil cases,[1783] or restricted for reasons of public policy.[1784]

These myths were dispelled when the government emphasised the parity of tax offences with other forms of serious crime and the intention to apply the AML framework to this offence.[1785] Following the G7 announcement in 1998,[1786] the UK enabled the Inland Revenue to access information generated by the AML framework.[1787] The pressure the UK imposed on its overseas dependencies to enact 'all-crime' money laundering legislation, including tax evasion,[1788] also demonstrated the transformation of its position. Consequently, although the UK AML framework has provided for the inclusion of tax evasion as predicate offence since 1993, in practice, this was achieved by a change in policy during the late 1990s. Since then,

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[1779] M Bridges, 'Tax Evasion – A Crime in Itself: The Relationship with Money Laundering' (1996) 4(2) JFC 161, 164

[1780] See for instance, T Graham, TJ Garrett, 'Money Laundering and Foreign Tax Evasion: Is Government of India v Taylor Really Dead?' (2000) 3(4) JMLC 377, 378; T Graham, R Wilkinson, 'Money Laundering and Foreign Tax Evasion: Is Foreign Tax Evasion a Predicate Offence for the Purposes of POCA 2002?' (2008) 14(8) T&T 534, 535

[1781] P Burrell, 'Preventing Tax Evasion through Money-Laundering Legislation' (2000) 3(4) JMLC 304, 308

[1782] MJ Bridges, P Green, 'Tax Evasion and Money Laundering – An Open and Shut Case?' (1999) 3(1) JMLC 51, 52

[1783] See *R. v Chief Metropolitan Stipendiary Magistrate Ex p. Secretary of State for the Home Department* [1988] 1 WLR 1204; KE Oliver, 'International Taxation: Tax Evasion as a Predicate Offence to Money Laundering' (2002) 27 Int'l Legal Prac 55, 59

[1784] See *In Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723 (HL) P Burrell, 'Preventing Tax Evasion through Money-Laundering Legislation' (2000) 3(4) JMLC 304, 307

[1785] See for instance, the quotations in J Rhodes, 'The Impact of UK Money-Laundering Legislation on Fiscal Crime' (2000) 8(2) JFC 117, 199

[1786] G7, 'G7 Initiative on Harmful Tax Competition' (Birmingham Summit, 12-17 May 1998) <www.g8.utoronto.ca/summit/1998birmingham/harmfultax.html> accessed 5 December 2019;

[1787] J Fisher, J Bewsey, 'Laundering the Proceeds of Fiscal Crime' (2000) 15(1) JIBL 11, 13

[1788] J Rhodes, 'The Impact of UK Money-Laundering Legislation on Fiscal Crime' (2000) 8(2) JFC 117, 119 citing Secretary of State for Foreign and Commonwealth Affairs Robin Cook, *Partnership for Progress and Prosperity Britain and the Overseas Territories* (Cm 4264, 1999) p.26; The Crown Dependencies had committed to introduce such legislation by 1998, see Secretary of State for the Home Department Andrew Edwards, *Review of Financial Regulation in the Crown Dependencies* (Cm4109, 1998) at S163

the two 'distinct threads' of the UK's AML framework have been integrated with the adoption of the Proceeds of Crime Act (POCA) 2002.[1789]

The AML Framework

The UK's AML framework is primarily contained in the POCA and the Money Laundering, Regulations (MLR),[1790] last amended in 2019.[1791] The MLR oblige relevant persons,[1792] to establish and maintain policies, controls and procedures to address risks of money laundering and terrorist financing.[1793] The MLR also requires relevant persons to take certain actions to prevent money laundering.

POCA makes it an offence for any individual to conceal, disguise, convert, transfer, remove,[1794] acquire, use, or possess,[1795] criminal property, or to enter into, or become concerned in an arrangement, which they know or suspect facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.[1796] Criminal property is comprised of a person's benefit from criminal conduct;[1797] itself defined as conduct amounting to an offence in any part of the UK, or conduct that would constitute an offence if it occurred there.[1798] Carrying out any of these actions with the proceeds of foreign or domestic tax offences amount to a laundering offence in the UK. The UK's designation of predicate offences is significantly wider than the Recommendations and EU Directives.[1799] The UK opted for an all-crime

[1789] P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart 2003) p.181
[1790] Terrorist financing is still treated separately within the Terrorism Act 2000, s16-18
[1791] Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511
[1792] Including FIs, tax advisers and legal professionals. The regulated sector also includes credit institutions, auditors, insolvency practitioners, external accountants, trust or company service providers, estate agents, high value dealers and casinos. The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, Regulation 8. The UK has been praised by the FATF for including a wide range of financial institutions and DNFPBs within its AML framework, FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 11 January 2020, at p.109
[1793] Ibid, Regulation 19. The policies, controls and procedures should be informed by a risk assessment, required under Regulation 18. Indeed, there are 'several layers of risk assessments' required by the MLR, as the Treasury and Home Office, as well as supervisory authorities, must carry out their own risk assessments under Regulations 16 and 17 of the MLR. These risk assessments must inform the risk assessment carried out by the regulated institution. See S Turner, J Bainbridge, 'An Anti-Money Laundering Timeline and the Relentless Regulatory Response' (2018) 82(3) The Journal of Criminal Law 215, 219
[1794] Proceeds of Crime Act 2002, s327(1).
[1795] Ibid, s329(1).
[1796] Ibid, s328(1).
[1797] Ibid, s340(3)
[1798] Ibid, s340(2)
[1799] S Kebbell, 'The Law Commission: Anti-Money Laundering and Counter-Terrorism Financing – Reform of the Suspicious Activity Reporting Regimes' (2018) 11 Crim LR 880, 885

approach to ease the burden placed on prosecutors,[1800] and professionals,[1801] who are no longer obliged to consider or prove the predicate offence.[1802] However, the broad range of offences, coupled with the lack of a *de minimis* threshold to exclude low-value transactions,[1803] has resulted in professionals being obliged to report numerous technical offences.[1804]

This is because POCA creates a 'two-tier reporting process'[1805] whereby, an individual does not commit one of the primary money laundering offences if they make an authorised disclosure[1806] and obtain appropriate consent before the act is undertaken.[1807] This is intended to protect the regulated sector,[1808] who may commit an offence by carrying out a customer's instructions if not reported.[1809] Secondly, those in the regulated sector,[1810] and their MLRO,[1811] are under a duty to report any suspicions of laundering and makes them liable for a failure to report suspicions or suspicions they should have reasonably held. It is an offence to 'tip off' the customer, by revealing that a SAR has been submitted.[1812] The UK's FIU is responsible for receiving SARs,[1813] and is situated within the National Crime Agency (NCA).[1814] Due to the

[1800] Ibid at p.886
[1801] M Goldby, 'Anti-Money Laundering Reporting Requirements Imposed by English Law: Measuring Effectiveness and Gauging the Need for Reform' (2013) 4 JBL 367, 369; Stokes and Arora note that professionals were likely to take an all-crimes approach to reporting even before this obligation was introduced in POCA, as they were unlikely to know the source of the funds involved. R Stokes, A Arora, 'The Duty to Report under the Money Laundering Legislation within the United Kingdom' [2004] JBL 332, 345
[1802] Following its recent consultation, the Law Commission recommended the retention of the all-crimes approach for this reason. Law Commission, *Anti-Money Laundering: The SARs Regime Report* (Law Com No 384, 2019) at para 4.72.
[1803] There is a very limited exemption for banks and other deposit-taking bodies, which may continue to effect transactions for a customer it suspects of money laundering, as long as the transactions do not exceed the threshold amount of £250. Proceeds of Crime Act 2002, s 339A. See Law Commission, *Anti-Money Laundering: the SARs Regime Consultation Paper* (Law Com CP No 236, 2018) para 2.70
[1804] 'Examples often cited by the profession are the failure to comply with a tree preservation order, or to obtain an asbestos-related environmental licence.' S Kebbell, '"Everybody's Looking at Nothing" - The Legal Profession and the Disproportionate Burden of the Proceeds of Crime Act 2002'(2017) 10 Crim LR 741, 742
[1805] P Morris, 'The Importance of Being Appropriate' (2004) 19(7) JIBLR 258, 258
[1806] Proceeds of Crime Act 2002, s338
[1807] Ibid, s327(2)a, s328(2)a, s329(2)a. These reports are known as Defence against Money Laundering (DAML) Suspicious Activity Reports (SARs), Law Commission, *Anti-Money Laundering: the SARs Regime Consultation Paper* (Law Com CP No 236, 2018) para 1.25.
[1808] As defined in Proceeds of Crime Act 2002, Schedule 9.
[1809] M Goldby, 'Anti-Money Laundering Reporting Requirements Imposed by English Law: Measuring Effectiveness and Gauging the Need for Reform' (2013) 4 JBL 367, 369
[1810] Proceeds of Crime Act 2002, s330
[1811] Ibid, s331
[1812] Ibid, s333A. Both offences carry harsh penalties, see s334(1)&(2), s333A(4).
[1813] NCA, 'Introduction to Suspicious Activity Reports (SARs)' (December 2019) <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/158-introduction-to-suspicious-activity-reports-sars+&cd=2&hl=en&ct=clnk&gl=uk > Accessed 19 January 2019
[1814] Ibid, ss330(4), s331(4); Crime and Courts Act 2013, s1; HM Treasury, Home Office, 'National Risk Assessment of Money Laundering and Terrorist Financing 2017' (October 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655198/National_risk_assessment_of_money_laundering_and_terrorist_financing_2017_pdf_web.pdf> accessed 19 January 2020, at p.11

inclusion of tax evasion as a predicate offence, SARs potentially provide valuable intelligence to law enforcement authorities (LEAs) in respect of investigations into tax offences.[1815]

Suspicion was defined in *R. v Da Silva*[1816] as 'a possibility which is more than fanciful that the relevant facts exist', effectively meaning that suspicion does not have to be 'clear' or 'firmly grounded'.[1817] The inclusion of a subjective test was intended to ensure that professionals would exercise greater caution in fulfilling their obligations[1818] and would submit greater numbers of SARs.[1819] However, this test is difficult to apply.[1820] The failure to report offence also applies when there are reasonable grounds to suspect money laundering, regardless of the professional's actual state of mind.[1821] Although the objective test was introduced to inhibit 'wilful blindness',[1822] this provision also criminalises negligence[1823] and thus undermines fundamental principles of the criminal law.[1824]

The wide definition of criminal conduct, the unclear test of suspicion, the obligation to submit SARs based on either subjective or objective grounds for suspicion has led to defensive

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[1815] National Crime Agency, 'UK Financial Intelligence Unit: Suspicious Activity Reports Annual Report 2019' < https://www.nationalcrimeagency.gov.uk/who-we-are/publications/390-sars-annual-report-2019/file> accessed 19 January 2020, at p.11; OECD, *Improving Co-operation Between Tax and Anti-Money Laundering Authorities: Access by Tax Administrations to Information Held by Financial Intelligence Units for Criminal and Civil Tax Purposes* (OECD Publishing 2015) p.8

[1816] [2006] EWCA Crim 1654; [2007] 1 WLR 303.

[1817] Ibid at para [16]. See also *K Ltd v National Westminster Bank Plc* [2006] EWCA Civ 1039; [2007] 1 WLR 311 and *Shah v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31; [2010] 3 All ER 477.

[1818] Unger and Takáts contend that the definition of suspicion is purposefully vague to force banks to persistently review their understanding of money laundering; a form of 'constructive ambiguity'. B Unger, F van Waarden, 'How to Dodge Drowning in Data? Rule- and Risk-Based Anti Money Laundering Policies Compared' (2009) 5(2) RLE 953, 962-63 citing Előd Takáts, 'A Theory of "Crying Wolf": The Economics of Money Laundering Enforcement' (IMF Working Paper no 07/81, April 2007) <http://www.imf.org/external/pubs/ft/wp/2007/wp0781.pdf> accessed 19 January 2020.

[1819] R Stokes, A Arora, 'The Duty to Report under the Money Laundering Legislation within the United Kingdom' [2004] JBL 332, 354

[1820] The Law Commission found that out of a sample of 563 DAML SARs, 15% did not meet the threshold for suspicion set out in *R. v Da Silva.* Law Commission, *Anti-Money Laundering: The SARs Regime Report* (Law Com No 384, 2019) at para 5.29, see also the case studies at p.97-98.

[1821] Proceeds of Crime Act 2002, s330(2)(b), s331(2)(b). A Campbell, E Campbell, 'Money Laundering and the Consent Regime in the United Kingdom – Time for Change?' in B Rider (Ed), *Research Handbook on International Financial Crime* (Edward Elgar 2015) p.487

[1822] Goldby notes that the objective test has been important in cases where defendants have intentionally ignored clear indications of money laundering, such as *R. v Griffiths and Pattison* [2006] EWCA Crim 2155; [2007] 1 Cr. App. R. (S.) 95. M Goldby, 'Anti-Money Laundering Reporting Requirements Imposed by English Law: Measuring Effectiveness and Gauging the Need for Reform' (2013) 4 JBL 367, 371-374.

[1823] G Sinha, 'AML-CTF: A Forced Marriage Post 9/11 and its Effect on Financial Institutions'(2013) 16(2) JMLC 142, 148

[1824] Such as, 'the principle of the dependence of criminal liability on guilt'. V Mitsilegas, *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles* (Kluwer Law International, 2003) p.185

reporting.[1825] The UK receives the greatest amount of SARs in Europe,[1826] with 573,085 SARs received in 2019-20.[1827] This is because professionals will take a 'better safe than sorry' approach,[1828] submitting a SAR when there is little evidence of criminality to avoid the harsh sanctions imposed.[1829] FIUs are best placed to judge the veracity of SARs,[1830] but have limited resources and expending them on useless information may cause serious crimes to go undetected.[1831] The Law Commission has called for further guidance on the meaning of suspicion, as well as further research on the merits of introducing a 'reasonable grounds to suspect' threshold.[1832] Although these are welcome suggestions, they are unlikely to resolve all of the flaws inherent in the UK's AML framework.[1833] Accordingly, the difficulties involved in the implementation of the framework must be considered in any evaluation of its utility in combatting tax offences.

5.4.3 Tax Evasion as a Predicate Offence

The Primary Money Laundering Offences

Criminal property is identified as a person's benefit from criminal conduct, or the representation thereof, when the offender knows or suspects it represents such a benefit.[1834] Criminal conduct is defined as conduct amounting to an offence in any part of the UK, or

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[1825] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 11 January 2020, at p.120. This has long been identified as a key weakness of the UK's AML framework. KPMG, 'Money Laundering: Review of the Reporting System' (1 July 2003) <http://dematerialisedid.com/PDFs/kpmgreport.pdf> accessed 19 January 2020, at p.34.

[1826] The UK accounts for 36% of all reports submitted. EUROPOL, 'From Suspicion to Action: Converting Financial Intelligence into Greater Operational Impact' (2017) <https://www.europol.europa.eu/publications-documents/suspicion-to-action-converting-financial-intelligence-greater-operational-impact> accessed 19 January 2020, at p.10.

[1827] National Crime Agency, 'UK Financial Intelligence Unit: Suspicious Activity Reports Annual Report 2020' <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/480-sars-annual-report-2020/file> accessed 26th April 2020, at p.2.

[1828] E Radmore, G Bhattacharyya, M Laddie, 'Money Laundering Prevention - Effect of the New Law on Solicitors' (1995) 16(5) Comp Law 155, 156

[1829] These are often referred to as 'technical SARs', see S Kebbell, '"Everybody's Looking at Nothing" - The Legal Profession and the Disproportionate Burden of the Proceeds of Crime Act 2002' (2017) 10 Crim LR 741, 746.

[1830] D Coates, 'SARs Transformation Project: Myth or Reality?' (2008) 156 MLB 6

[1831] Law Commission, *Anti-Money Laundering: the SARs Regime Consultation Paper* (Law Com CP No 236, 2018) para 1.26. Also known as the 'crying wolf' problem, see E Takáts, 'A Theory of "Crying Wolf": The Economics of Money Laundering Enforcement' (2007) IMF Working Paper no 07/81 <http://www.imf.org/external/pubs/ft/wp/2007/wp0781.pdf> accessed 19 January 2020. In this respect, the UK's AML framework appears to be 'drowning government agencies in data' see B Unger, F van Waarden, 'How to Dodge Drowning in Data? Rule- and Risk-Based Anti Money Laundering Policies Compared' (2009) 5(2) Review of Law and Economics 953, 963.

[1832] Law Commission, *Anti-Money Laundering: The SARs Regime* (Law Com No 384, 2019) p.115-117.

[1833] The Law Commission itself notes that the review was 'limited in scope'. Ibid at p.18.

[1834] Proceeds of Crime Act 2002, s340(3)

conduct that would constitute an offence if it occurred there,[1835] and a person is considered to benefit from such conduct if they obtain property as a result or in connection with the commission of the offence.[1836] Although this definition encompasses property obtained through committing tax fraud, such as claiming false tax rebates,[1837] it is questionable whether the use of the word 'obtain' enables the application of the statute 'to sums unlawfully *retained* as a result of criminal activity'.[1838] As such, s.340(6) provides that 'if a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.'[1839] In *R v Dimsey and Allen*, it was argued that failure to pay or declare tax due did not amount to a pecuniary advantage for the purposes of the Act, because the tax remained due and payable.[1840] Similarly, it has been suggested that the only benefit gained by those who evade tax is the deferral of a debt.[1841] Nevertheless, the courts have consistently held that the evasion of tax constitutes a pecuniary advantage and the advantage gained is the value of the debt itself.[1842]

Consequently, evaded taxation is criminal property for the purposes of the Act.[1843] However, it is difficult to apply the money laundering offences to this form of criminal property. s340(6) as a deeming provision, which considers a defendant to 'have a sum of money that s/he does not actually have'.[1844] The implication is that it is impossible to launder hypothetical criminal property that does not actually exist.[1845] Alldridge and Mumford provide that for the money

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[1835] Ibid, s340(2)
[1836] Ibid, s340(5)
[1837] For a recent case of this type, see *R v McLeod and Francis* [2019] EWCA Crim 2214.
[1838] KE Oliver, 'International Taxation: Tax Evasion as a Predicate Offense to Money Laundering' (2002) 27 Int'l Legal Prac 55, 57.
[1839] Proceeds of Crime Act 2002, s340(6)
[1840] *R v Dimsey and Allen* [2000] 1 Cr App R (S) 497 (CA). The case considered the identical provision in the Criminal Justice Act 1988, s71(5).
[1841] The benefit of which is often negligible, P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 364-367.
[1842] The fact that the Revenue may later seek to recover the debt does not alter the position. 'The fact that he remained in law liable to pay the tax, the fact even, were it so, that the Revenue might later recover it, does not, in our judgment, yield the proposition that the proceeds of his crime were one penny less than the whole of the tax evaded.' See *R v Dimsey and Allen* [2000] 1 Cr App R (S) 497 at 501 (CA). This does not breach Article 1 of the Protocol to the European Convention on Human Rights, as considered in *R v Waya* [2012] UKSC 51; [2013] 1 AC 294. 'Once it is concluded that the respondent was the person liable to pay the duty which has been evaded, there is nothing disproportionate in the conclusion that the financial benefit gained by the respondent is the amount of duty which he has evaded,' *R v Parker* [2018] EWCA Crim 1057 at para 25.
[1843] *R v K* [2007] EWCA Crim 491; [2007] 1 WLR 2262; *R v William and William and William* [2013] EWCA Crim 1262; [2015] Lloyd's Rep FC 704. However, if the prosecution wishes to rely on this offence as predicate, a prima facie case of cheat must be made out, see *R v Gabriel* [2006] EWCA Crim 229 [2007] 1 WLR 2272.
[1844] P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 368.
[1845] 'It is no more impossible to conceal (and the rest) property that does not exist than it is to conceal a unicorn.' P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.176.

laundering offences to apply, it is necessary to identify the criminal property involved as distinct from other legitimately earned funds.[1846] However, this is contested by Ormerod, who claims that although it is necessary to demonstrate that the property exists, it is not necessary to identify the specific property concerned.[1847] Notwithstanding these conceptual difficulties, the courts have held that dealing with the proceeds of tax evasion constitutes a money laundering offence.[1848]

The inclusion of tax evasion as a predicate offence to laundering facilitates the prosecution of tax evaders because of the lower standard of *mens rea*, specifically, proof of knowledge or suspicion is required, rather than intention or dishonesty.[1849] Additionally, it is easier to prosecute facilitators of tax offences, it being simpler to demonstrate a breach of money laundering legislation, as opposed to, a conspiracy between the tax evader and their advisor.[1850] Moreover, facilitators may be charged with money laundering offences even if based overseas.[1851] However, while laundering offences may prove beneficial as an *alternative* to a tax evasion charge, there is a risk that all instances of tax evasion will be charged as tax evasion *and* money laundering.[1852] In this respect, the 'laundering' of the funds is a core element of the tax offence,[1853] and thus, without any additional level of criminality, it is inappropriate to also use the AML framework as a form of 'uncritical over-criminalization'.[1854] To resolve this issue, POCA offences could be confined to laundering by third parties.[1855] This approach was

[1846] P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 367.
[1847] D Ormerod, 'Case Comment - Money Laundering: Whether Undeclared Takings of a Legitimate Business Capable of Amounting to "Criminal Property" Where Offence of Cheating the Public Revenue Alleged' [2007] Crim LR 645, 647.
[1848] *R v K* [2007] EWCA Crim 491; [2007] 1 WLR 2262; *R v William and William and William* [2013] EWCA Crim 1262; [2015] Lloyd's Rep FC 704.
[1849] P Burrell, 'Preventing Tax Evasion through Money-Laundering Legislation' (2000) 3(4) JMLC 304, 308
[1850] M Bridges, 'Tax Evasion – A Crime in Itself: The Relationship with Money Laundering' (1996) 4(2) JFC 161, 166.
[1851] Providing, a 'significant part of the criminality underlying the case' takes place in England, *R v Rogers and others* [2014] EWCA Crim 1680; [2015] 1 WLR 1017, at para 55; See also, T Epps, M Beardsworth, A Amole, 'Extraterritoriality: The UK Perspective' in J Seddon et al (Eds.), *The Practitioner's Guide to Global Investigations* (3rd edn, Global Investigations Review 2019) p.464.
[1852] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.173.
[1853] M Levi, P Reuter, 'Money Laundering' (2006) 34 *Crime and Justice* 289, 292.
[1854] V Mitsilegas, N Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23 *Maastricht Journal of European and Comparative Law* 261, 267. This would violate the principle of proportionality and ne bis in idem, see AM Maugeri, 'Self-laundering the Proceeds of Tax Evasion in Comparative Law: Between Effectiveness and Safeguards' (2018) 9(1) NJECL 83, 97
[1855] Thereby excluding self-laundering, which means 'that a person commits an offence with economic profit and launders themselves the dirty money from the offence.' T Hyttinen, 'A European Money Laundering Curiosity: Self-Laundering in Finland' 8(2) EuCLR 268, 268

commonly used in European countries,[1856] before pressure to criminalise conduct was exerted by the FATF and EU.[1857] However, this would destroy one of the primary benefits of the application of POCA to tax offences - the ability to prosecute an individual for money laundering when it is impracticable or impossible to prosecute the predicate.[1858] Nevertheless, the extent to which over-criminalization causes problems in practice is mitigated by the common use of concurrent, rather than consecutive, sentences.[1859] Furthermore, in *R v GH*, the court held that 'it would be bad practice for the prosecution to add additional counts of [money laundering] unless there is a proper public purpose in doing so'.[1860] However, this is entirely at the court's discretion,[1861] and the principle should be placed on a statutory footing.

Including tax evasion as a predicate offence also has an impact on the labelling function of the criminal law.[1862] As profits derived from criminal activities are taxable,[1863] it may be easier for prosecutors to charge criminals with laundering the proceeds of tax evasion, as opposed to the 'true' predicate offence.[1864] Indeed, several individuals were convicted of money laundering offences because there was 'an irresistible inference' that the property could only derive from crime, including tax evasion.[1865] While such an outcome may seem just when this strong inference can be drawn, this approach is contrary to the Rule of Law.[1866]

[1856] On the basis that self-laundering should be regarded as a form of complicity in, or a mere consequence of, the predicate offence, M Meriani, 'The Crime vs the Privilege of Self-Laundering: A Forefront Reform Shakes the Italian Criminal Law System' (2016) 19(4) JMLC 426, 427.

[1857] See T Hyttinen, S Heinikoski, 'Harmonizing Criminal Law Provisions on Money Laundering – A Litmus Test of European Integration' [2018] European Intelligence and Security Informatics Conference 31, 37; see also T Hyttinen, 'A European Money Laundering Curiosity: Self-Laundering in Finland' 8(2) EuCLR 268.

[1858] AM Maugeri, 'Self-laundering the Proceeds of Tax Evasion in Comparative Law: Between Effectiveness and Safeguards' (2018) 9(1) NJECL 83, 107-8.

[1859] *R v Berger (Leib)* [2018] EWCA Crim 1019; see also RC Alexander, '"Cost Savings" As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom' (2011) 45 Int'l Law 749, 812.

[1860] Such as where the conduct involved 'some added criminality' or it was impossible to prosecute the defendant for the predicate offence, *R v GH* [2015] UKSC 24; [2015] 1 WLR 2126 at para 48.

[1861] Ibid; see also AM Maugeri, 'Self-laundering the Proceeds of Tax Evasion in Comparative Law: Between Effectiveness and Safeguards' (2018) 9(1) NJECL 83, 102.

[1862] P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 373.

[1863] For a review of the case law see, R Curtis, 'It's A Fair Cop' (2005) 155 *Taxation* 1.

[1864] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.178.

[1865] *R v Kuchhadia* [2015] EWCA Crim 1252; [2015] 1 WLR 4895; When juries ask questions regarding tax evasion in unspecified crime money laundering cases, they should be directed not to speculate on this issue if no evidence has been presented or directions made as to the elements of the tax offence, see *R v Yip* [2010] EWCA Crim 1381; *R v Anwar* [2013] EWCA Crim 1865. However, juries may speculate and convict on this basis, providing the issue is not raised during the trial itself, see *R v Solanki and Patel* [2020] EWCA Crim 47. In *Solanki* the defendants' money laundering convictions were determined to be safe, even though the jury raised the issue of tax evasion during its deliberation.

[1866] 'The principle of legality requires that if the authorities want to claim that Capone is a murdering racketeer, they should be compelled to make that allegation in court, and produce evidence of those offences.' P Alldridge, 'Are Tax Offences Predicate Offences for Money-Laundering Offences?' (2001) 4(4) JMLC 350, 355.

The Reporting Obligation

It may be asked why AML legislation needs to encompass tax offences?[1867] The answer lies in the financial intelligence provisions of the framework, and their potential utility in detecting and preventing tax crimes. As tax evasion is regarded as a predicate offence to laundering, SARs must be submitted when it is known or suspected that another is engaged in laundering the proceeds of tax evasion, potentially providing valuable intelligence.[1868] In considering the effectiveness of SARs in tax cases, there are significant obstacles to comprehensively measuring effectiveness of AML instruments, particularly through a cost benefit analysis, as many potential benefits are impossible to measure.[1869] Moreover, quantifiable benefits, such as the volume of criminal proceeds recovered, are not optimal indicators of effectiveness owing to competing objectives.[1870] However, one of the primary indicators of the effectiveness of tax evasion law and its enforcement is its ability to facilitate compliance and recover revenue lost through tax offences.[1871] Accordingly, this section aims to provide some insight into the realisation of these benefits.

Customs and Excise were always able to access information contained in SARs,[1872] whereas the Inland Revenue only gained access in 1998.[1873] Afterwards, the Channel Islands and Isle of Man agreed to provide SARs reports to the National Criminal Intelligence Service.[1874] Inland Revenue's access to SAR data was considered to provide valuable intelligence in combatting tax fraud,[1875] with approximately one quarter of all SARs leading to enquiries into tax

[1867] P Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave MacMillan 2016) p.27.
[1868] Proceeds of Crime Act 2002, s330-332.
[1869] See M Levi, P Reuter, T Halliday, 'Can the AML System Be Evaluated Without Better Data?' (2018) 69 Crime, Law and Social Change 307; J Ferwerda, 'The Effectiveness of Anti-Money Laundering Policy: A Cost-Benefit Perspective' in C King, C Walker, J Gurulé. (Eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave MacMillan, London, 2018) p.317.
[1870] M Goldby, 'Anti-Money Laundering Reporting Requirements Imposed by English Law: Measuring Effectiveness and Gauging the Need for Reform' (2013) 4 JBL 367, 383.
[1871] The collection of tax has long been prioritised by HMRC, see HM Revenue & Customs, 'HMRC's Criminal Investigation Policy' (Guidance, 13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 11 March 2020.
[1872] MJ Bridges, P Green, 'Tax Evasion and Money Laundering – An Open and Shut Case?' (1999) 3(1) JMLC 51, 54
[1873] Following the G7 announcement, ibid.
[1874] The UK's former financial intelligence unit. The NCIS was replaced by the Serious Organised Crime Agency (SOCA), which was in turn replaced by the National Crime Agency (NCA). National Audit Office, *Tackling Fraud Against the Inland Revenue: Report by the Comptroller and Auditor General* (HC 2002-2003, 429-I) p.34
[1875] Ibid; see also SOCA, 'The Suspicious Activity Reports Regime: Annual Report 2008' (2008) <webarchive.nationalarchives.gov.uk/20100711235311/http:www.soca.gov.uk/about-soca/library/doc_download/55-the-suspicious-activity-reports-regime-annual-report-2008.pdf > accessed 14th March 2020 at p.28, both cited in J Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' (2010) 3 BTR 235, 264-5.

matters.[1876] From 2004-2007, SARs prompted over 7,000 investigations, leading to the recovery of over £27million.[1877] Since then, the combined HMRC has received regular reports from the FIU, and is the largest recipient of SAR data.[1878] Nevertheless, HMRC has been criticised for not making full use of this intelligence,[1879] using only just over one percent of the 300,000 reports it received in 2013.[1880] HMRC's use of SARs improved with the move to feed SAR data into the CONNECT database, which enables the matching of SAR data with other data held by HMRC.[1881] In 2018-19, SAR data assisted HMRC in recovering £40.2million through civil enquiries and over £30million from civil investigations.[1882] Despite the vast number of SARs received by HMRC, SARs have a marginal role in the detection of tax evasion and the recovery of unpaid tax and penalties. This is highlighted by comparing the sums recovered to the total sum of £34.1billion collected by HMRC through compliance activities in 2018-19,[1883] with the Fraud Investigation Service alone recovering £5.47billion through civil and criminal investigations in 2018.[1884] The utility of SAR data in obtaining convictions for tax evasion, or the laundering of the proceeds thereof, is unclear.[1885]

[1876] Ibid (Fisher) at p.263.
[1877] Ibid at p.265 citing National Audit Office, *Tackling the Hidden Economy* (HC 2007-8, 341-I)
[1878] Her Majesty's Inspectorate of Constabulary, 'An Inspection of Her Majesty's Revenue and Customs Performance in Addressing the Recovery of the Proceeds of Crime from Tax and Duty Evasion and Benefit Fraud: Revisit 2013' (HMIC, 2014) <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/hmrc-proceeds-of-crime-revisit.pdf> accessed 14th March 2020 p.30. It is 'a major user of SAR information' HMRC Officer Jonathan Chapman cited in National Crime Agency, 'SARs in Action' (Issue 1, March 2019) <https://nationalcrimeagency.gov.uk/who-we-are/publications/268-ukfiu-sars-in-action-march-2019> accessed 14th March 2020, at p.7
[1879] Her Majesty's Inspectorate of Constabulary, 'An Inspection of Her Majesty's Revenue and Customs Performance in Addressing the Recovery of the Proceeds of Crime from Tax and Duty Evasion and Benefit Fraud' (HMIC, 2011) <https://www.justiceinspectorates.gov.uk/hmicfrs/media/hmrc-proceeds-of-crime-inspection-20110712.pdf> accessed 14th March 2020, p.32; Her Majesty's Inspectorate of Constabulary, 'An Inspection of Her Majesty's Revenue and Customs Performance in Addressing the Recovery of the Proceeds of Crime from Tax and Duty Evasion and Benefit Fraud: Revisit 2013' (HMIC, 2014) <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/hmrc-proceeds-of-crime-revisit.pdf> accessed 14th March 2020, p.30.
[1880] T Monger, 'Pointless POCA?' (2014) 174 Taxation 8.
[1881] National Crime Agency, 'Suspicious Activity Reports (SARs) Annual Report 2014' <https://www.octf.gov.uk/OCTF/media/OCTF/images/publications/SARS-Annual-Report-2014.pdf?ext=.pdf> accessed 14th March 2020, at p.24
[1882] In addition, 'A further £9,408,865 was generated from enhancing HMRC cases already under civil investigation by providing intelligence in SARs.' National Crime Agency, 'Suspicious Activity Reports (SARs) Annual Report 2019' <https://nationalcrimeagency.gov.uk/who-we-are/publications/390-sars-annual-report-2019 > accessed 14th March 2020, at p.11.
[1883] HM Revenue & Customs, *Annual Report and Accounts 2018-19* (HC 2018-19, 2394-I) p.6
[1884] Freedom of Information request submitted by Pinsent Masons, 'HMRC's Elite Fraud Team Collects £5.47 Billion in Extra Tax – Up 7% in Just the Last Year' (2018) < https://www.pinsentmasons.com/en/media/press-releases/2018/hmrcs-elite-fraud-team-collects-547-billion-in-extra-tax--up-7-in-just-the-last-year/> accessed 14 March 2020.
[1885] Law Commission, *Anti-Money Laundering: The SARS Regime* (Law Com No 236, 2018) p.60. Although other countries have made use of SAR data for this purpose. In 2012, Austria secured 61 criminal tax prosecutions using this information, OECD, *Improving Co-operation Between Tax and Anti-Money Laundering*

Consequently, the inclusion of tax evasion as a predicate offence, and in turn the application of the SARs regime to suspicions of tax offences, has been successful to a limited extent. However, these benefits must be weighed against the costs of including tax offences within the AML framework, including the impact on individual privacy and compliance costs incurred by FIs and DNFPBs. Regrettably, as tax evasion has a number of 'frayed edges',[1886] the inclusion of tax evasion as a predicate offence is likely to lead to widespread reporting of arrangements concerning lawful tax avoidance, resulting in intrusions to privacy which are not based on justifications pertaining to the prevention of criminal activity.[1887] Additionally, the inclusion of tax evasion as a predicate offence is likely to have caused an increase in defensive reporting. This is because, it is often difficult to identify whether an offence has been committed, and if it has, the property that is the subject of the offence. This is because tax noncompliance does not become a criminal offence unless the owner of the funds possesses the requisite *mens rea*.[1888] Accordingly, it may be difficult to determine the state of mind of the individual concerned and thus, the nature of the funds involved,[1889] which in turn may cause professionals to err on the side of caution submitting a defensive report. The forgoing inability to identify the criminal property arising from evasion, as distinct from fraud, is likely to encourage more SARs to be submitted.[1890] This is in contrast to the position for other offences, where reports only need to be made in respect of dealings with the specific criminal property.[1891]

The costs to FIs of complying with the UK's AML framework are considered to be significant, with the then British Bankers' Association estimating that its members spend approximately £5billion each year on complying with the obligations.[1892] This expense is experienced by the

Authorities: Access by Tax Administrations to Information held by Financial Intelligence Units for Criminal and Civil Purposes (OECD Publishing, September 2015) p.14.

[1886] G Loutzenhiser, *Tiley's Revenue Law* (8th edn, Hart 2016)

[1887] See generally, J Rhodes, SP Jones, 'Legislative Comment: The Proceeds of Crime Act 2002 and Tax Evasion' (2004) 1 PCB 51; J Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' (2010) 3 BTR 235

[1888] With the exception of the strict liability offence contained in Taxes Management Act 1970, s106B-D.

[1889] MJ Bridges, P Green, 'Tax Evasion and Money Laundering – An Open and Shut Case?' (1999) 3 JMLC 51, 56.

[1890] P Alldridge, 'Are Tax Evasion Offences Predicate Offences for Money-Laundering Offences?' (2001) 4 JMLC 350, 354.

[1891] Ibid. Alldridge notes the potential infringement of Article 8 of the European Convention on Human Rights.

[1892] The BBA has since integrated into UK Finance. British Bankers' Association, 'BBA Response to Cutting Red Tape Review – Effectiveness of the UK's AML Regime' (6 November 2015) <https://www.bba.org.uk/policy/bba-consultation-responses/bba-response-to-cutting-red-tape-review-effectiveness-of-the-uks-aml-regime/> accessed 19th March 2020 at p.2

entirety of the regulated sector,[1893] and increase annually.[1894] Although much of this expense is attributable to the generic issues inherent in the UK's AML framework identified above, it is not fanciful to suggest that, owing to the large volume of individuals and transactions that fall to be reported in respect of tax offences, the inclusion of this predicate has increased the costs involved.

5.4.4 Recovering the Proceeds of Crime

A central part of the AML framework is confiscation measures,[1895] specifically, measures that enable the state to acquire property, which constitutes, or represents, the proceeds of crime.[1896] Confiscation takes place after a criminal conviction,[1897] and may capture the proceeds, instrumentalities or the subject of crime.[1898] Use of extended criminal confiscation, including non-conviction based civil confiscation, is also encouraged.[1899] The UK has an established history concerning the forfeiture of property following a criminal conviction,[1900] yet confiscation measures were only introduced following *R v Cuthbertson,*[1901] which revealed the Crown's inability to confiscate the proceeds, as opposed to the instrumentalities, of crime.[1902]

[1893] T Edmonds, 'Money Laundering Law' (House of Commons Library Briefing Paper, Number 2592, 14 February 2018) <https://researchbriefings.files.parliament.uk/documents/SN02592/SN02592.pdf> accessed 19th March 2020, at p.12.

[1894] LexisNexis Risk Solutions, 'Future Financial Crime Risks 2017: A View of the Current and Future Financial Crime Risks Faced by Banks in the UK' (LexisNexis 2018) <https://risk.lexisnexis.co.uk/insights-resources/white-paper/future-financial-crime-risks-2017-wp-uk> accessed 19th March 2020

[1895] See section 5.3 'The International AML Framework'; see also Y Chistyakova, DS Wall, S Bonino, 'The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK' (2019) Eur J Crim Policy Res <https://doi.org/10.1007/s10610-019-09423-5> accessed 7th April 2020.

[1896] P Alldridge, 'Proceeds of Crime Law Since 2003 - Two Key Areas' (2014) 3 Crim LR 171, 172. Confiscation is based on the principle that criminals should not be able to profit from unlawful activity P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart 2003) p.45. The aims of confiscation include prevention, deprivation, punishment, and reparation, see M Fernandez-Bertier, 'The Confiscation and Recovery of Criminal Property: A European Union State of the Art' (2016) 17 ERA Forum 323, 325; The primary aim of the UK legislation is to deprive criminals of their proceeds of crime, *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 at para 21.

[1897] This form of confiscation is widely accepted in Europe, see M Simonato, 'Extended Confiscation of Criminal Assets: Limits and Pitfalls of Minimum Harmonisation in the EU' (2016) 41(5) EL Rev 727, 727-8

[1898] G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge Studies in International and Comparative Law, CUP 2004) p.29.

[1899] Referred to as 'civil recovery' in the UK and 'civil forfeiture' in the US, although both terms inaccurately describe the process involved, see J Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart 2017) p.17.

[1900] M Raphael, 'Tracing and Confiscating Illicit Proceeds: The Perspective of the Defence' (2011) 11 ERA Forum 545, 546; see also RG Kroeker, 'The Pursuit of Illicit Proceeds: From Historical Origins to Modern Applications' (2014) 17(3) JMLC 269; KJ Kesselring, 'Felony Forfeiture and the Profits of Crime in Early Modern England' (2010) 53(2) The Historical Journal 271.

[1901] *R v Cuthbertson* [1981] AC 470 (HL).

[1902] B Vettori, *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* (Springer 2006) p.7

Subsequent legislation compelled courts to confiscate the proceeds of drug trafficking,[1903] followed by a discretionary,[1904] then mandatory,[1905] obligation to confiscate the proceeds of all indictable offences. However, several reports highlighted the inadequacies of this legislation, leading to the enactment of POCA.[1906] Inspired by US law,[1907] POCA introduced criminal confiscation and civil recovery measures,[1908] taxation of the proceeds of crime,[1909] forfeiture measures,[1910] as well as powers to obtain information and preserve property.[1911] There used to be a 'hierarchy of preference' in the use of confiscation, recovery and taxation measures.[1912] A number of LEAs are provided with the powers contained in POCA, including HMRC,[1913] and the NCA.[1914] This section provides a critical evaluation of the UK's proceeds of crime

[1903] Drug Trafficking Offences Act 1986, s.1. The Act was introduced in response to the decision in *R v Cuthbertson* [1981] AC 470 (HL) and the consequent report of the Hodgson Committee which recommended the introduction of broader confiscation powers. D Hodgson, *Profits of Crime and their Recovery* (Heinemann 1984).

[1904] Criminal Justice Act 1988, s71.

[1905] Confiscation became mandatory following the introduction of the Proceeds of Crime Act 1995, s1 which amended Criminal Justice Act 1988, s71. See N Clark, 'The Impact of Recent Money Laundering Legislation on Financial Intermediaries' (1996) 14(3) Dickinson Journal of International Law 467, 473.

[1906] See for instance, Home Affairs Committee, *Third Report on Organised Crime* (HC 1994-5, 18-I); Cabinet Office Performance and Innovation Unit, 'Recovering the Proceeds of Crime' (June 2000) <https://webarchive.nationalarchives.gov.uk/+/http:/www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf> accessed 8th April 2020. See also, N Ryder, *Financial Crime in the 21st Century: Law and Policy* (Edward Elgar 2011) p.196.

[1907] Specifically, the Racketeer Influenced and Corrupt Organisations (RICO) Act 1970. See AVM Leong, 'Assets Recovery under the Proceeds of Crime Act 2002: The UK Experience' in SNM Young (Ed), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar 2009) p.197. Inspiration was also drawn from similar measures in Ireland and Australia, AVM Leong, 'Civil Recovery and Taxation Regime: Are These New Powers under the Proceeds of Crime Act 2002 Working?' (2006) Comp Law 27(12) 362, 363.

[1908] Proceeds of Crime Act 2002, Part 2 and Part 5.

[1909] Ibid, Part 6.

[1910] Ibid, Chapter 3; Sproat argues that, in effect, this gives UK authorities 'four bites of the proceeds of crime cherries', PA Sproat, 'An Evaluation of the UK's Anti-Money Laundering and Asset Recovery Regime' (2007) 47 Crime, Law and Social Change 169, 176.

[1911] Ibid, Part 2, Part 5, Part 8.

[1912] A Kennedy, 'Civil Recovery Proceedings under the Proceeds of Crime Act 2002: The Experience So Far' (2006) 9(3) JMLC 245, 260; It is no longer strictly imposed, yet the central principle remains P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.182.

[1913] HMRC has the power to use most of the asset recovery and investigation powers provided by POCA. Ibid, s.316, s.378.

[1914] These powers were originally given to the Assets Recovery Agency (ARA), which was established by the Proceeds of Crime Act 2002, s.1. Ultimately, the ARA was considered to be a failure. See for instance, National Audit Office, *The Assets Recovery Agency: Report by the Comptroller and Auditor General* (HC 2006-07, 253-I); House of Commons Committee of Public Accounts, *Assets Recovery Agency* (HC 2006–07, 391-I); see also, J Harvey, 'Asset Recovery: Substantive or Symbolic?' in C King, C Walker (Eds.), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Routledge, 2014). However, the failure of the ARA may have been due to either, factors beyond its control, N Ryder, *Financial Crime in the 21st Century: Law and Policy* (Edward Elgar 2011) p.205, or the criteria by which it was judged, P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.182. Its civil recovery powers were later vested in its successors - the Serious Organised Crime Agency (SOCA), established by the Serious Organised Crime and Police Act 2005, followed by the National Crime Agency, established by the Crime and Courts Act 2013. Its civil recovery powers were also extended to other authorities, see Assets Recovery Agency, *Annual Report and Resource Accounts 2007-08 (For the year ended 31 March 2008)* (HC 2007-08, 661-I) p.3.

legislation and argues that the framework is increasingly becoming effective in recovering the proceeds of tax-related offences. However, it is questionable whether the AML framework is appropriate, both generally and for this specific purpose, considering its impact on constitutional rights and the ability to recover the proceeds of tax offences through established mechanisms.

Criminal confiscation orders are the UK's primary asset recovery tool.[1915] Confiscation orders follow a criminal conviction in the Crown Court,[1916] and must be issued when the court or the prosecutor considers it appropriate.[1917] The court must determine whether the defendant has a criminal lifestyle,[1918] and has obtained more than £5000 from his criminal conduct.[1919] If the defendant is determined to have a criminal lifestyle, the court must presume that all property transferred to, or held by the defendant, as well as any expenditure incurred, both after conviction and at any time in the six years before the start of criminal proceedings, were obtained as a result of the defendant's general criminal conduct.[1920] If the defendant is not considered to have a criminal lifestyle, the court must determine whether, and if so to what extent, the defendant has benefited from specific criminal conduct.[1921] The court then determines the recoverable amount,[1922] specifically, the greater of the defendant's benefit or the amount available to satisfy a confiscation order.[1923] The confiscation order forms a debt owed by the defendant, which can be settled with licit or illicit assets.[1924] If a defendant fails to

[1915] Y Chistyakova, DS Wall, S Bonino, 'The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK' (2019) Eur J Crim Policy Res <https://doi.org/10.1007/s10610-019-09423-5> accessed 7th April 2020.
[1916] Proceeds of Crime Act 2002, s.6(2).
[1917] Ibid, s.6(3).
[1918] Ibid, s.6(4)(a).
[1919] Ibid, s.75(4). A defendant has a criminal lifestyle if 'the offence (or any of the offences) concerned satisfies any of these tests—(a) it is specified in Schedule 2; (b) it constitutes conduct forming part of a course of criminal activity; (c) it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.' Ibid, s.75(2).
[1920] Ibid, s.10.
[1921] Ibid, s.6(4)(c); Under s76, a defendant benefits from conduct 'if he obtains property as a result of or in connection with the conduct. If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage[…] If a person benefits from conduct his benefit is the value of the property obtained.'
[1922] Ibid, s.7(1).
[1923] Ibid, s.6(5), s.7(2).
[1924] 'It is evident that a confiscation order made under the 2002 Act operates on what may be called a value basis. The recoverable amount is not directed at or confined to assets which are specifically shown to represent the proceeds of crime: rather, it is directed at the amount which the defendant is adjudged liable to pay.' *R v Moss* [2019] EWCA Crim 501; [2019] 1 WLR 6033 at para 15.

pay a confiscation order, interest will be levied upon unpaid sums,[1925] and a default sentence of imprisonment may be imposed.[1926].

Confiscation orders are draconian,[1927] because a number of the protections inherent in criminal proceedings are not available during a confiscation hearing; the civil standard of proof applies, namely, the balance of probabilities,[1928] and the criminal rules of evidence do not apply, potentially permitting the introduction of hearsay and illegally obtained evidence.[1929] The lifestyle provisions also require the assumptions to be applied regardless of the severity of the offence committed,[1930] and irrespective of the hardship such an order would cause.[1931] Although the defendant is entitled to rebut the assumptions,[1932] this is often an onerous task,[1933] particularly for those who are detained.[1934] Even when the lifestyle assumptions do not apply, the application of the Act often leads to the offender being ascribed a greater benefit than he actually received.[1935] For instance, the courts have determined that an offender who obtains a benefit jointly or successively with others obtains the entire benefit for the purposes of

[1925] Proceeds of Crime Act 2002, s.12.
[1926] Ibis, s.38. Compliance orders are also available under ss.13A and 13B of the Act. Although this will not extinguish the debt, s.38(5)
[1927] 'Amongst defence practitioners and certain Court of Appeal judges, the regime is commonly described as draconian and one which can lead to unfair and disproportionate outcomes.' S Gentle, C Spinks, M Omer, 'Proceeds of Crime Act 2002: Update 1' (2019) 170 COB 1, 3. It has also been described as 'manifestly unjust' I Lawrence QC, 'Draconian and Manifestly Unjust: How the Confiscation Regime has Developed' (2008) 76 Amicus Curiae 22
[1928] Proceeds of Crime Act 2002, s.6(7). See also, P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart 2003) p.144.
[1929] P Alldridge, 'Proceeds of Crime Law Since 2003 - Two Key Areas' (2014) 3 Crim LR 171, 173-4; see also, *R v Silcock and Levin* [2004] EWCA Crim 408; [2004] 2 Cr App R (S) 323, para 60 and *R v Clipston* [2011] EWCA Crim 446; [2011] 2 Cr App R (S) 101, paras 57-60.
[1930] K Bullock, S Lister, 'Post-Conviction Confiscation of Assets in England and Wales: Rhetoric and Reality' in C Walker, C King (Eds.), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate 2014) p.62
[1931] Ibid, at p.60; see also C Fletcher, 'Social Value or Social Harm? The Impact of the Proceeds of Crime Act 2002 Upon the Defendant and their Families' in K Benson, C King, C Walker (Eds.), *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Routledge 2020)
[1932] K Murray, 'Confiscation and Forfeiture' in B Rider (Ed), *Research Handbook on International Financial Crime* (Edward Elgar 2015) p.464
[1933] 'A presumption that concerns property obtained over a long time can be difficult, if not impossible, to rebut' J Boucht, 'Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR' (2014) 5(2) New Journal of European Criminal Law 221, 252; 'Any evidence produced by anyone with those convictions to show lawful acquisition may be discredited as part of the scheme of criminality to which the defendant was committed.' P Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave MacMillan 2016) p.44; see also K Bullock, S Lister, 'Post-Conviction Confiscation of Assets in England and Wales: Rhetoric and Reality' in C Walker, C King (Eds.), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate 2014) p.62
[1934] I Lawrence QC, 'Draconian and Manifestly Unjust: How the Confiscation Regime has Developed' (2008) 76 Amicus Curiae 22, 24
[1935] Indeed, financial investigators often 'exploit the legislation pushing its application to its upper limits, making extravagant estimations of benefit to make the most of what might be recoverable.' K Bullock, 'Criminal Benefit, the Confiscation Order and the Post-Conviction Confiscation Regime' (2014) 62 Crime Law Soc Change 45, 62

confiscation,[1936] and an offender who expends money in carrying out an offence is not permitted to deduct expenses from the benefit obtained to arrive at a profit figure.[1937] In addition, even if an offender restored the proceeds or subject of the offence to the victim in full, for a time, this was not taken into account in determining the offender's benefit.[1938] Problematically, an inflated calculation of benefit may also cause the court to assume that the offender has 'hidden assets', which are factored into the recoverable amount regardless of their actual existence.[1939]

Several challenges have been made to the confiscation provisions of POCA.[1940] Appellants have argued that the confiscation provisions of POCA violate Article 6 of the European Convention on Human Rights,[1941] as confiscation should properly be characterised as a new criminal charge.[1942] If characterised in this manner, confiscation proceedings would attract the extra rights and protections afforded under Articles 6(2) and 6(3), such as the presumption of innocence.[1943] However, the courts of England and Wales, as well as the ECtHR itself, have held that confiscation proceedings are not a criminal charge and thus, Articles 6(2) and 6(3) do not apply,[1944] even when the lifestyle assumptions are made.[1945] Additionally, challenges under

[1936] *R v May* [2008] UKHL 28; [2008] 1 AC 1028; *Crown Prosecution Service v Jennings* [2008] UKHL 29; [2008] 1 AC 1046; *R v Green* [2008] 1 AC 1053; However, Ulph notes that this issue may not always arise in practice, as other methods are available to restrict the benefit attributed to the offender. J Ulph, 'Confiscation Orders, Human Rights and Penal Measures' [2010] 126 LQR 251, 270

[1937] *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 at para 26; Deductions will sometimes be permitted where the enterprise is not wholly criminal in nature, see *R v Reynolds* [2017] EWCA Crim 1455; [2018] 4 WLR 33; *R v James* [2011] EWCA Crim 2991; [2012] 2 Cr App R (S) 44. However, as Alldridge notes, it is often difficult to distinguish between criminal and non-criminal enterprises P Alldridge, 'Proceeds of Crime Law Since 2003 - Two Key Areas' (2014) 3 Crim LR 171, 181-2

[1938] *R v Rose* [2008] EWCA Crim 239; [2008] 1 WLR 2113; *R v Nield* [2007] EWCA Crim 993; *R v Forte* [2004] EWCA Crim 3188

[1939] 'Leading to confiscation orders that cannot be satisfied' JB Kwan, J Fisher, 'Confiscation: Deprivatory and Not Punitive – Back to the Way We Were' (2018) 3 Crim LR 192, 200

[1940] M Raphael, 'Tracing and Confiscating Illicit Proceeds: The Perspective of the Defence' (2011) 11 ERA Forum 545, 546, 555

[1941] The right to a fair trial, Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR), Art 6

[1942] J Boucht, 'Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR' (2014) 5(2) New Journal of European Criminal Law 221, 233

[1943] Ibid; See also T Kooijmans, 'The Burden of Proof in Confiscation Cases: A Comparison between the Netherlands and the United Kingdom in the Light of the European Convention of Human Rights' (2010) 18 Eur J Crime Crim L & Crim Just 225, 232

[1944] *HM Advocate v McIntosh* [2001] UKPC D 1; [2003] 1 AC 1078; *Phillips v United Kingdom* [2001] 11 BHRC 280; [2001] Crim LR 817, *R v Rezvi* [2002] UKHL 1; [2003] 1 AC 1099*; R v Benjafield* [2002] UKHL 2; [2003] 1 AC 1099; see P Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave MacMillan 2016) p.42.

[1945] Ibid; see also *Grayson v United Kingdom* (2009) 48 EHRR 30

Article 1 of the First Protocol (A1P1) have failed, with the courts considering confiscation to be a legitimate and proportional interference with the right to the protection of property.[1946]

The impact of A1P1 on confiscation proceedings was further considered in the seminal case of *Waya*.[1947] Here, it was determined that confiscation orders should not be issued if the order would be disproportionate to the aim of the legislation, namely, 'to recover the financial benefit that the offender has obtained from his criminal conduct'.[1948] The decision in *Waya* has led to a 'seismic shift' in the benefit attributed to some defendants.[1949] Confiscation orders are now considered disproportionate where the benefit of the offence has been fully restored,[1950] and where otherwise lawful trading takes place as a result of fraud or deception.[1951] However, *Waya* also confirms that confiscation orders can be issued for the whole value of property an offender has obtained jointly or in succession with others,[1952] although this would be considered disproportionate if enforced.[1953] In addition, *Waya* confirms that confiscation orders are not discretionary,[1954] and the courts are not permitted to 'undertake an accounting exercise' to deduct the expenses incurred in committing crime from the benefit attributed to the offender.[1955]

In effect, confiscation orders are regularly issued over the proceeds, rather than the profits of crime.[1956] It is difficult to see why the courts are unwilling to countenance deductions, considering the necessity of this endeavour in terms of reconciling confiscation practice with

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[1946] Ibid; Arguments based on Article 8 of the Convention have also failed, see *R v Ahmed and Qureshi* [2005] 1 WLR 122; [2005] 1 All ER 128

[1947] *R v Waya* [2012] UKSC 51; [2013] 1 AC 294

[1948] Ibid, paras 21-22. The issue of proportionality should only be considered after all of the evidence has been determined in the confiscation proceedings, see *R v Parveaz (Mohsin)* [2017] EWCA Crim 873.

[1949] *R v Harvey* [2013] EWCA Crim 1104; [2014] 1 WLR 124 at para 38, cited in P Alldridge, 'Proceeds of Crime Law Since 2003 - Two Key Areas' (2014) 3 Crim LR 171, 178. The principle in Waya was codified by the Serious Crime Act 2015, which added a paragraph to s.6(5) of the Proceeds of Crime Act 2002.

[1950] *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 at para 28.

[1951] Ibid, at para 34; this obiter statement has been applied inconsistently. For instance compare, *R v Sale* [2013] EWCA Crim 1306; [2014] 1 WLR 663, where a confiscation order for the entire price of a contract obtained by bribery was considered disproportionate; *R v Neuberg* [2016] EWCA Crim 1927; [2017] 4 WLR 58, where it was not disproportionate to confiscate the entire turnover of a business operated by the offender under a prohibited name.

[1952] *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 at para 26

[1953] *R v Ahmad* [2014] UKSC 36; [2015] AC 299; This does not include sums recovered from money launderers, see *Re A* [2016] EWHC 304 (Admin); [2016] Crim LR 577; The same principle is applied when a confiscation order is issued in addition to a compensation order, see *R v Jawad* [2013] EWCA Crim 644; [2013] 1 WLR 3861.

[1954]*R v Waya* [2012] UKSC 51; [2013] 1 AC 294 at para 24; see also *R v Morrison* [2019] EWCA Crim 351; [2019] 4 All ER 181.

[1955] Ibid, at para 26

[1956] JB Kwan, J Fisher, 'Confiscation: Deprivatory and Not Punitive – Back to the Way We Were' (2018) 3 Crim LR 192, 192

its stated objective; namely, the recovery of the proceeds of crime, rather than the punishment of the offender.[1957] As such, it appears as though *Waya* was only a 'sticking plaster' and legislation is needed to reduce the severe impact of the confiscation provisions.[1958] Accordingly, despite recent efforts to improve the confiscation regime,[1959] the draconian nature of these measures must be considered in any assessment of their use in recovering the proceeds of tax offences.

Although the provisions of POCAhave harsh outcomes, the principle that a convicted criminal should not be able to profit from the proceeds of crime is relatively uncontentious.[1960] However, the appropriateness of civil recovery is widely disputed,[1961] because of the absence of a criminal conviction.[1962] The civil recovery mechanisms are based 'upon a principle that a holder of property cannot rightfully own property that is obtained by unlawful conduct', and are accordingly directed towards specific items of property, rather than the individual.[1963] POCA provides LEAs with the power to bring civil recovery proceedings against individuals who hold recoverable property,[1964] specifically, property obtained through unlawful conduct.[1965] The property can be traced into the hands of others who have no connection to the unlawful conduct,[1966] as well as into subsequent representations of the original property.[1967] Any additional value in the property is included,[1968] although the issues surrounding the inflated benefit frequently attributed to defendants under confiscation orders will not arise.[1969] Often, a civil settlement will be reached between the suspected offender and the LEA.[1970]

[1957]Ibid.
[1958] P Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave MacMillan 2016) p.60.
[1959] Law Commission, 'Confiscation under Part 2 of the Proceeds of Crime Act 2002' (November 2018) <https://www.lawcom.gov.uk/project/confiscation-under-part-2-of-the-proceeds-of-crime-act-2002/> accessed 17th April 2020
[1960] J Hendry, C King, 'How Far is Too Far? Theorising Non-Conviction-Based Asset Forfeiture? (2015) 11(4) International Journal of Law in Context 398, 401
[1961] Relatively few states have implemented non-conviction-based recovery mechanisms MM Gallant, 'AML: Maintaining the Balance between Controlling Serious Crime and Human Rights' in B Rider (Ed), *Research Handbook on International Financial Crime* (Edward Elgar 2015) p.536; However, they are becoming more widespread, see J Boucht, 'Asset Confiscation in Europe – Past, Present, and Future Challenges' (2019) 26(2) JFC 526, 531
[1962]
[1963] J Boucht, 'Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR' (2014) 5(2) New Journal of European Criminal Law 221, 223
[1964] Proceeds of Crime Act 2002, ss.240, 243.
[1965] Ibid, ss.241, 242, and ss.304-306.
[1966] Ibid. However, it cannot be traced into the hands of person who obtains property in 'good faith, for value and without notice that it was recoverable property', ibid, s.308.
[1967] Ibid.
[1968] Ibid, s.307.
[1969] P Alldridge, 'Proceeds of Crime Law since 2003 - Two Key Areas' (2014) 3 Crim LR 171, 185.
[1970] Ibid at p.183.

Civil recovery is an 'easier'[1971] and more efficient,[1972] method of recovering the proceeds of crime.[1973] Civil recovery requires a lower standard of proof, namely, the balance of probabilities,[1974] and a wider range of evidence will be admissible.[1975] Furthermore, it is not necessary to show that the property is derived form a particular kind of criminal activity.[1976] This facilitates the recovery of assets, even when it is not possible to secure a conviction of the offender.[1977] Moreover, the *in rem* nature of the proceedings enables the proceeds of crime to be recovered when it is impossible to bring a suspect to trial at all.[1978] Nevertheless, it is questionable whether these measures are a legitimate response to criminal activity, as they are entirely premised on eroding criminal procedural safeguards owing to the perceived failure of this forum.[1979]

Challenges to the civil recovery regime based on human rights grounds have failed, with the courts determining that the civil recovery provisions constitute a legitimate and proportional interference with the right to the protection of property.[1980] Moreover, civil recovery does not equate to or involve a criminal charge,[1981] and does not attract the extra rights and protections

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[1971] J Boucht, 'Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU: On Striking a Balance between Efficiency, Fairness and Legal Certainty' (2013) 21 European Journal of Crime, Criminal Law and Criminal Justice 127, 129.

[1972] Ibid; see also, see M Simonato, 'Extended Confiscation of Criminal Assets: Limits and Pitfalls of Minimum Harmonisation in the EU' (2016) 41(5) EL Rev 727, 728.

[1973] Civil recovery measures form part of a wider '"follow-the-money" approach', which targets the financial assets of criminals. J Hendry, C King, 'How Far is Too Far? Theorising Non-Conviction-Based Asset Forfeiture?' (2015) 11(4) International Journal of Law in Context 398, 400; See also, MM Gallant, 'Alberta and Ontario: Civilizing the Money-Centered Model of Crime Control' (2004) 4 Asper Journal of International Business and Trade 13

[1974] *Serious Organised Crime Agency v Gale* [2011] UKSC 49; [2011] 1 WLR 2760

[1975] P Alldridge, 'Proceeds of Crime Law since 2003 - Two Key Areas' (2014) 3 Crim LR 171, 186.

[1976] Proceeds of Crime Act 2002, s.242(2)(b). 'The Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.' *R (on the application of the Director of the Assets Recovery Agency) v Green* [2005] EWHC 3168 at para 47.

2. A claim for civil recovery cannot be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant his lifestyle

[1977] For examples of cases where civil forfeiture is particularly useful/necessary, see A Kennedy, 'Civil Recovery Proceedings under the Proceeds of Crime Act 2002: The Experience So Far' (2006) 9(3) JMLC 245, SD Cassella, 'The Case for Civil Forfeiture: Why in Rem Proceedings are an Essential Tool for Recovering the Proceeds of Crime' (2008) 11(1) JMLC 8

[1978] Ibid.

[1979] 'NCB forfeiture represents a step too far, a blatant attempt to avoid inbuilt procedural protections through a semantic mislabeling designating it as 'civil' in character, and at the very real expense of both criminal procedural and legal systemic legitimacy.' J Hendry, C King, 'How Far is Too Far? Theorising Non-Conviction-Based Asset Forfeiture? (2015) 11(4) International Journal of Law in Context 398, 408

[1980] *M v Italy* App. No. 12386/86, 15 April 1991, *Acuri v Italy* App. No. 54024/99, 5 July 2001, *Assets Recovery Agency v. Jia Jin He and Dan Dan Chen* (2004) EWHC 3021 (Admin). In *Ahmed*, there was said to be 'an even greater argument for proportionality when applying Part 5 [of POCA]', *Ahmed v Her Majesty's Commissioners for Revenue and Customs* [2013] EWHC 2241 (Admin) at para 45.

[1981] *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6; [2005] NI 383; *Serious Organised Crime Agency v Gale* [2011] UKSC 49; [2011] 1 WLR 2760. Boucht notes that a primary consideration is the fact that

afforded under Articles 6(2) and 6(3).[1982] Although the reasoning of the courts has been heavily disputed,[1983] it is clear that very few challenges will be entertained.[1984]

In determining a defendant's specific benefit from criminal conduct, a defendant is considered to benefit from criminal conduct if he obtains property, or a pecuniary advantage, as a result of or in connection with the conduct, with the benefit being the value of the property or pecuniary advantage obtained.[1985] The provisions are similar to those used for determining the existence of criminal property under the money laundering offences, and, accordingly, the same issue is raised; does the evasion of tax constitute a pecuniary advantage, and, if so, what is the value of the advantage obtained?[1986] In *R v Smith (David Cadman)*,[1987] it was held that the evasion of duty constituted a pecuniary advantage and the advantage obtained was the value of the tax evaded, rather than the value of deferring the liability to tax.[1988]. It is clear that money obtained or retained through tax offences may be subject to confiscation in the UK and the benefit obtained will be the value of the tax evaded.

Nevertheless, as with most of the decisions concerning confiscation, *Smith* is an 'exercise of judicial overkill' owing to the overstated benefit attributed to the defendant.[1989] As Alldridge notes, 'the decision has the effect that confiscation orders in respect of evaded tax are greatly inflated',[1990] which does not cohere with the stated aims of the legislation.[1991] Yet, *Smith* is regarded as good law.[1992] Indeed, in many confiscation cases concerning tax offences, the

civil recovery proceedings are in rem and thus, do not aim to determine the guilt of the defendant, but rather, focus on the origin of the property involved. J Boucht, 'Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR' (2014) 5(2) New Journal of European Criminal Law 221, 237.

[1982] Ibid at p.242; See also C King, 'Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland' (2014) 34(3) LS 371

[1983] 'The in rem/in personam distinction, however, merits criticism; it rests on tautologous reasoning' ibid (King) at p.378; '[T]he reasoning still gives the impression of being tautologous: CAF is not a criminal charge because no criminal charge is involved.' Ibid. 'Such circular reasoning stoops to an unseemly level of intellectual dishonesty because it ignores the punitive nature of in rem forfeiture.' BC Hadaway, 'Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture' (2000) 55 U Miami L Rev 81, 115.

[1984] 'The consistency of the procedure with the Convention is now beyond argument' P Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave MacMillan 2016) p.63.

[1985] Proceeds of Crime Act 2002, s.76

[1986] P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 364

[1987] *R v Smith (David Cadman)* [2001] UKHL 68; [2002] 1 WLR 54

[1988] Ibid; see also *R v Dimsey and Allen* [2000] 1 Cr App R (S) 497 (CA). As such, the defendant, who had been convicted and punished for smuggling cigarettes ,was still liable for the full amount of the unpaid duty, even though the cigarettes had been forfeited and the tax could still be recovered.

[1989] P Alldridge, 'Smuggling, Confiscation and Forfeiture' (2002) 65 MLR 781, 781

[1990] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.164.

[1991] JB Kwan, J Fisher, 'Confiscation: Deprivatory and Not Punitive – Back to the Way We Were' (2018) 3 Crim LR 192, 192

[1992] See for instance, *R v Parker* [2018] EWCA Crim 1057; *Pilats v Director of Border Revenue* [2016] UKFTT 193 (TC). *Harvey* and *Waya,* decided that *Smith* was correctly decided in regards to the interpretation of the

offender is attributed a greater benefit than they actually received. For instance, tax evasion convictions have enabled the application of the lifestyle assumptions, leading to an assessed benefit of £863,303 when the offender evaded approximately £7,000 in tax.[1993] Additionally, in line with the case law discussed above, defendants have not been permitted to deduct expenses from confiscation orders in tax cases,[1994] and those who benefit from a tax offence with others are considered to obtain the entire amount.[1995] Furthermore, the facilitators of tax offences have been considered to have obtained a benefit equal to the entire amount received from the offence,[1996] and even the entire amount moved through a money service bureau used to commit the offence,[1997] rather than the lower amount of commission actually paid to the facilitator. Moreover, the confiscation order does not eradicate the liability to tax.[1998]

Waya appears to have had a minor impact on these decisions.[1999] Although a confiscation order does not alter a liability to tax, these outcomes should now be avoided in practice through enforcement mechanisms.[2000] In addition, *Harvey* determined that defendants should be able to deduct VAT paid over to HMRC from the benefit under the confiscation order.[2001] However, this does not apply to sums that have not yet been accounted for to HMRC,[2002] and does not seem to apply to other types of tax.[2003] Although the case of *Ahmad* held that the costs of

statute, yet the question of proportionality and legitimacy remains open, R v *Harvey* [2015] UKSC 73; [2017] AC 105 at paras 47-48; *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 at paras 33-34.

[1993] *R v Steed* [2011] EWCA Crim 75; [2011] Lloyd's Rep. F.C. 238

[1994] For instance, in *R v Louca* [2013] EWCA Crim 2090; [2014] 2 Cr App R (S) 9, the defendant's benefit was considered to be the entire value of the cigarettes smuggled, ignoring the £10,000 paid for the items.

[1995] *R v Ahmad and another* [2014] UKSC 36; [2015] AC 299

[1996] See the case of *Mooney v HM Advocate* [2019] HCJAC 49, where an accountant devised a scheme to defraud HMRC. The accountant was considered to benefit from the total amount paid in tax rebates to various individuals by HMRC, or £50,981, rather than the £15,294 she was paid in commission.

[1997] See *R v Fulton* [2019] EWCA Crim 163; [2019] 4 WLR 123, when a missing trader fraud was facilitated by a foreign exchange dealer, the defendant's benefit was calculated by reference to the money he had moved through the money service bureau, rather than the commission he was paid.

[1998] 'The fact that he remained in law liable to pay the tax, the fact even, were it so, that the Revenue might later recover it, does not, in our judgment, yield the proposition that the proceeds of his crime were one penny less than the whole of the tax evaded.' See *R v Dimsey and Allen* [2000] 1 Cr App R (S) 497 at 501 (CA).

[1999] *R v Waya* [2012] UKSC 51; [2013] 1 AC 294

[2000] 'Where a finding of joint obtaining is made, whether against a single defendant or more than one, the confiscation order should be made for the whole value of the benefit thus obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit' *R v Ahmad and another* [2014] UKSC 36; [2015] AC 299 at para 74; In practice, HMRC will not seek to recover both the payment of the unpaid duty and a confiscation order relating to the same benefit see *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 at para 33; see also R v *Harvey* [2015] UKSC 73; [2017] AC 105 at para 73 and *R v Edwards* [2004] EWCA Crim 2923; [2005] 2 Cr App R (S) 29 at paras 24-25. However, HMRC are permitted to determine whether the confiscation order actually covers the tax due see *Martin v Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0161 (TCC).

[2001] *R v Harvey* [2015] UKSC 73; [2017] AC 105

[2002] Ibid at para 47

[2003] Ibid at para 25; see also *R v Reynolds* [2017] EWCA Crim 1455; [2018] 4 WLR 3

committing a tax offence should not form part of the benefit if the lifestyle assumptions do not apply,[2004] the legal status of this decision is uncertain.[2005] It has not been followed in subsequent cases, with the principle in *Smith* being preferred.[2006] Nevertheless, even if the case law can again be systematised into a coherent body of rules, the majority of decisions are still at odds with the principle said to underpin POCA and legislation is necessary to rectify this. This is important, as the artificially high benefits ascribed to defendants under confiscation orders will encourage the prosecution of tax offences, especially when combined with LEAs' economic incentives to use POCA.[2007] More prosecutions may be a welcome outcome, but such a decision should be based on the utility and propriety of using this enforcement mechanism to combat this offence, as opposed to financial incentives.[2008]

With the exception of forfeiture powers, the civil recovery jurisdiction in POCA is less often used to recover the proceeds of tax offences.[2009] It appears as though sums derived from tax offences constitute recoverable property, namely, 'property obtained through unlawful conduct', for the purposes of Part 5.[2010] However, it is uncertain whether sums retained through tax evasion, rather than obtained through tax fraud, technically fall within this definition.[2011] After all, if a defendant 'obtained' property through tax evasion, there would not be any need for the inclusion of the term 'pecuniary advantage' within the meaning of benefit under the money laundering and confiscation provisions.[2012] In addition, it may be difficult to identify the specific property involved, as distinct from other legitimately earned property.[2013] Support for this interpretation may be found in *Bosworth*,[2014] where the court held that the defendant's failure 'to make income tax returns of his income would not appear to have had the effect that

[2004] *R v Ahmad* [2012] EWCA Crim 391; [2012] 1 WLR 2335; see also *R v Louca* [2013] EWCA Crim 2090; [2014] 2 Cr App R (S) 9
[2005] This part of the decision was not reviewed on appeal, see *R v Ahmad and another* [2014] UKSC 36; [2015] AC 299
[2006] See for instance, *R v Parker* [2018] EWCA Crim 1057; *Pilats v Director of Border Revenue* [2016] UKFTT 193 (TC). *Harvey* and *Waya,* decided that *Smith* was correctly decided in regards to the interpretation of the statute, yet the question of proportionality and legitimacy remains open, R v *Harvey* [2015] UKSC 73; [2017] AC 105 at paras 47-48; *R v Waya* [2012] UKSC 51; [2013] 1 AC 294 at paras 33-34.
[2007] Such as the Asset Recovery Incentivisation Scheme, discussed at pp. below.
[2008] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.170
[2009] Ibid at p.184
[2010] Ibid; see also RC Alexander, '"Cost Savings" As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom' (2011) 45 Int'l Law 749, 808
[2011] P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart 2003) p.234
[2012] Proceeds of Crime Act 2002, s.76(5), s.340(6).
[2013] N Shaw, 'Tax and the Proceeds of Crime' (2003) 2(2) GTIC Review 42, 44-46
[2014] *Serious Organised Crime Agency v Bosworth* [2010] EWHC 645 (QB)

he obtained anything'.[2015] Nevertheless, civil recovery proceedings are less likely to be used to recover the proceeds of tax offences, as prosecution followed by a confiscation order, or the imposition of civil penalties, are preferred options for HMRC.[2016] In addition, if the matter is dealt with by the NCA, cases of tax evasion may be dealt with more appropriately by the taxation powers.[2017] Indeed, case law suggests that civil recovery proceedings tend to be used in respect of the proceeds of tax-related crime either, when tax evasion forms part of a host of allegations concerning unexplained wealth held by the defendant,[2018] or when forfeiture,[2019] or a confiscation order, [2020] cannot be obtained.

In addition to criminal confiscation and civil recovery powers, POCA also provides for the taxation of the proceeds of crime.[2021] Most common law countries have subjected unlawful gains to taxation,[2022] with the aim of achieving parity of treatment between income and profits made by lawful and unlawful means.[2023] However, modern use of taxation powers against criminal activity takes inspiration from the US.[2024] Likewise, the UK has long had the power to tax income derived from unlawful activity,[2025] yethistorically little use was made of this power.[2026] This was because, in order to raise an assessment to income tax, the UK's schedular system of assessment formerly required the source of any income to be identified and attributed

[2015] Ibid at para 25; See also, '"obtain" does not mean "retain", *Ahmed v Her Majesty's Commissioners for Revenue and Customs* [2013] EWHC 2241 (Admin) at para 28,
[2016] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.184.
[2017] P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 366.
[2018] See for instance, *National Crime Agency v Grubisic* [2019] EWHC 2622 (Admin), where the assets were alleged to have been obtained from mortgage fraud or tax evasion. See also, *Serious Organised Crime Agency v Azam* [2011] EWHC 3262 (Admin) and *Serious Organised Crime Agency v Gale* [2011] UKSC 49; [2011] 1 WLR 2760, where the assets were alleged to have been obtained from drug offending, money laundering and tax evasion.
[2019] *Revenue and Customs Commissioners v B* [2019] EWHC 3207 (Admin); [2020] ACD 12
[2020] See for instance, *Director of the Assets Recovery Agency v Singh* [2004] EWHC 2335 (Admin); [2005] ACD 36
[2021] Proceeds of Crime Act 2002, s.317
[2022] Including the UK, US, Australia, Ireland and Canada, see J Glover, 'Taxing the Proceeds of Crime' (1997) 1(2) JMLC 117, 117
[2023] M Gallant, 'Tax and the Proceeds of Crime: A New Approach to Tainted Finance' (2013) 16 JMLC 119, 120; For an overview of the arguments for and against taxing the proceeds of crime see RE Bell, 'Taxing the Proceeds of Crime' (2000) 8(2) JFC 136
[2024] Where taxation is considered to be 'one of the most powerful and versatile weapons against organised crime', D Lusty, 'Taxing the Untouchables Who Profit from Organised Crime' (2003) 10(3) JFC 209, 209
[2025] *Mann v Nash* [1932] 1 KB 752 (HC); For a review of the case law, see R Curtis, 'It's A Fair Cop' (2005) 155 *Taxation* 1; R Cockfield, M Mulholland, 'The Implications of Illegal Trading' [1995] BTR 572.
[2026] Cabinet Office Performance and Innovation Unit, 'Recovering the Proceeds of Crime' (June 2000) <https://webarchive.nationalarchives.gov.uk/+/http:/www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf> accessed 8th April 2020, at p.90

to a particular year.[2027] However, it was often a problematic task to identify the source of criminal earnings.[2028]

Part 6 of POCA enables the NCA to assume the Revenue functions of HMRC,[2029] when it has reasonable grounds to suspect that income or gains are chargeable to tax and arise as a result of the person's or another's criminal conduct.[2030]. Thetaxation powers cannot be used by the NCA in respect of a 'pure' tax offence, specifically, the evasion of tax on otherwise lawful income.[2031] Nevertheless, POCA facilitates the taxation of unlawful activity by removing the requirement for the NCA to identify the source of the income or gain in order to raise an assessment.[2032] Once an assessment has been raised, the burden of proof falls on the individual, who must demonstrate its inaccuracy.[2033] The displaced burden of proof and the assumed lack of integrity of the taxpayer both make this an exceedingly difficult tax.[2034] Moreover, although deductions for lawful expenses are permitted,[2035] many criminals will not possess, or be willing to share, records and receipts to prove expenses incurred.[2036] Accordingly, taxation powers can often be used to recover more than just the tax evaded on illicit earnings, especially when

[2027]Ibid at p.95; See also, J Glover, 'Taxing the Proceeds of Crime' (1997) 1(2) JMLC 117, 120; P Alldridge, A Mumford, 'Taxation as an Adjunct to the Criminal Justice System: The New Assets Recovery Agency Regime' [2002] 6 BTR 458, 461

[2028] Ibid; Others question the frequency of cases where a source cannot be identified, see D Lusty, 'Taxing the Untouchables Who Profit from Organised Crime' (2003) 10(3) JFC 209, 210. In addition, this had 'never been a priority' P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.157.

[2029] Proceeds of Crime Act 2002, s.317. The functions are set out in s.323 and ss.321-2.

[2030] Or, that 'a company is chargeable to corporation tax on its profits arising in respect of a chargeable period and the profits arise as a result of the company's or another person's criminal conduct', Ibid, s.317(1). Criminal conduct is defined in almost identical terms as in other parts of the Act, s.326(1).

[2031] The definition of criminal property for taxation purposes excludes offences 'relating to a matter under the care and management of the Board', s.326(2). G Kelly, K Hobson, 'ARA and the Taxation of the Proceeds of Crime—Some Practical Considerations' (2006) 862 Tax J 5, 6

[2032] Proceeds of Crime Act 2002, s.319. Indeed, it is often beneficial not to do so, see *Rose v Director of the Assets Recovery Agency* [2006] STC (SCD) 472; [2006] STI 1631; *Chadwick v National Crime Agency* [2017] UKFTT 656 (TC); [2017] BPIR 1429.

[2033] P Alldridge, A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353, 357, citing *Norman v Golder* [1945] 1 All ER 352

[2034] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.160.

[2035] Ibid. The Income Tax (Trading and Other Income) Act 2005, s.5 applied to 'profits' rather than 'proceeds'. Deductions for illegal expenses are prohibited under s.55 of the Act.

[2036] M Gallant, 'Tax and the Proceeds of Crime: A New Approach to Tainted Finance' (2013) 16 JMLC 119, 123

combined with interest and penalties.[2037] Nonetheless, the taxation provisions have withstood challenges on human rights grounds.[2038]

Part 6 of POCA is likened to the net worth method of computing income for the purposes of prosecuting tax evasion in the US,[2039] the constitutionality of which has been persistently questioned.[2040] However, the purpose of the POCA taxation power is to recover a percentage of criminal proceeds, rather than to prosecute tax offences.[2041] Even so, as with civil recovery, the legitimacy of the taxation power, as a measure aimed at eroding procedural safeguards on grounds of efficiency, is questionable.

Forfeiture

In the UK, there is an established history of forfeiting property following a criminal conviction,[2042] as well as a legislation providing for the forfeiture of objects used in the commission of an offence.[2043] Customs authorities have made significant use of forfeiture powers, which can be imposed on both prohibited and restricted goods,[2044] as well as goods in respect of which the relevant duty has not been paid,[2045] often without a conviction.[2046] In 1990, cash forfeiture was introduced as part of the AML framework.[2047] However, the original power to seize cash only applied to cash derived from drug-trafficking offences and only upon the

[2037] The PIU report noted '(…)coupled with the Revenue's ability to impose additional fines, raises the very real possibility that much, and in some cases all, of a person's illegally gained wealth could be removed.' Cabinet Office Performance and Innovation Unit, 'Recovering the Proceeds of Crime' (June 2000) <https://webarchive.nationalarchives.gov.uk/+/http:/www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf> accessed 8th April 2020, at p.90

[2038] *Khan v Director of the Assets Recovery Agency* [2006] STC (SCD) 154; [2006] STI 593; See also, *King v Walden* [2001] STC 822 (HC)

[2039] *Holland v United States*, 348 US 121 (1954); See for instance, P Alldridge, A Mumford, 'Taxation as an Adjunct to the Criminal Justice System: The New Assets Recovery Agency Regime' [2002] 6 BTR 458, 460

[2040] See for instance, LS Eads, 'From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof' (1991) 79 Cal L Rev 1421, 1481; S Avakian, 'Net Worth Computations as Proof of Tax Evasion' (1955) 10(4) Tax L Rev 431 noting at 452, 'Realistically, even though not legally, the defendant will have the burden of proving his innocence'.

[2041] As such, the UK power is more similar to the Canadian form of net worth assessment, see MM Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar 2005) p.114

[2042] KJ Kesselring, 'Felony Forfeiture in England, c.1170-1870' (2009) 30(3) Journal of Legal History 201, 201; The current provision is Powers of Criminal Courts (Sentencing) Act 2000, s.143

[2043] P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart 2003) p.109

[2044] Customs and Excise Management Act 1979, s.68

[2045] Ibid, s.49, s.170(6), s.170B(2)

[2046] *Amber Services Europe Ltd & Anor v The Director of Border Revenue* [2015] EWHC 3665 (Admin); [2016] 1 WLR 1889

[2047] Criminal Justice (International Cooperation) Act 1990, ss.25-26; Drug Trafficking Act 1994, s.42-43

importation to, or exportation of, cash from the UK.[2048] Accordingly, POCA introduced the power for an officer of Revenue and Customs, a constable, or an SFO officer, to search any premises or suspects for cash,[2049] as well as to seize,[2050] and detain,[2051] cash, if they have reasonable grounds for suspecting that it is recoverable property,[2052] or intended by any person for use in unlawful conduct.[2053] The cash must exceed the minimum amount, currently set at £1,000.[2054] Once the cash has been detained, the officer may apply to the magistrate's court for its forfeiture.[2055] The court will make the order if it is satisfied that the cash is recoverable property, or is intended by any person for use in unlawful conduct.[2056] The civil nature of the proceedings means that there is no requirement for a conviction and the lower standard of proof applies.[2057] The Act also provides for administrative forfeiture in uncontested cases.[2058]

The cash forfeiture provisions are considered 'straightforward and cost-effective', with many cases being uncontested.[2059] Cash forfeiture has the potential to play a significant role in combatting tax evasion; a crime often concealed through the avoidance of banking facilities.[2060] However, the cash forfeiture provisions do not stem from a clear principle, often resulting in double-recovery,[2061] and represent another attempt to combat illicit activity by removing criminal procedural standards and safeguards.[2062] These objections have not led to successful

[2048] RE Bell, 'The Seizure, Detention and Forfeiture of Cash in the UK' (2003) 11(2) JFC 134, 135. Followed by terrorism financing offences, see Terrorism Act 2000, s.23, s.23A, Schedule 4, Anti-terrorism, Crime and Security Act 2001, Part 1, Schedule 1.
[2049] Proceeds of Crime Act 2002, s.289. Prior approval must be given by a judicial or senior officer, ibid s.290. Cash includes, notes and coins in any currency, postal orders, cheques of any kind, including travellers' cheques, bankers' drafts, bearer bonds and bearer shares, gaming vouchers, fixed-value casino tokens and betting receipts, s.289(6) &(7).
[2050] Ibid, s.294.
[2051] Ibid, s.295. Initially for a period of 48 hours, but this may be extended for a period of up to two years under s.295(2)(b).
[2052] As defined under ss.304-306.
[2053] Ibid, s.289(1), s294(1), s.295(1),(5) & (6)
[2054] Ibid, s.289(1)(b), s.294(3), s.303. Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006, SI 2006/1699
[2055] Ibid, s.298(1)
[2056] Ibid, s.298(2)
[2057] F Cram, 'Understanding the Proceeds of Crime Act 2002: Cash Seizure and Frontline Policing' (2013) 52(2) The Howard Journal of Criminal Justice 121, 122
[2058] Where the cash can be forfeited without a court hearing, Proceeds of Crime Act 2002, s.297A
[2059] S Gentle, C Spinks, M Omer, 'Proceeds of Crime Act 2002: Update 1' (2019) 170 COB 1, 16.
[2060] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.184
[2061] Alldridge notes that, 'if forfeiture is *neither* regarded as a punishment of a criminal nor as a means of preventing the criminal from making a profit from a crime, then there is no reason why the same object should not be the subject of a confiscation order and of forfeiture' as in *R v Smith* (David Cadman) [2001] UKHL 68; [2002] 1 WLR 54, P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart 2003) p.112
[2062] F Cram, 'Understanding the Proceeds of Crime Act 2002: Cash Seizure and Frontline Policing' (2013) 52(2) The Howard Journal of Criminal Justice 121, 122

challenges on human rights grounds.[2063] However, following *Waya,*[2064] there is said to be 'an even greater argument for proportionality' in Part 5 cases, which may reduce the forfeiture.[2065]

The erosion of these safeguards are more acceptable in this context, for large amounts of cash may be regarded as inherently suspicious and in need of explanation.[2066] However, this cannot be said of large amounts of money held in bank accounts, and consequently, cannot be used to justify the account freezing and forfeiture powers inserted into POCA.[2067] These powers enable an enforcement officer to apply to a magistrate's court for an order to freeze money in a bank or building society account,[2068] if they have reasonable grounds for suspecting that the money constitutes recoverable property,[2069] or is intended by any person for use in unlawful conduct.[2070] Once a freezing order has been obtained, the court may order the forfeiture of the money, if it is satisfied on the balance of probabilities that the money is recoverable property, or is intended for use in unlawful conduct.[2071] As with cash forfeiture, there is also provision for administrative account forfeiture in uncontested cases.[2072]

These new powers have been extensively utilised by authorities, including HMRC, as the powers provide authorities with an expedient method to obtain illicit funds.[2073] However, this expediency is achieved by way of lowering or removing typical procedural safeguards and standards. For instance, applications for account freezing orders can be made before any investigation has started, are heard before magistrate's courts and depend only upon the low

[2063] For the compatibility of forfeiture generally, see for instance, *Air Canada v United Kingdom* (1995) 20 EHRR 150; *Goldsmith v Commissioners of Customs & Excise* [2001] 1 WLR 1673; For the compatibility of cash forfeiture, see for instance, Butt v HM Customs and Excise [2001] EWHC Admin 1066; Butler v United Kingdom Application 41661/98, 27th June 2002.
[2064] *R v Waya* [2012] UKSC 51; [2013] 1 AC 294
[2065] *Ahmed v Her Majesty's Commissioners for Revenue and Customs* [2013] EWHC 2241 (Admin) at para 45. For instance, in *Ahmed,* when a company director cheated the public revenue by keeping cash takings in his home without declaring them, only part of the cash equivalent to the value of unpaid tax was recoverable property.
[2066] *R (Merida Oil Traders Ltd) v Central Criminal Court* [2017] EWHC 747; [2017] 1 WLR 3680 at para 57; *R (on the application of the Director of the Assets Recovery Agency) v Green* [2005] EWHC 3168 at paras 32-3
[2067] Proceeds of Crime Act 2002, Chapter 3B, inserted by the Criminal Finances Act 2017, s.16. See also, The Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017, SI 2017/1297.
[2068] Exceeding the minimum amount of £1000, Proceeds of Crime Act 2002, s.303Z8
[2069] As defined under ss.304-306. See also, the exemption in s.308.
[2070] Ibid, s.303Z. Unlawful conduct is defined in ss.241-2.
[2071] Ibid, s.303Z3
[2072] Ibid, s. 303Z9-13
[2073] Overcoming issues in recovering money held in bank accounts under the confiscation, civil recovery and cash forfeiture measures provided for in POCA, JS Fisher, A Clifford, *The Criminal Finances Act 2017* (Routledge 2019) p.53

threshold of reasonable suspicion.[2074] Additionally, funds can be regarded as recoverable property, even when the unlawful conduct generating the property has not been identified with specificity.[2075] When combined with the potential to extend account freezing orders for a period of up to two years,[2076] these powers have the potential to cause significant harm to the rights and well-being of individuals, who may ultimately be able to demonstrate the legal origin of the funds.

Unexplained Wealth Orders

LEAs, including HMRC, can apply to the High Court for UWOs.[2077] A UWO will be granted when a respondent holds property exceeding £50,000 in value,[2078] and 'there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property'.[2079] It must also be shown that the respondent is a politically exposed person,[2080] or there are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime.[2081] A UWO requires a respondent to answer questions regarding the property,[2082] as well as to provide any requested documents.[2083] If a respondent fails to comply, the property is to be presumed to be recoverable property.[2084] This effectively facilitates a civil recovery

[2074] R Barnes, R Dowding, 'Account Freezing Orders: Part 1 – An Introduction' (2020) 1 Arch Rev 6; J Nakhwal, N Querée, 'The Criminal Finances Act 2017: Account Freezing and Forfeiture Provisions' (2017) 181 JPN 303

[2075] Ibid at p.7, noting the definition of unlawful conduct in Proceeds of Crime Act 2002, ss.241-2. It is likely that the same approach will be taken as for cash forfeiture and civil recovery. Here, s.242(b) has been interpreted as permitting officers to demonstrate that property was 'obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct', but not permitting officers to 'point to criminal conduct of an unspecified kind'. *Angus v United Kingdom Border Agency* [2011] EWHC 461 (Admin); [2011] Lloyd's Rep FC 329. This does not apply when the cash is intended for use in criminal activity, where the 'irresistible inference' test may apply, see *Sandhu v Chief Constable of West Midlands* [2019] EWHC 3316 (Admin); [2020] ACD 25.

[2076] Proceeds of Crime Act 2002, s.303Z3(3)&(4)

[2077] Ibid, s362A(1)&(2). The relevant authorities are the National Crime Agency, Her Majesty's Revenue and Customs, the Financial Conduct Authority, the Director of the Serious Fraud Office, and the Director of Public Prosecutions, ibid, s362A(7).

[2078] Ibid, s.362B(2). This includes 'holding' property through trusts and company arrangements, as defined in s.362H.

[2079] Ibid, s.362B(3)

[2080] Ibid, s.362B(4)(a). The term is defined in s.362B(7)&(8).

[2081] 'Whether in a part of the United Kingdom or elsewhere', ibid, s.362B(4)(b). 'A person is involved in serious crime in a part of the United Kingdom or elsewhere if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007', ibid, s.362B(9)

[2082] Including the nature and extent of their interest, and how the property was obtained, ibid, s.362A(3). Any duty of confidentiality is overruled by the UWO, s.362G(I).

[2083] Ibid, s.362A(5)

[2084] Ibid, s.362(C)(2)

action under Part 5 POCA.[2085].It is not an offence to fail to comply with a UWO, but it is a criminal offence for a respondent to make a false statement in response.[2086]

UWOs were introduced in the context of concerns surrounding money laundering through the London property market.[2087]. However, UWOs may be used to facilitate the recovery of assets held by those who commit tax offences, with 'offences in relation to public revenue' explicitly included as a serious crime.[2088] Although this category includes offences of tax evasion as well as tax fraud, the extent to which UWOs will be used against tax evaders is likely to depend on the meaning of 'insufficient' and the degree of discrepancy required between the income and asset in question. The scope of the Act needs to be clarified.[2089] There are unlikely to be many cases of 'pure' tax evasion,[2090] where there is such a significant difference in the amounts earnt and declared by the respondent that they could buy property they could not legitimately claim to afford. In addition, the courts' interpretation of the Act is unlikely to assist HMRC in its pursuit of tax evaders. Authorities must not regard complex offshore arrangements in secrecy jurisdictions using companies and legal structures as indicative of criminality, without more.[2091] However, UWOs may further the use of allegations of tax crimes to address other illicit activities.[2092]Additionally, UWOs may play an indirect role in recovering sums retained

[2085] Although the respondent may challenge the presumption in the proceedings Explanatory notes to the Criminal Finances Act 2017, para 65.
[2086] Proceeds of Crime Act 2002, s.362E. Statements made in response to UWOs cannot be used in evidence against respondents in criminal proceedings, s.362F.
[2087] For instance, organisations such as Transparency International claim to have identified at least 160 properties, worth £4.4billion, in the UK that have been purchased by 'high corruption risk' individuals, Transparency International UK, 'Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market' (March 2017) <https://www.transparency.org.uk/publications/faulty-towers-understanding-the-impact-of-overseas-corruption-on-the-london-property-market/> accessed 19th June 2020, at p.9. Witnesses from the NCA, SFO, and the OPBAS 'agreed that this estimate was reasonable', House of Lords Joint Committee on the Draft Registration of Overseas Entities Bill, *Draft Registration of Overseas Entities Bill* (2017-2019, HL 358, HC 2009) p.11. They were introduced to facilitate the recovery the proceeds of corruption when sufficient evidence could not be obtained for the purposes of civil recovery; typically, where international cooperation is essential, but not forthcoming, and/or a PEP is involved. Home Office, National Crime Agency, 'Impact Assessment: Criminal Finances Bill – Unexplained Wealth Orders' (10 January 2017) <https://www.parliament.uk/documents/impact-assessments/IA17-001D.pdf> accessed 19th June 2020 at p.4.
[2088] ibid, s.362B(9). Serious Crime Act 2007, ss.2-3, Schedule 1, 1(8).
[2089] For, 'this places significant discretion in the hands of the authorities and Court.' R Julien, 'Unexplained Wealth Orders (UWOs) under the UK's Criminal Finances Act 2017: The Role of Tax Laws and Tax Authorities in its Successful Implementation' (2019) WU International Taxation Research Paper Series No. 2019-02 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465485> accessed 19th June 2020, at p.14
[2090] This author adopts Kelly and Hobson's definition of this term, i.e. the evasion of tax on otherwise lawful income, see G Kelly, K Hobson, 'ARA and the Taxation of the Proceeds of Crime—Some Practical Considerations' (2006) 862 Tax J 5, 6
[2091] *National Crime Agency v Baker* [2020] EWHC 822 (Admin) at para 97, following the principle applied in cases concerning the risk of dissipation of assets, see *Holyoake v Candy* [2017] EWCA Civ 92; [2018] Ch 297.
[2092] As those who have profited from other offences are unlikely to have declared this for tax purposes and will not be able to offer a legitimate explanation as to the source of their wealth, see section 'Taxation of the Proceeds of Crime' at p. above

through tax evasion, as responses to UWOs will often reveal unreported income and gains.[2093] However, using the information obtained via UWOs in this manner will require inter-agency cooperation.[2094]

Only a handful of UWOs have been applied for so far.[2095] This may be due to the extensive resources required to make full use of UWOsor a lack of political motivation.[2096] However, despite their potential utility in addressing tax crimes, restraint in using UWOs is to be commended, as these powers go further than any other in POCA, forcing individuals to explain the provenance of their wealth and effectively damaging the traditional relationship between the citizen and the state.[2097] Although any challenges to UWOs on human rights grounds are unlikely to be successful,[2098] Rule of Law considerations would suggest that the scope and application of UWOs should be further restricted.[2099]

International Cooperation

[2093] R Julien, 'Unexplained Wealth Orders (UWOs) under the UK's Criminal Finances Act 2017: The Role of Tax Laws and Tax Authorities in its Successful Implementation' (2019) WU International Taxation Research Paper Series No. 2019-02 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465485> accessed 19th June 2020, p.19

[2094] Ibid. Julien notes that this one of the key features that has enabled Ireland to recover $160million using its powers to tax criminal activity from 1998-2011. This is in comparison to the $15.7million recovered using Irish forfeiture laws from 2004-2011, citing Booz, Allen, Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders' (Report Prepared for the US Department of Justice National Institute of Justice, 31 October 2011) <https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf> accessed 19th June 2020, at p.134.

[2095] *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108; [2020] 2 Cr App R 5; *National Crime Agency v Mansoor Hussain and others* [2020] EWHC 432 (Admin); [2020] 1 WLR 2145; *National Crime Agency v Baker* [2020] EWHC 822 (Admin); NCA, 'NCA Secures Unexplained Wealth Order Against Properties Owned by a Northern Irish Woman' (31 July 2019) <https://www.nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-order-against-properties-owned-by-a-northern-irish-woman> accessed 19 June 2020

[2096] For instance, the Impact Assessment predicted that only 20 UWOs would be sought each year Home Office, National Crime Agency, 'Impact Assessment: Criminal Finances Bill – Unexplained Wealth Orders' (10 January 2017) <https://www.parliament.uk/documents/impact-assessments/IA17-001D.pdf> accessed 19th June 2020 at p.3, cite in P Sproat, 'Unexplained Wealth Orders: An Explanation, Assessment and Set of Predictions' (2018) 82(3) J Crim L 232, 240. However, a NCA official has stated that the Agency considered over 140 UWOs in the first year of operation. See KYC 360, 'UK Looks into 140 Unexplained Wealth Orders, Many Linked to Russians' (8 February 2019) <https://www.riskscreen.com/kyc360/news/update-uk-looks-into-140-unexplained-wealth-orders-many-linked-to-russians-nca/> accessed 23 June 2020

[2097] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.188.

[2098] As Sproat notes, 'Earlier attempts to use human rights to challenge the use of civil powers for such public ends have had little impact and it is difficult to see why this would be that much different with this investigative power' P Sproat, 'Unexplained Wealth Orders: An Explanation, Assessment and Set of Predictions' (2018) 82(3) J Crim L 232, 240

[2099] For instance, it is questionable whether the value threshold for seeking UWOs should have been lowered from £100,000 to £50,000. Home Office, National Crime Agency, 'Impact Assessment: Criminal Finances Bill – Unexplained Wealth Orders' (10 January 2017) <https://www.parliament.uk/documents/impact-assessments/IA17-001D.pdf> accessed 19th June 2020 at p.6

POCA provides for international cooperation in respect of the recovery of the proceeds of crime.[2100] Overseas authorities may submit requests to UK authorities via formal MLA channels,[2101] to use the measures contained in POCA, such as confiscation and civil recovery orders, on their behalf.[2102] All requests pertaining to tax-related matters must be sent directly to HMRC.[2103] A separate regime exists for the recovery of assets within the EU.[2104] Similarly, the UK is able to make requests to overseas authorities for assistance in conserving or recovering property held abroad.[2105] In addition, the civil asset recovery measures in POCA may be applied extraterritorially,[2106] and these powers are beginning to be recognised by other jurisdictions.[2107] It appears as though the UK framework has been somewhat successful in assisting other states to recover the proceeds of crime. By December 2017, £254million had been restrained by the CPS for other countries, and, from 2014-16, the UK repatriated over £47million in assets.[2108] The UK has also benefited from the existence of international cooperation, with £23million being recovered from other countries since 2013.[2109] Accordingly, the AML framework may provide a mechanism for the recovery of the proceeds

[2100] Proceeds of Crime Act 2002, Part 11; The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, SI2005/3181

[2101] Discussed in Chapter 3.

[2102] Proceeds of Crime Act 2002, Part 11; The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, SI2005/3181; Other orders, such Unexplained Wealth Orders and Freezing Orders, may also be obtained for overseas jurisdictions, see Proceeds of Crime Act 2002 (External Investigations and External Orders and Requests) (Amendment) Order 2018, SI 2018/1078; See also Home Office, 'United Kingdom Briefing on International Cooperation in Criminal Matters: Mutual Legal Assistance' (United Nations Office on Drugs and Crime, 29 March 2019) <https://www.unodc.org/documents/international-cooperation/News_and_events/UK_UNTOC_Contributions.pdf> accessed 9th April 2020

[2103] Ibid

[2104] The Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014, SI2014/3141; although the uncertainties surrounding the UK's continued relationship with the EU renders its continued existence questionable, see B Hone, A Noorali, 'The International Dimension of the Proceeds of Crime Act 2002' (Drystone Chambers, July 2018) <https://drystone.com/files/5288f4abc7dc68202eecc612d0e3947d.pdf> accessed 9th April 2020; A study conducted for the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs noted that going back to relying on the CoE Convention would 'result in a substantial reduction in the level of cooperation' M Gutheil et al, 'The EU-UK Relationship Beyond Brexit: Options for Police Cooperation and Judicial Cooperation in Criminal Matters' (Study for the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, July 2018) <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604975/IPOL_STU(2018)604975_EN.pdf> accessed 9th April 2020, at p.10

[2105] Proceeds of Crime Act 2002, s.74, s.282B-F

[2106] Ibid, s.282A. The section was introduced by the Crime and Courts Act 2013, s.48 to reverse the decision in *Perry v Serious Organised Crime Agency* [2012] UKSC 35; [2013] 1 AC 182.

[2107] *National Crime Agency v Azam* [May 2015], District Court of Luxembourg, cited in T Epps, M Beardsworth, A Amole, 'Extraterritoriality: The UK Perspective' in J Seddon et al (Eds.), *The Practitioner's Guide to Global Investigations* (3rd edn, Global Investigations Review 2019) p.466

[2108] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 11 January 2020, at p.78.

[2109] Ibid, at p.79.

of tax crimes, even when this is not provided for by the international agreements discussed in the previous chapter.[2110]

5.5.3 Recovering the Proceeds of Tax Crimes

Confiscation orders are regularly used to recover the proceeds of tax crime, with tax-related offending contributing 10-57% of the total value of all confiscation orders issued each year from 2014-17.[2111] Approximately 15% of the sums actually recovered through confiscation orders are directly attributable to tax and benefit fraud,[2112] and fraud and money laundering are quickly overtaking drug trafficking as the largest sources of assets recovered using confiscation orders, both of which potentially encompass tax-related criminality.[2113] HMRC has made extensive use of these powers. HMRC makes greater use of confiscation orders than any other individual LEA,[2114] being responsible for the recovery of over £20million via confiscation orders in 2017-18, as well as over £15million in 2018-19.[2115] These figures amount to around 12% and 9% of the total amount recovered through confiscation orders for these respective years.[2116] For comparison, the amounts recovered by HMRC amount to 300% of the sums recovered by the NCA, more than 1500% of the amount recovered by the FCA, and in excess of 4600% of the amount recovered by the SFO in 2017-18.[2117] The amounts recovered are much lower than the value of confiscation orders imposed.[2118] However, the high value of attrition in the regime is largely due to the problematic approach taken to determining a

[2110] See Chapter 4.
[2111] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 11 January 2020, at p.83.
[2112] Y Chistyakova, DS Wall, S Bonino, 'The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK' (2019) Eur J Crim Policy Res <https://doi.org/10.1007/s10610-019-09423-5> accessed 23 June 2020
[2113] Ibid
[2114] When considering each police force individually, see Home Office, 'Reporting Force and Agency Data – Assets Recovered: September 2019' (13 September 2019) <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2014-to-2019> accessed 23 June 2020
[2115] Ibid
[2116] Ibid (author's own calculation). A total of £119,466,577 was recovered in 2017-18 and £165,576,950 in 2018-19.
[2117] Ibid
[2118] Y Chistyakova, DS Wall, S Bonino, 'The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK' (2019) Eur J Crim Policy Res <https://doi.org/10.1007/s10610-019-09423-5> accessed 23 June 2020. This is a longstanding issue. For instance, in 2013, the National Audit Office found that only 26p in every £100 of criminal proceeds was confiscated National Audit Office, *Criminal Justice System: Confiscation Orders* (HC 2013-14, 738-I) p.4. Prior to this, both the ARA and SOCA were ultimately disbanded owing to their inability to recover enough money to cover their own costs, see J Harvey, 'Asset Recovery: Substantive or Symbolic?' in C King, C Walker (Eds.), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Routledge, 2014) p.189-192.

defendant's benefit for the purposes of a confiscation order,[2119] which is in urgent need of rectification.

HMRC is the largest user of both cash and account forfeiture powers. For instance, HMRC recovered over £9million following cash forfeiture orders, an amount which more than doubled to over £19million in 2019.[2120] In addition, over 670 bank and building society accounts containing £110million were frozen by June 2019, increasing to £210million in the following two months.[2121] HMRC accounts for a significant proportion of these orders, with over 60 accounts containing £8million frozen in 2018, followed by 166 accounts containing £19.5million in 2019-2020, leading to the seizure of £1.2million and £4.8million respectively.[2122] It is unclear how much HMRC recovers each year through civil recovery orders. However, these powers play a much more modest role in recovering the proceeds of crime in the UK.[2123] In total, HMRC recovered more than £192 million in 2018-2019, using its proceeds of crime powers.[2124]

POCA's asset recovery tools have a positive impact in combatting tax evasion and tax fraud. However, these sums only represent a modest proportion of the total sums attributable to tax

[2119] Ibid (Chistyakova). HMRC explained that this contributed to the large amount of unenforceable confiscation orders in 2013. Her Majesty's Inspectorate of Constabulary, 'An Inspection of Her Majesty's Revenue and Customs Performance in Addressing the Recovery of the Proceeds of Crime from Tax and Duty Evasion and Benefit Fraud: Revisit 2013' (HMIC, 2014) <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/hmrc-proceeds-of-crime-revisit.pdf> accessed 14th March 2020 p.50-51.

[2120] Home Office, 'Reporting Force and Agency Data – Assets Recovered: September 2019' (13 September 2019) <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2014-to-2019> accessed 23 June 2020

[2121] Home Office, 'Asset Recovery Statistical Bulletin 2013/14 - 2018/19, England, Wales and Northern Ireland' (Criminal Finances Team, September 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831394/asset-recovery-financial-years-2014-to-2019-hosb2019.pdf> accessed 17th June 2020, p.8; R Barnes, R Dowding, 'Account Freezing Orders: Part 1 – An Introduction' (2020) 1 Arch Rev 6, 6

[2122] K Beioley, 'HMRC Profits by New Powers to Crack Down on Illicit Finance' (27 May 2020) <https://www.ft.com/content/bc4128d8-8bd7-4088-aae6-8d7686e26fda?desktop=true&segmentId=d8d3e364-5197-20eb-17cf-2437841d178a> accessed 17 June 2020; The information was obtained by the firm RPC, through a Freedom of Information Request. RPC, 'HMRC Ramps up use of New Account Freezing and Forfeiture Orders to Tackle Suspected Criminal Activity' (27 May 2020) <https://www.rpc.co.uk/press-and-media/hmrc-ramps-up-use-of-new-account-freezing-and-forfeiture-orders/> accessed 17th June 2020

[2123] 'Civil recovery was once considered only as a secondary alternative to confiscation, but authorities confirmed this is no longer the case and civil recovery is now considered an equivalent action to pursue in first instance. This is not reflected in the statistics which show a decreasing number of civil recovery orders, with a fluctuating amount recovered.' FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 23 June 2020, at p.73.

[2124] HM Revenue & Customs, *Annual Report and Accounts 2018-19* (HC 2018-19, 2394-I) p.31

evasion ,[2125] or even of those recovered by HMRC.[2126] This may be due to HMRC's inconsistent use of POCA powers,[2127] with the authority also making use of its traditional powers.[2128] However, it is questionable whether the tax authority should be afforded use of POCA powers , as this option potentially distorts enforcement decisions. If the proceeds of tax crime are recovered through POCA, HMRC benefits from the Asset Recovery Incentivization Scheme (ARIS), which enables LEAs to obtain a share of the sums recovered.[2129] In this respect, ARIS may provide HMRC with a financial incentive to prosecute and confiscate the proceeds of tax offences.[2130] These issues urgently need to be addressed, as part of a wider review of HMRC's enforcement policy and approach.

Overall, the UK's AML framework has played a marginal, yet expanding role, in both the identification and the recovery of the proceeds of tax crimes. However, as with the inclusion of tax offences as predicate offences to laundering, it is questionable whether the proceeds of tax offences should be recovered using this framework when ample powers are already provided to HMRC and ulterior motives underpin its application.

5.4.6 Beneficial Ownership

Introduction

[2125] HMRC estimates that tax evasion amounts to £5.3billion, criminal attacks £4.9billion, and the hidden economy £3billion. HM Revenue & Customs, 'Measuring Tax Gaps 2019 Edition: Tax gap estimates for 2017-18' (20 June 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820979/Measuring_tax_gaps_2019_edition.pdf> accessed 23 June 2020

[2126] As noted above in regards to SARs, these sums represent a small proportion of the total sum of £34.1billion collected or retained by HMRC through compliance activities in 2018-19, with the Fraud Investigation Service alone recovering £5.47billion through civil and criminal investigations in 2018. HM Revenue & Customs, *Annual Report and Accounts 2018-19* (HC 2018-19, 2394-I) p.6; Freedom of Information request submitted by Pinsent Masons, 'HMRC's Elite Fraud Team Collects £5.47 Billion in Extra Tax – Up 7% in Just the Last Year' (2018) <https://www.pinsentmasons.com/en/media/press-releases/2018/hmrcs-elite-fraud-team-collects-547-billion-in-extra-tax--up-7-in-just-the-last-year/> accessed 14 March 2020.

[2127] Her Majesty's Inspectorate of Constabulary, 'An Inspection of Her Majesty's Revenue and Customs Performance in Addressing the Recovery of the Proceeds of Crime from Tax and Duty Evasion and Benefit Fraud: Revisit 2013' (HMIC, 2014) <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/hmrc-proceeds-of-crime-revisit.pdf> accessed 14th March 2020 p.42.

[2128] See Chapters 6 and 7.

[2129] Home Office, 'Asset Recovery Incentivisation Scheme Review - February 2015' <http://data.parliament.uk/DepositedPapers/Files/DEP2015-0223/ARIS_Review_Report_unmarked.pdf > accessed 23 June 2020.

[2130] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.170.

Companies and legal arrangements may be used by tax evaders,[2131] money launderers, and financial criminals to hold money offshore or to enter into transactions anonymously.[2132] Accordingly, the Recommendations require countries to ensure that they are able to obtain BOinformation,[2133] regarding legal persons and arrangements.[2134] Countries may opt to obtain the information using a number of methods, including through the CDD obligations imposed on designated professionals.[2135] However, there is evidence to suggest that professionals are failing to fulfil these obligations,[2136] particularly in OECD countries,[2137] such as the UK and US.[2138] Accordingly, the UK opted to introduce central registers of the BOs of companies and

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[2131] The importance of identifying the beneficial owners of legal entities and arrangements to prevent tax evasion was also highlighted by the Panama Papers. 'Mossack Fonseca was unable to identify the beneficial owners of more than 70% of 28,500 active companies in the British Virgin Islands (BVI) as well as 75% of companies in Panama.' J Oliver, 'Panama Papers: Massack Fonseca was Unable to Identify Company Owners' (BBC News, 20 June 2018) <https://www.bbc.co.uk/news/world-latin-america-44553932> accessed 4 July 2020

[2132] 'Of the current money laundering cases being investigated by HMRC over 70% have used company structures for money laundering, moving over £800 million (…) The misuse of companies is an issue in almost every case investigated by the SFO.' HM Treasury, Home Office, 'National Risk Assessment of Money Laundering and Terrorist Financing 2017' (October 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655198/National_risk_assessment_of_money_laundering_and_terrorist_financing_2017_pdf_web.pdf> accessed 19 January 2020, at p.69

[2133]A beneficial owner refers to 'the person or persons who ultimately own or control an asset (for example, a property or a company) and benefit from it', F Mor, 'Registers of Beneficial Ownership' (House of Commons Briefing Paper 8259, 7 August 2019) <https://commonslibrary.parliament.uk/research-briefings/cbp-8259/> accessed 2nd July 2020, at p.4.

[2134] FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 4 December 2019, Recommendations 24 and 25

[2135] Ibid. See also, FATF, 'Guidance on Transparency and Beneficial Ownership' (October 2014) <https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> accessed 2 July 2020; FATF, 'Best Practices on Beneficial Ownership for Legal Persons' (October 2019) <http://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf> accessed 2 July 2020

[2136] FATF, 'FATF Report to the G20 Finance Ministers and Central Bank Governors' (July 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Report-G20-FM-CBG-July-2018.pdf> accessed 5 January 2020, at p.5; 'Failure to identify the client's beneficial owner appears to be the main weakness affecting [the DNFBP] sector' Commission, 'Report from the Commission to the European Parliament and the Council on the Assessment of the Risk of Money Laundering and Terrorist Financing Affecting the Internal Market and Relating to Cross-Border Activities' COM(2019) 370 final at p.3; '27 out of 34 OECD countries perform below expectations on beneficial ownership of corporate vehicles and trusts' OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (2014) <https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf> accessed 5 January 2020, p.1

[2137] 'On nearly every count, tax havens outperform the OECD Countries: Lower non-compliance, higher part-compliance, and higher full compliance – all at statistically and substantively significant levels'. MG Findley, DL Nielson, JC Sharman, *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism* (CUP 2014) p.72

[2138]Ibid. In 2011, the FSA noted, 'We were not satisfied that all banks understood their legal CDD obligations in relation to their customers' beneficial owners. A third of banks in our sample failed to take adequate measures to understand and verify their customers' ownership and control structure.' FSA, 'Banks' Management of High Money-Laundering Risk Situations: How Banks Deal with High-Risk Customers (Including Politically Exposed Persons), Correspondent Banking Relationships and Wire Transfers' (June 2011) <https://www.fca.org.uk/publication/corporate/fsa-aml-final-report.pdf> accessed 2 July 2020

trusts,[2139] and plans to introduce a register of the BOs of overseas entities that own land or real property.[2140]

Companies

In 2015, the UK introduced the PSC Register,[2141] which was described as the 'first of its kind in the world'.[2142] The Act requires companies[2143] to identify and gather information on their BOs,[2144] termed people with significant control (PSC),[2145] and provides for corresponding obligations on these individuals to supply this information.[2146] PSC are those who meet one or more conditions, including holding, either directly or indirectly,[2147] more than 25% of the shares or the voting rights in the company, as well as possessing other forms of control.[2148] Companies must keep PSC information in their own registers,[2149] as well as file this information with Companies House.[2150] The public can access most of the information contained in the central PSC Register,[2151] unless the information is protected.[2152] It is an offence

[2139] Small Business, Enterprise and Employment Act 2015, s.81, Schedule 3 inserting Part 21A and Schedules 1A and 1B into the Companies Act 2006; Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692

[2140] Department for Business, Energy & Industrial Strategy, *Draft Registration of Overseas Entities Bill* (Cm 9635, 2018)

[2141] Small Business, Enterprise and Employment Act 2015, s.81, Schedule 3 inserting Part 21A and Schedules 1A and 1B into the Companies Act 2006

[2142] Department for Business Minister, Baroness Neville Rolfe, Department for Business Innovation & Skills, 'People with Significant Control Register Comes into Force' (6 April 2016) <https://www.gov.uk/government/news/people-with-significant-control-register-comes-into-force> accessed 2 July 2020

[2143] As defined in, Companies Act 2006, s.790B(1), Register of People with Significant Control Regulations 2016, SI 2016/339, Regulation 3 and extended by The Information about People with Significant Control (Amendment) Regulations 2017, SI 2017/693. See also Limited Liability Partnerships (Register of Persons with Significant Control) Regulations 2016, SI 2016/340.

[2144] The required information for an individual PSC includes, their name, a service address, country of residence, nationality, date of birth and usual residential address. Companies Act 2006, s.790K

[2145] Companies Act 2006, s.790D, s.790E

[2146] Ibid, s.790G, s.790H

[2147] If an overseas company meets the conditions, the UK company must look through the overseas company and identify the PSCs in its own register. If the UK company is owned by another registrable UK company, it only needs to identify the entity itself. Companies Act 2006, s.790C(4),(8)&(9), Schedule 1A, Part 2. A Turner, T Follett, 'Tangled Up in Chains? Making Sense of the New UK Requirement to Keep Registers of 'People with Significant Control' (2016) 22(5) T&T 537, 640-641

[2148] Companies Act 2006, ss.790C(2) and (3), Schedule 1A, Part 1, paras. 2-6.

[2149] Ibid, s.790M, unless the company decides against keeping a separate register under ss.790W–790ZE

[2150] Both upon incorporation and via regular updates for inclusion in a central register Ibid, s.9, s.12A, s.790M. The information must be updated on the internal PSC Register within 14 days of the change and must be filed with Companies House within a further 14 days, The Information about People with Significant Control (Amendment) Regulations 2017, SI 2017/693, Reg 7 & 8.

[2151] The information can be obtained through the general search function, or data snapshots, published on the Companies House website, Companies House, 'People with Significant Control (PSC) Snapshot' <http://download.companieshouse.gov.uk/en_pscdata.html> accessed 4 July 2020. A company must also make its internal PSC register available for inspection by any person, without charge, ibid s.790N, s.790O, s.790P.

[2152] The PSC can apply to have their residential address protected from disclosure on the Register, ibid, s.790T, s.790ZF. The information may be further protected from disclosure from Credit Reference Agencies (CRAs) if

for the company and/or the PSC to fail to supply information, or to provide inaccurate information.[2153] Bearer shares were also abolished to prevent the frustration of the aims of the Register.[2154]

The PSC register has provided assistance in combatting tax evasion and other financial crimes. LEAs believe the Register has had a positive impact, making 'it quicker and easier to obtain information'.[2155] Additionally, the Register has led to a reduction in the use of certain legal vehicles used to facilitate financial crimes..[2156] However, the Register is unlikely to fulfil its aims because 'Companies House does not conduct identification, verification, or other CDD checks',[2157] meaning that the system effectively relies on criminals to provide accurate information.[2158] Moreover, until 2020, FIs and DNFBPs did not have an obligation to report any inaccuracies identified in the Register.[2159] This resulted in inaccurate information being supplied, as well as indications of criminality going unchecked.[2160] Open Ownership and Global Witness determined that over 3,000 companies identified their BOs as other entities

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the PSC can show that there is 'a serious risk that the applicant, or a person who lives with the applicant, will be subjected to violence or intimidation' because of the company's activities, Register of People with Significant Control Regulations 2016, SI 2016/339, Part 6. A PSC may also apply to prevent the disclosure of all of their information, either on the Register or to CRAs, if they can show that 'the activities of that company, or one or more characteristics or personal attributes of the applicant when associated with that company, will put the applicant or a person living with the applicant at serious risk of being subjected to violence or intimidation', Register of People with Significant Control Regulations 2016, SI 2016/339, Part 7. The information still needs to be filed with Companies House and will be made available to LEAs.

[2153] Companies Act 2006, s.790F (failure by company to comply with information duties), s.790M(12) (failure to comply with duty to keep register), s.790N(4) (failure to make register available for inspection), s.790S (failure to provide information as to state of register), s.790I, Schedule 1B (failure by individual to comply with a notice under s.790D or s.790E, or duty to supply or update information under s.790G or s.790H).

[2154] Small Business, Enterprise and Employment Act 2015, s.84, inserting Companies Act 2006, s.779(4).

[2155] Department for Business, Energy & Industrial Strategy, 'Review of the Implementation of the PSC Register' (BEIS Research Paper Number 2019/005, March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf> accessed 4 July 2020, at p.34

[2156] The rate of incorporation of Scottish Limited Partnerships decreased by 80% following the introduction of the register; a vehicle previously implicated in the Russian and Azerbaijani Laundromats, Global Witness, 'The Companies We Keep: What the UK's Open Data Register Actually Tells Us About Company Ownership' (July 2018) <https://www.globalwitness.org/en/blog/three-ways-uks-register-real-owners-companies-already-proving-its-worth/> accessed 4 July 2020, at p.10; See also, Global Witness, Getting the UK's House in Order' (March 2019) <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/getting-uks-house-order/> accessed 4 July 2020, at p.3

[2157] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 11 January 2020, at p.150

[2158] D Thomas-James, 'Reviewing International Standards on Beneficial Ownership Information of Companies (2020) 41(5) Comp Law 129, 130

[2159] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, Reg 30A, inserted by The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511, Reg 5

[2160] That is, until highlighted by Non-Governmental Organisations (NGOs) such as Global Witness (n.683 above).

located in secrecy jurisdictions.[2161] This inaccuracy has led some LEAs to conclude that the Register has limited utility in criminal investigations.[2162] This is concerning considering the significant costs imposed on both businesses and society because of the PSC Register,[2163] with little value provided to either LEAs or the public in return.[2164]

The information submitted to Companies House needs to be subject to authentication and verification checks if the Register is to play any meaningful role in combatting tax offences. It is positive to note that the UK Government is currently consulting on mechanisms to verify the information submitted to the Register by making greater use of technology,[2165] and improving the accuracy of the information contained in the Register, by expanding the powers of Companies House and crosschecking data with government and private organisations.[2166] The

[2161] Information on beneficial owners also seemed to match 76 individuals on the US Sanctions List, as well as 267 disqualified directors Open Ownership, Global Witness, 'Learning the Lessons from the UK's Public Beneficial Ownership Register' (October 2017) <https://www.openownership.org/uploads/learning-the-lessons.pdf> accessed 4 July 2020, p.3

[2162] Some LEAs 'did not think that the introduction of the PSC register had affected their work. For these organisations, this was because concerns over data quality meant that they did not use the register much to inform their investigations.' Department for Business, Energy & Industrial Strategy, 'Review of the Implementation of the PSC Register' (BEIS Research Paper Number 2019/005, March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf> accessed 4 July 2020, at p.35. As Haynes notes, this leads to the question, what is the point? A Haynes, 'Corporate Privacy or Public Nakedness?' (2018) 39(7) Comp Law 209, 211

[2163] The transparency measures needed to achieve the G8 Commitments on Transparency and Trust, namely, the PSC Register, preventing corporate opacity through company directors and the prohibition of bearer shares were estimated 'have a quantified net cost (on an equivalent annualised basis) to business of £102m (…) and a Net Present Value of -£1,059m to society.' Most of these costs are attributable to the PSC register, which was predicted to generate '£470m one-off costs and £78m annually recurring costs'. Department for Business, Innovation & Skills, 'Impact Assessments: Summary Document, Small Business, Enterprise and Employment Act' (March 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418684/bis-15-276-small-business-enterprise-and-employment-act-impact-assessement-summary.pdf> accessed 4 July 2020, at p.9. These estimates appeared to be reasonably accurate with companies estimated to have spent £648million in one-off costs and £87.2million each year to comply with the register, Department for Business, Energy & Industrial Strategy, 'Post-Implementation Review of the People with Significant Control Register' (October 2019) <http://www.legislation.gov.uk/uksi/2016/375/pdfs/uksiod_20160375_en_001.pdf> accessed 4 July 2020, at p.38

[2164] The 'annual user benefits of [Companies House] data are estimated to be between £1billion and £3billion per year'. However, access to PSC information only accounts for approximately 4-13% of the total value. Department for Business, Energy & Industrial Strategy, Companies House, 'Valuing the User Benefits of Companies House Data' (Policy Summary, BEIS Research Paper Number 2019/015, September 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/833764/valuing-benefits-companies-house-data-policy-summary.pdf> accessed 12 July 2020

[2165] For the importance of using technology in ensuring the accuracy of beneficial ownership information see, A Knobel, 'Technology and Online Beneficial Ownership Registries: Easier to Create Companies and Better at Preventing Financial Crimes (Tax Justice Network, 1 June 2017) < https://www.taxjustice.net/wp-content/uploads/2017/06/Technology-and-online-beneficial-ownership-registries-June-1-1.pdf> accessed 4 July 2020. In addition, better use could be made of technology to improve the security of the information held in the Register. See for instance, J de Jong, A Meyer, J Owens, 'Using Blockchain for Transparent Beneficial Ownership Registers' [2017] International Tax Review 2

[2166] Department for Business, Energy & Industrial Strategy, 'Corporate Transparency and Register Reform: Consultation on Options to Enhance the Role of Companies House and Increase the Transparency of UK

enforcement of the Register also appears to have improved,[2167] leading to greater compliance with the requirements.[2168] Nevertheless, the Act still contains loopholes legally permitting BO information to be concealed from the Register. Although the UK's definition of a PSC is wider than the international definition of a BO,[2169] the 25% threshold is too easy to circumvent and must be lowered.[2170] In addition, the lack of a global standard,[2171] means that incorporating in another jurisdiction potentially provides another loophole for those wishing to avoid identification. Nevertheless, progress is being made, with 81 jurisdictions approving laws requiring the disclosure of BO information by 2020.[2172]

Corporate Entities' (May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819994/Corporate_transparency_and_register_reform.pdf> accessed 4 July 2020

[2167] At first, very few prosecutions were brought, despite a 3% non-compliance rate. Parliament, 'Companies: Ownership: Written Question – 9558' (12 September 2017) <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-09-07/9558> accessed 4 July 2020. The Secretary of State for Business, Energy and Industrial Strategy stated, 'Compliance is Companies House' primary aim, rather than prosecution'. Parliament, 'Companies: Ownership: Written Question – 105316' (12 October 2017) <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-09-14/105316/> accessed 4 July 2020

[2168] By March 2019, 227 companies and 243 directors had been subject to criminal proceedings for failing to comply with PSC requirements, although 108 were subsequently withdrawn. 66 Directors and 79 companies were convicted of these offences. Department for Business, Energy & Industrial Strategy, 'Post-Implementation Review of the People with Significant Control Register' (October 2019) <http://www.legislation.gov.uk/uksi/2016/375/pdfs/uksiod_20160375_en_001.pdf> accessed 4 July 2020, at p.19

[2169] A Haynes, 'Corporate Privacy or Public Nakedness?' (2018) 39(7) Comp Law 209, 209

[2170] 'For example, a company equally owned by two parents and two children, or by four friends, would have zero beneficial owners identified because everyone would have 25 per cent but not more than 25 per cent of ownership.' A Knobel, 'Beneficial Ownership Verification: Ensuring the Truthfulness and Accuracy of Registered Ownership Information' (Tax Justice Network, 22 January 2019) <https://www.taxjustice.net/wp-content/uploads/2019/01/Beneficial-ownership-verification_Tax-Justice-Network_Jan-2019.pdf> accessed 5 January 2020 at p.19

[2171] 63% of EU Countries failed to implement public central registers of the beneficial owners of companies by the implementation date (10 January 2020) of the 5th EU AML Directive, Global Witness, 'Patchy Progress in Setting up Beneficial Ownership Registers in the EU' (20 March 2020) <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/5amld-patchy-progress/> accessed 4 July 2020; By 2018, only six G20 countries had established central registers of beneficial ownership, Transparency International, 'G20 Leaders or Laggards? Reviewing G20 Promises on Ending Anonymous Companies' (2018) <https://www.transparency.org/en/publications/g20-leaders-or-laggards> accessed 4 July 2020, p.13

[2172] M Harari, A Knobel, M Meinzer, M Palanský, 'Ownership Registration of Different Types of Legal Structures from an International Comparative Perspective: State of Play of Beneficial Ownership – Update 2020' (Tax Justice Network, 1 June 2020) <https://www.taxjustice.net/wp-content/uploads/2020/06/State-of-play-of-beneficial-ownership-Update-2020-Tax-Justice-Network.pdf> accessed 4 July 2020, p.2; 'The Financial Secrecy Index 2020 shows that the biggest reforms have been in automatic exchange of information and beneficial ownership registration' Tax Justice Network, 'Financial Secrecy Index 2020 Reports Progress on Global Transparency – But Backsliding from US, Cayman and UK Prompts Call for Sanctions' (18 February 2020) <https://www.taxjustice.net/2020/02/18/financial-secrecy-index-2020-reports-progress-on-global-transparency-but-backsliding-from-us-cayman-and-uk-prompts-call-for-sanctions/> accessed 4 July 2020

The UK has unilaterally sought to require the disclosure of BO information on overseas entities when entering into certain transactions in its jurisdiction, potentially eradicating one route of circumvention. For instance, the UK is currently consulting on the introduction of a BO register of overseas entities that own land or real property in the UK.[2173] However, this Register will suffer from the same weaknesses as the PSC Register; including, the lack of verification, the low threshold for identifying BOs, and the lack of verification by Companies House.[2174] Additionally, the Register of Overseas Entities suffers from an additional weakness, the exclusion of trusts from the disclosure obligations.[2175] Appropriate amendments must be made to the Trust Registration Service.

Trusts

The UK Government held the view that the differences between companies and trusts meant that the introduction of public central BO registers was an unsuitable solution for combatting the misuse of the latter.[2176] There is evidence to suggest that trusts are much less likely to be used for illicit purposes.[2177] However, offshore trusts do seem to be used to facilitate tax avoidance and evasion[2178] and there is a risk that trusts are simply more of an effective vehicle

[2173] Department for Business, Energy & Industrial Strategy, *Draft Registration of Overseas Entities Bill* (Cm 9635, 2018)
[2174] Joint Committee on the Draft Registration of Overseas Entities Bill, *Draft Registration of Overseas Entities Bill* (2017-19, HL 358, HC 2009)
[2175] Ibid, p.22.
[2176] F Noseda, 'Too Much Information: When the UK Gets it Wrong – The Constitutional Fallout of Flawed UK Decisions in the Area of Tax Transparency' [2017] Jersey & Guernsey Law Review 182, 188 referring to a letter sent by then Prime Minister David Cameron to the President of the European Council. Cameron stated, 'It is clearly important that we recognise the important differences between companies and trusts. This means that the solution for addressing the potential misuse of companies – such as central public registries – may well not be appropriate generally.' Letter dated 14 November 2013 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/258997/PM-letter-tax-evasion.pdf> accessed 8 July 2020
[2177] 'Our review of grand corruption investigations suggests that trusts are used infrequently. In fact, only 5 percent of the corporate vehicles identified were trusts, appearing in only about 15 percent of the investigations.' E van der Does de Willebois, AM Halter, RA Harrison, J Won Park, JC Sharman, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to do About It* (The World Bank 2011) p.44; 'The risk of criminals exploiting UK trusts to launder money is therefore assessed to be low. The precise extent of abuse of UK trusts remains an intelligence gap. However, there are significantly higher risks associated with overseas trusts' HM Treasury, Home Office, 'National Risk Assessment of Money Laundering and Terrorist Financing 2017' (October 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655198/National_risk_assessment_of_money_laundering_and_terrorist_financing_2017_pdf_web.pdf> accessed 19 January 2020, at p.58
[2178] HM Revenue & Customs, 'The Taxation of Trusts: A Review' (Consultation Document, 7 November 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754210/The_Taxation_of_Trusts_A_Review.pdf> accessed 8 July 2020, p.11

for concealing financial crimes.[2179] Additionally, failing to subject trusts to the same disclosure requirements as companies would lead to an increase in the future use of trusts for illicit activities.[2180] Accordingly, the UK was compelled to introduce a register of the BOs of trusts by the EU.[2181].

The transposing Regulations require the trustees of a relevant trust,[2182] to keep accurate and up to date records of the BOs of the trust, as well as any potential beneficiaries.[2183] This information must be provided to relevant persons,[2184] when the trust enters into a transaction or forms a business relationship with them,[2185] as well as LEAs upon request.[2186] The Regulations require HMRC to establish and maintain a register of the BOs and potential beneficiaries of taxable trusts.[2187] Trustees must provide HMRC with information on the trust itself,[2188] and must provide identifying information for any BOs and potential beneficiaries.[2189]

[2179]Leaving investigations unable to reveal the '"successful" misuse of trusts' L Campbell, 'The Organisation of Corruption in Commercial Enterprise: Concealing (and Revealing) the Beneficial Ownership of Assets' in L Campbell, N Lord (Eds.), *Corruption in Commercial Enterprise*
Law, Theory and Practice (Routledge 2018) p.88; E van der Does de Willebois, AM Halter, RA Harrison, J Won Park, JC Sharman, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to do About It* (The World Bank 2011) p.45-47

[2180] E Virgo, 'Trust Registers and Transparency: A Step Too Far?' (2019) 33(3) Tru LI 95, 101

[2181] 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 [2015] OJ L141/73, Article 31

[2182] A 'relevant trust' is 'a UK trust which is an express trust; or a non-UK trust which is an express trust; and receives income from a source in the United Kingdom; or has assets in the United Kingdom, on which it is liable to pay one or more of the taxes referred to in regulation 45(14)', Ibid Reg.42(b).

[2183] Ibid, Reg. 44.

[2184] Relevant persons are credit institutions, financial institutions, auditors, insolvency practitioners, external accountants and tax advisers, independent legal professionals, trust or company service providers, estate agents, high value dealers, and casinos, ibid, Regs. 6&8.

[2185] Ibid, Reg.44(2)

[2186] Ibid, Reg,44(5). For the purposes of the Regulations, LEAs are the Commissioners, the FCA, the NCA, the Police and the SFO, ibid, Reg. 44(10).

[2187] Ibid, Reg.45.

[2188] Ibid, Reg.45(2), Reg. 45(5)

[2189] Ibid, Reg.45(2), The information to be provided includes the individual's full name, date of birth, national insurance number or unique taxpayer reference, or the individual's usual residential address. If the address is not in the UK, the individual's passport number or identification card number must also be provided, or an equivalent form of identification. The nature of the individual's role in relation to the trust must also be identified, ibid, Reg. 45(6). Information must also be provided about legal entity beneficial owners (Reg.45(2), Reg 45(7).

The term BO is given a broad definition.[2190] Civil and criminal sanctions may be imposed for non-compliance.[2191]

The TRS was extended beyond trusts that generate a tax consequence in the UK,[2192] to all UK express trusts and non-EU resident express trusts that purchase land or enter into a new business relationship with an obliged entity in the UK, regardless of whether or not the trust generates tax consequences.[2193] This was predicted to expand the number of trusts within scope of the TRS from 200,000 to 2million.[2194] Expanding the scope of the TRS will further its ability to assist in combatting tax evasion, as it could potentially reveal the existence of trusts that have not previously submitted tax returns to HMRC.[2195] Unlike the PSC Register, the BO information stored in the TRS has been subject to verification checks from the outset, being compared with the 22billion records held by HMRC.[2196] However, the TRS was much more expensive to establish and maintain than the PSC Register,[2197] suggesting the level of investment necessary to enable the PSC Register to fulfil its objectives. It remains to be seen whether this system can enable HMRC to maintain the accuracy of the information submitted to the TRS when the number of registrable trusts is subject to a tenfold increase.[2198] Unfortunately, the requirement to register does not presently seem to be enforced rigorously, with approximately 40% of registrable trusts failing to register.[2199] The imposition of

[2190] F Noseda, 'CRS and Beneficial Ownership Registers - A Call to Action' (2017) 23(5) T&T 496, 497. Including, the settlor, the trustees, the beneficiaries, or, in the case of discretionary trusts, the 'class of persons in whose main interest the trust is set up, or operates', as well as any individual who has control over the trust, Reg. 6, Potential beneficiaries are defined as 'any other individual referred to as a potential beneficiary in a document from the settlor relating to the trust such as a letter of wishes' ibid, Reg 44(5)(b).
[2191] Ibid, Part 9, Ch 2 & 3. Including, imprisonment for a period not exceeding two years, Regs 86-88.
[2192] As defined in Reg. 45(14)
[2193] HM Revenue & Customs, HM Treasury, 'Fifth Money Laundering Directive and Trust Registration Service' (Technical Consultation Document, 24 January 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860269/Technical_consultation_document_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service.pdf> accessed 8 July 2020
[2194] STEP, 'Two Million UK Trusts May Have to Register by 2020 under 5AMLD' (22 October 2018) <https://www.step.org/industry-news/two-million-uk-trusts-may-have-register-2020-under-5amld> accessed 8 July 2020
[2195] A Slater-Brooks, 'Mistrustful of the Trusts Register' (2019) 183(4697) Taxation 12, 13
[2196] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 11 January 2020, at p.151
[2197] 'HMRC have modelled the cost of building the register and they expect it to cost approximately £3.5 million to build and maintain over 5 years'. The costs of submitting information to the Register are said to be minimal, as trustees are already required to record beneficial ownership information under the Regulations. HM Treasury, 'Impact Assessment: The Money Laundering Regulations 2017' (13 April 2017) <http://www.legislation.gov.uk/ukia/2017/118/pdfs/ukia_20170118_en.pdf> accessed 8 July 2020 at p.13
[2198] E Virgo, 'Trust Registers and Transparency: A Step Too Far?' (2019) 33(3) Tru LI 95, 104-5
[2199] HMRC's Trust Statistics state that 85,000 trusts complied with the TRS by March 2019, i.e. 40% of the 141,000 trusts that submitted a tax return in 2016-17 A Slater-Brooks, 'Mistrustful of the Trusts Register' (2019) 183(4697) Taxation 12, 13-14, citing HM Revenue & Customs, 'Trusts Statistics: Number of Trusts and

verification checks is pointless if criminals are not required to register in the first place. Accordingly, further resources should be dedicated to enforcing compliance with the TRS to ensure the availability of BO information of all trusts within its scope.

The TRS will be amended to widen access to the information contained in the Register, to those who can demonstrate a 'legitimate interest'.[2200] The UK's definition of 'legitimate interest' appears to be narrower than the Directive it aims to transpose, suggesting that the request 'must necessarily be in relation to a specified instance of suspected money laundering or terrorist financing activity and form part of an investigation into this instance'.[2201] This could hinder the ability of NGOs, journalists and others to investigate the data contained in the TRS, as envisaged by the drafters of 5MLD.[2202] However, it is questionable whether any BO information should be available to anyone other than LEAs or regulated entities. After all, public central registers of the BOs of legal entities and arrangements infringe rights of privacy and data protection,[2203] posing grave risks to the safety of individuals, who may suffer physical harm, or become victims of other criminal offences following disclosure.[2204] In this respect, the UK is correct to restrict access to the information contained in the Trust Register.

However, access to the PSC Register should also be restricted to LEAs, regulated entities and those who can demonstrate a legitimate interest to protect law-abiding BOs from becoming the victims of crime. For instance, the accessibility of information pertaining to company directors

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Estates Self-Assessment Returns Received, Total Tax Paid in Respect of Trusts and Estates, Total Income by Type of Trust 2012-13 to 2016-17' (14 February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778417/Trusts_bulletin_Feb_2019.pdf> accessed 8 July 2020

[2200] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43, Article 1(16)(d), replacing Article 31(4) of Directive (EU) 2015/849.

[2201] HM Revenue & Customs, HM Treasury, 'Fifth Money Laundering Directive and Trust Registration Service' (Technical Consultation Document, 24 January 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860269/Technical_consultation_document_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service.pdf> accessed 8 July 2020, p.13. See also, Draft Reg 45ZB(12), ibid at p.28.

[2202] Commission, 'Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing and Amending Directive 2009/101/EC' (Proposal) COM (2016) 450 final at p.11.

[2203] See for instance, F Noseda, 'Common reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection of Privacy and Data Protection' (2017) 23 T&T 404; F Noseda, 'CRS and Beneficial Ownership Registers—What Serious Newspapers and Tabloids Have in Common: The Improbable Story of a Private Client Lawyer Turned Human Rights Activist' (2017) 23(6) T&T 601; F Noseda, 'CRS and Beneficial Ownership Registers—A Call to Action' (2017) 23(5) T&T 496; HSH Prince Michael von und zu Liechtenstein, 'Public Register: A Populist Tool to Control the Citizen' (2017) 23(6) T&T 693

[2204] J Niegel, 'En Route to Nineteen Eighty-Four? Are the Tunes of Orwell's Nineteen Eighty-Four Echoed in Twenty-Seventeen?' (2017) 23(6) T&T 587, 593; E Virgo, 'Trust Registers and Transparency: A Step Too Far?' (2019) 33(3) Tru LI 95, 103-4

on central registers has left them being exposed to a much higher risk of identity fraud.[2205] Indeed, if the UK's exemptions from public disclosure for the PSC Register mirrored those contained in the Directive, which allows Member States to prevent access to information when the BO would be subject 'to disproportionate risk' including 'risk of fraud',[2206] *all* BOs could apply to have their information protected from disclosure on this basis. The rationale underpinning the introduction of public registers, does not justify the risks imposed on BOs by public disclosure and would be wholly unnecessary if the PSC Register was subject to effective verification checks and enforcement. Instead, companies should have the option to voluntarily disclose BO information.[2207]

The UK's Overseas Territories (OTs) and Crown Dependencies (CDs)

The UK has been criticised for its failure to take action against secrecy jurisdictions,specifically, its OTs and CDs, for their involvement in facilitating tax evasion and other financial crimes.[2208] The pressure on the UK escalated following the Panama Papers,[2209] which revealed the significant involvement of UK companies and professionals.[2210] The UK

[2205] E Virgo, 'Trust Registers and Transparency: A Step Too Far?' (2019) 33(3) Tru LI 95, 104 citing K Napley, 'Identity Fraud: Company Directors at Double the Risk of Other Individuals' (Lexology, 25 April 2019) <https://www.lexology.com/library/detail.aspx?g=07319be0-01e6-4fee-9e6f-ef220c843f72&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2019-04-26&utm_term=> accessed 8 July 2020

[2206] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43, Article 1(16)(h), inserting Article 31(7a) into Directive (EU) 2015/849.

[2207] Indeed, during the consultation process, some expressed their support for the introduction of a public register, viewing it as part of good corporate governance, Department for Business, Innovation & Skills, 'Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business' (Government Response, April 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/304297/bis-14-672-transparency-and-trust-consultation-response.pdf> accessed 8 July 2020, at p.34

[2208] Shaxson infamously referred to the UK's relationship with its OTs and CDs as a 'spider's web', which meant 'criminal and other money could be handled by the City of London, yet far enough from London to minimise any stink' N Shaxson, *Treasure Islands: Tax Havens and the Men who Stole the World* (Bodley Head, 2011) p.103; 'Despite the relatively low secrecy score, the UK's ranking in the top twenty of the financial secrecy index reveals its important role at the core of a global web of closely associated secrecy jurisdictions; for example Cayman (#1), British Virgin Islands (#9), Guernsey (#11) and Jersey (#16) feature in the top twenty.' Tax Justice Network, 'Financial Secrecy Index 2020: Narrative Report on the United Kingdom' (18 February 2020) <https://fsi.taxjustice.net/PDF/UnitedKingdom.pdf> accessed 12 July 2020, p.1

[2209] Noseda notes that the agreements with the OTs and CDs were instigated to save the then Prime Minister, David Cameron's, reputation, after his father was named in the Panama Papers. 'Too Much Information: When the UK Gets it Wrong – The Constitutional Fallout of Flawed UK Decisions in the Area of Tax Transparency' [2017] Jersey & Guernsey Law Review 182, 189

[2210] 'Among the EU Member States, the United Kingdom had the largest number of offshore entities revealed in the Panama Papers (17 973 entities)… of the 21 countries most used by Mossack Fonseca to set up shell companies or other complex structures, 12, in addition to the UK itself, are British Overseas Territories, British

Government entered into agreements with its OTs and CDs to permit LEAs to request 'adequate, accurate and current' BO information within a set period of time.[2211] This is both a positive and 'startling development', for it enables UK LEAs to access BO information without using the time-consuming and arduous MLA process.[2212] Indeed, LEAs have found the agreements to be 'extremely useful' in providing access to BO information,[2213] with HMRC being one of the most frequent users.[2214] However, the agreements will only assist HMRC in combatting tax evasion and other offences using criminal investigations.[2215] Despite the overwhelming compliance of the OTs and CDs with the agreements,[2216] amendments were tabled to the Sanctions and Anti-Money Laundering Bill to force the OTs and CDs to establish public central registers of the BOs of companies, replicating the UK's PSC register.[2217] The Act requires the OTs, but not the CDs,[2218] to establish public registers by the end of 2020, or the Secretary of State will force them to do so via an Order in Council.[2219] Such an Order would compel non-compliant OTs to establish public registers by December 2023.[2220] In the event, the CDs agreed to establish public registers by 2023.[2221]

The introduction of public registers in the OTs and CDs will assist in combatting the use of opaque companies in secrecy jurisdictions to evade taxation, by revealing the identity of

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Crown Dependencies or members of the Commonwealth.' European Parliament, 'Report on the Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (2017/2013(INI)' (A8-9999/2017, 8 November 2017) <https://www.europarl.europa.eu/cmsdata/131460/2017-11-08%20PANA%20Final%20Report.pdf> accessed 12 July 2020 at p.14

[2211] The exchange of notes between the UK and the CDs, and the UK and the OTs, is available from Cabinet Office, Foreign & Commonwealth Office, 'Collection – Beneficial Ownership: UK Overseas Territories and Crown Dependencies' (21 April 2016) <https://www.gov.uk/government/collections/beneficial-ownership-uk-overseas-territories-and-crown-dependencies> accessed 12 July 2020

[2212] J Hatchard, 'Money Laundering, Public Beneficial Ownership Registers and the British Overseas Territories: The Impact of the Sanctions and Money Laundering Act 2018' (2018) 30 Denning LJ 185, 194

[2213] Home Office, 'Statutory Review of the Implementation of the Exchange of Notes on Beneficial Ownership between the United Kingdom, Crown Dependencies and Overseas Territories' (June 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812355/Statutory_review_of_the_exchange_of_notes_arrangements.pdf> accessed 12 July 2020, p.4

[2214] Ibid, at p.7

[2215] Ibid, at p.17-18

[2216] Within the first 18 months, the UK made 296 requests. All of the requests were responded to and only four responses were not received within the agreed timeframe. Ibid, at p.13.

[2217] F Mor, 'Registers of Beneficial Ownership' (House of Commons Briefing Paper 8259, 7 August 2019) <https://commonslibrary.parliament.uk/research-briefings/cbp-8259/> accessed 2nd July 2020, at p.15-16

[2218] This was due to the different constitutional relationship the UK has with the CDs, ibid.

[2219] Sanctions and Anti-Money Laundering Act 2018, s.51

[2220] 'British Overseas Territories: Companies: Written Question – 211611' (Answered by Sir Alan Duncan on 28 January 2019) < https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-01-23/211611> accessed 12 July 2020

[2221] Following the EU's review of the implementation of 5MLD, and to permit access to beneficial ownership information by European LEAs and regulated institutions in the meantime, States of Guernsey, 'Joint Statement by Governments of Guernsey, Jersey & Isle of Man on Beneficial Ownership Registers' (19 June 2019) <https://www.gov.gg/benownership> accessed 12 July 2020

individuals controlling or benefiting from these entities. However, the methods used by the UK to achieve these reforms show a lack of respect for the autonomy of the OTs. In this respect, although 'as a matter of constitutional law the UK Parliament has unlimited power to legislate for the Territories',[2222] it rarely does so without their consent and cooperation.[2223] The UK's actions have drawn fierce criticism from the leaders of the CDs and OTs, which disputed the UK's ability to intervene in their internal affairs,[2224] as well as the harm likely to be caused to their economies.[2225] The UK's actions may be justified by the harm caused to its reputation by the activities taking place in these jurisdictions, as well as fact that the OTs and CDs benefit economically from their constitutional relationship with the UK.[2226] The UK Government has attempted to justify its position by noting that the introduction of public registers in the OTs is a 'matter of national security'.[2227] However, while recent events have demonstrated the necessity of access to BO information, this does not mean that such information has to be available to the public. After all, the compatibility of public BO registers with fundamental human rights is an issue that is yet to be determined. Moreover, the OTs and CDs have already shown not only a willingness to share information through existing mechanisms within very short time frames, but also, an ability to ensure that the information supplied is 'adequate,

[2222] Foreign & Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (Cm 8374, 2012) p.14. The UK is expected to consult the CDs on enacting legislation applying to their territories, Ministry of Justice, 'Fact Sheet on the UK's Relationship with the Crown Dependencies' (February 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863381/crown-dependencies-factsheet-february-2020.pdf> accessed 12 July 2020, at p.2. However, this is a convention, which may not be followed if the UK needs to take action to ensure 'good government' in the CDs or OTs. This would require 'the most serious of circumstances', such as the endemic corruption in the Turks and Caicos Islands that led to UK Government intervention in 2009. See, House of Commons Justice Committee, *Crown Dependencies* (2009-10, HC 56-I) p.16

[2223] House of Commons, Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship* (HC 2017-19, 1464) p.13

[2224] For instance, the British Virgin Islands initially contemplated taking legal action against the UK, see Ed, 'BVI Mounts Legal Challenge to Public Registers of Beneficial Ownership' (2018) 1403 Tax Journal 2, 3

[2225] House of Commons, Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship* (HC 2017-19, 1464) p.14

[2226] 'Being an Overseas Territory entails responsibilities. We expect Territory Governments to meet the same high standards as the UK Government' Foreign & Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (Cm 8374, 2012) p.14; see also, J Hatchard, 'Money Laundering, Public Beneficial Ownership Registers and the British Overseas Territories: The Impact of the Sanctions and Money Laundering Act 2018' (2018) 30 Denning LJ 185, 201

[2227] House of Commons, Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship* (HC 2017-19, 1464) p.15

accurate and current';[2228] a standard not currently met by the UK's own PSC Register.[2229] Accordingly, instead of coercing the OTs and CDs to adopt public registers, the UK should consult with these jurisdictions on expanding the scope of the arrangements to permit the use of information in civil tax matters.

Bank Accounts

5MLD introduces a requirement for the creation of central registries, or electronic data retrieval systems, which enable the identification of the BOs of payment accounts, bank accounts, and safe-deposit boxes held by credit institutions.[2230] In order to comply with the Directive,[2231] the latest version of the MLR[2232] requires the UK Government to establish a central automated mechanism, the Bank Account Portal (BAP), to make and respond to requests.[2233] Additionally, credit institutions and providers of safe custody services must respond to requests for information made by LEAs using this mechanism.[2234] BAP is intended to enable LEAs to access information pertaining to bank accounts at a much quicker pace.[2235] This information includes the name, date of birth and address of the account holder, as well as those with a beneficial interest in the account.[2236]

[2228] Home Office, 'Statutory Review of the Implementation of the Exchange of Notes on Beneficial Ownership between the United Kingdom, Crown Dependencies and Overseas Territories' (June 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812355/Statutory_review_of_the_exchange_of_notes_arrangements.pdf> accessed 12 July 2020, p.7-10.

[2229] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United Kingdom Mutual Evaluation Report' (December 2018) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf> accessed 11 January 2020, at p.150

[2230] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43, Article 1(19), inserting Article 32a into Directive (EU) 2015/849.

[2231] As the UK is currently in an implementation period for leaving the EU, it must still implement EU Law, including the 5th AML Directive. HM Treasury, 'Transposition of the Fifth Money Laundering Directive: Response to the Consultation' (January 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860491/5MLD_Consultation_Response.pdf> accessed 14 July 2020, p.2.

[2232] Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511, Reg. 6 inserting Part 5A into the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692

[2233] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, Reg. 45A

[2234] Ibid, Reg. 45B

[2235] However, the UK government was satisfied with the existing arrangements whereby FIUs obtain information on accounts through credit reference agencies and other established relationships. See A Srivastava et al, 'Financial Crime Update' (2018) 157 COB 1, 7

[2236] The institution must also provide the IBAN of the account, or other identifying number, the date of opening of the account and, if closed, the date of closing. Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, Reg. 45C. The information that can be requested in relation to safety deposit boxes is set out in Reg. 45D.

While the NCA can request information for the purpose of carrying out any of its functions,[2237] other LEAs, including HMRC,[2238] may only request information for the purposes of investigating money laundering, terrorism, or terrorist financing, to determine whether property has been obtained through the aforementioned activities, or to carry out its supervisory functions under the Regulations.[2239] The power to retrieve account information may not be used for the purpose of combatting tax offences, unless this forms part of a money laundering investigation. As such, it is possible that this new power will provide yet another incentive for HMRC to pursue money laundering investigations in criminal tax cases, where it may not have done so otherwise.

As can be seen, the UK decided to implement a retrieval mechanism, in implementing the requirements of 5MLD. The UK has been opposed to the creation of a central register,[2240] due to the cost of establishing and maintaining such a register,[2241] the onerous burden this would impose on credit institutions, and the safety and security risks involved in storing huge volumes of personal data in one place.[2242] While this decision is to be welcomed, it raises questions regarding the proportionality of the CRS, explored in the previous chapter, which involves the mass transmission of vast amounts of personal information regarding the holders of offshore bank accounts, on both a generalised and automatic basis. If these costs and risks render the automatic and centralised storage of information unacceptable in relation to the holders of national bank accounts, why are they accepted in the context of the CRS? In a globalised

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[2237] Ibid, Reg.45E(1)
[2238] Relevant LEAs are identified in Reg.3 and Reg.44(10)
[2239] Ibid, Reg.45E(2)
[2240] See for instance, HM Treasury, 'Proposals to Amend the Fourth Anti-Money Laundering Directive' (5 September 2016)
<http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/09/EM_on_4AMLD_Amendments_(002).pdf> accessed 14th July 2020, at para 24; House of Commons European Scrutiny Committee, *Documents Considered by the Committee on 31 January 2018* (HC 2017-19, 301-xii) p.116
[2241] Consultation respondents thought a central register would have lower initial costs, but higher ongoing costs, than a retrieval system. HM Treasury, 'Transposition of the Fifth Money Laundering Directive: Response to the Consultation' (January 2020)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860491/5MLD_Consultation_Response.pdf> accessed 14 July 2020, p.30. The retrieval system itself is estimated to costs businesses within scope of the Directive between £129.36million and £1,731million in transition costs and £8.778million and £96.794million in annual costs. As the UK has gold-plated the Directive, additional business are in scope, such as building societies and safe-deposit box providers that are not credit institutions. These businesses are likely to face transition costs of between £20.02million and £314.67million and annual costs of between £1.358million and £17.801million. HM Treasury, 'Impact Assessment: Transposition of the Fifth Anti-Money Laundering Directive' (21st October 2019)
<http://www.legislation.gov.uk/ukia/2019/172/pdfs/ukia_20190172_en.pdf> p.27-28.
[2242] HM Treasury, 'Transposition of the Fifth Money Laundering Directive: Response to the Consultation' (January 2020)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860491/5MLD_Consultation_Response.pdf> accessed 14 July 2020, p.30.

economy, surely the holders of onshore and offshore accounts should be treated equally, at least in terms of the protection of personal safety and security.

5.4.7 Conclusion

The UK's inclusion of tax offences within its AML framework makes it easier for authorities to detect and prosecute those who commit tax offences and their facilitators. Including tax as a predicate offence provides LEAs with a tool to combat criminal offences where the nature of the suspected criminal activity is unknown, or difficult to prove. However, the inclusion also dilutes the integrity and constitutionality of the offences used to address both crimes, rendering it questionable whether tax offences should be addressed using the AML framework. In order to gain further insight into this question, the next section examines the US AML framework.

5.5 The US AML Framework

5.5.1 Introduction

The US AML framework predates, and heavily influenced, the creation of the international AML framework.[2243] The US is considered to have a 'well developed and robust' legal framework for combatting money laundering,[2244] ratifying both the Vienna and Palermo Conventions.[2245] However, the US has a significantly lower level of compliance with the FATF Recommendations than the UK.[2246] The US AML framework originally focused on gathering intelligence and was primarily designed to combat tax evasion,[2247] particularly, the concealment of income by US citizens through secrecy jurisdictions.[2248] However, one of the

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[2243] N Ryder, *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge 2012) p.41

[2244] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.3

[2245] FATF, 'Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America' (23 June 2006) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf> accessed 4 august 2020, at p.258

[2246] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating' (March 2020) <http://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-United-States-March-2020.pdf > accessed 4 August 2020, at p.8.

[2247] L White, 'The Anti-Money Laundering Complex in the Modern Era' (2016) 133(10) The Banking Law Journal 1, 6-7; 'The US tax authorities were a key advocate of the BSA' PC van Duyne, JH Harvey, LY Gelemerova, *The Critical Handbook of Money Laundering Policy: Analysis and Myths* (Palgrave Macmillan 2018) p.50

[2248] *Legal and Economic Impact of Foreign Banking Procedures on the United States: Hearings before the House Committee on Banking and Currency,* 90th Cong., 2d Sess. 1 (1968); *Foreign Bank Secrecy: Hearings on*

weaknesses identified by the FATF's evaluation of the US framework was its failure to include tax crimes as a predicate offence.[2249] In contrast to the UK, the US does not take an all-crime approach to defining money laundering, but rather, only criminalises actions taken with respect to the proceeds of specified unlawful activity (SUA); which excludes tax evasion offences.[2250] While the US can use the intelligence gathering provisions of the AML framework to combat tax crimes, tax evasion offences will rarely be prosecuted, and their proceeds will rarely be recovered, through the use of this legal framework.

This section examines the evolution of the US AML framework, from a focus on tax evasion, to the proceeds of drug offences and the financing of terrorism. It examines US legislation pertaining to money laundering and the forfeiture of the proceeds of crime, examining the effectiveness of this legislation in detecting, addressing and recovering the proceeds of tax offences. Additionally, it also examines the introduction of measures to obtain BO information in the US, assessing their impact in combatting this financial crime. Ultimately, this section argues that the US' failure to include tax evasion as a predicate offence is not a weakness, but rather, a strength of its AML framework.

5.5.2 Money Laundering

Background

The Bank Secrecy Act (BSA),[2251] is regarded as one of the first components of the US AML framework.[2252] Introduced in the wake of US concern surrounding its ability to enforce its tax laws,[2253] the BSA authorised the Treasury to introduce regulations to combat the 'evil of bank secrecy'.[2254] FIs record and file reports on transactions 'where they have a high degree of

S.3678 and H.R. 15073 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. 1 (1970).

[2249] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.8.

[2250] 18 U.S.C. §1956(c)(7), §1957(f)

[2251] The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970 (also known as the Bank Secrecy Act 1970) Pub. L. No. 91-508, 84 Stat. 1114-2 (codified at 31 U.S.C. §5311 *et seq.*, 12 U.S.C. §1829b & §§1951-1959). The BSA Regulations are codified in 31 C.F.R. Chapter X

[2252] Stessens explains that the 'first generation' AML measures included the 'Klein conspiracy' whereby the offence of conspiracy was extended to attempts to defraud the IRS and used to address what would later be characterised as money laundering activities. The 'second generation' AML measures include the BSA, G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge Studies in International and Comparative Law, CUP 2004) p.96-97

[2253] Ibid

[2254] PW Schroth, 'Bank Confidentiality and the War on Money Laundering in the United States' (1994) 42 Am J Comp L Supp 369, 376

usefulness in enforcement of criminal, tax, or regulatory proceedings.'[2255] Money laundering was criminalised by virtue of the Money Laundering Control Act (MLCA) 1986.[2256] However, by this time US rhetoric began to focus on narcotics and organized crime,[2257] with money laundering measures seen as an essential tool in the 'war on drugs'.[2258] The Act introduced several money laundering offences, which prohibit undertaking certain actions with the proceeds of a SUA.[2259] However, tax evasion was deliberately omitted from the long list of criminal activities,[2260] for it was considered inappropriate to address 'run-of-the-mill' tax evasion using money laundering offences, for tax evasion 'does not have any clearly identifiable "proceeds".[2261]

This change in tone may have been a purposeful attempt by the US to adopt 'the war on drugs as a political veil' to legitimise attempts to target secrecy jurisdictions and tax evasion,[2262] as well as to ensure wider acceptance of AML measures among domestic and foreign bankers.[2263] For instance, the Annunzio-Wylie Anti-Money Laundering Act (AWAMLA) 1992, which required the Treasury to introduce regulations requiring FIs to submit SARs to the US FIU,[2264] the Financial Crimes Enforcement Network (FinCEN),[2265] was focused on the interception of

[2255] 12 U.S.C. §§1951-1952
[2256] Money Laundering Control Act 1986, enacted as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 18 U.S.C. §§ 1956-57 (1988)
[2257] 'The Commission believes that its recommendations, when implemented, will arm the financial community and law enforcement authorities with the weapons needed to strike at the very heart of the narcotics trade and other activities engaged in by organized criminal groups', President's Commission on Organized Crime, 'The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering' (Interim Report to the President and the Attorney General, October 1984)
<https://www.ncjrs.gov/pdffiles1/Digitization/166517NCJRS.pdf> accessed 10 August 2020, p.v
[2258] M Levi, P Reuter, 'Money Laundering' (2006) 34 Crime and Just 289, 296
[2259] As defined in 18 U.S.C. §1956(c)(7), §1957(f)
[2260] B Zagaris, 'Practitioners Discuss Defects of Criminalizing International Tax Fraud as a Separate Money Laundering Offence' (2009) 25(5) Int'l Enforcement L Rep 181, 181
[2261] Committee on the Judiciary, *The Money Laundering Crimes Act of 1986*, S. Rep. 433, 99th Cong., 2d Sess (1986), p.11-12.
[2262] MA Young, M Woodiwiss, 'A World Fit for Money Laundering: The Atlantic Alliance's Undermining of Organized Crime Control' (2020) *Trends in Organized Crime* <https://doi.org/10.1007/s12117-020-09386-8> accessed 4 August 2020; 'The taxman does not win "hearts and minds". However, fear of drugs and organised crime does'. PC van Duyne, JH Harvey, LY Gelemerova, *The Critical Handbook of Money Laundering Policy: Analysis and Myths* (Palgrave Macmillan 2018) p.51
[2263] Ibid; A similar accusation has been levied against the UK, see R Bosworth-Davies, 'Money Laundering: Chapter Five — The Implications of Global Money Laundering Laws' (2007) 10 JMLC 189, 200
[2264] Annunzio-Wylie Anti-Money Laundering Act of 1992, enacted as Title XV of the Housing and Community Development Act of 1992, Public Law 102–550, 106 Stat. 4044. The SAR replaces the Criminal Referral Form in the US, which had to be filed with various LEAs, see MR Hall, 'An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report' (1996) 84(3) Kentucky Law Journal 643, 655
[2265] FinCEN was established by Treasury Order Number 105-08 in 1990. FinCEN was made a bureau of the Treasury by the USA PATRIOT ACT and Treasury Order Number 180-01.

drug trafficking activities.[2266] However, the obligation to submit SARs does not depend upon suspicion that the proceeds are derived from a SUA, but rather, suspicion that the transaction involves, or attempts to disguise funds derived from illegal activity, attempts to evade the BSA reporting requirements, or lacks a 'business or lawful apparent purpose'.[2267] This enables the use of SARs to inform tax investigations in the US, although to a more limited extent. In the wake of the terrorist attacks against the US in 2001,[2268] the US enacted the USA PATRIOT Act.[2269] This resulted in a change of emphasis within the US AML framework from drugs to terrorism, and consequently enabled the US to introduce more expansive money laundering measures.[2270]

Following the expansion of the AML framework, courts also begun to recognise the applicability of money laundering offences to tax evasion, notwithstanding its omission from the list of SUAs.[2271] In this respect, US courts have accepted that mail and wire fraud offences may be used to address tax crimes, including foreign tax evasion,[2272] and both offences are SUAs.[2273] Furthermore, US courts have held that, when characterised as wire or mail fraud, money retained through tax evasion constitutes 'proceeds' for the purposes of the statute.[2274] However, in contrast to the UK, US policy restricts, rather than encourages, the use of money laundering and forfeiture laws to address tax crimes and permission must be sought to charge

[2266] L White, 'The Anti-Money Laundering Complex in the Modern Era' (2016) 133(10) The Banking Law Journal 1, 18
[2267] 31 CFR § 1020.320(a)(2), 12 CFR § 21.11(c)(4)
[2268] The Act was signed into law just weeks after September 11th 2001, M Roberts, 'Big Brother Isn't Just Watching You, He's Also Wasting Your Tax Payer Dollars: An Analysis of the Anti-Money Laundering Provisions of the USA Patriot Act' (2004) 56 Rutgers L Rev 573, 573
[2269] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Public Law 107-56, 115 Stat. 272
[2270] L White, 'The Anti-Money Laundering Complex in the Modern Era' (2016) 133(10) The Banking Law Journal 1, 26; Eric J Gouvin, 'Bringing out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism' (2003) 55 Baylor L Rev 955, 960-961; EJ Gouvin, 'Are There Any Checks and Balances on the Government's Power to Check Our Balances - The Fate of Financial Privacy in the War on Terrorism' (2005) 14 Temp Pol & Civ Rts L Rev 517, 524-25
[2271] 18 U.S.C. §1956(c)(7), §1957(f)
[2272] [2272] See for instance, *United States v. Kellogg*, 955 F2d 1244 (9th Cir. 1992), *United States v. Helmsley*, 941 F2d 71, 94 (2d Cir.), cert. denied, 502 US 1091 (1991)
[2273] 18 U.S.C. §1956(c)(7)(A), §1961(1)
[2274] See for instance, *United States v. Yusuf*, 536 F3d 178, 190 (3d Cir. 2008)

money laundering offences in tax cases.[2275] Such permission is infrequently given,[2276] largely owing to 'concern that making every garden variety tax offense into a money laundering offense would eviscerate the criminal provisions of the federal tax code.'[2277]

The AML Framework

The US AML framework is still largely contained in the MCLA 1986 and the BSA 1970, as well as implementing regulations.[2278] The BSA requires FIs[2279] to establish and maintain AML Programs,[2280] and to implement CDD[2281] and Customer Identification Programs to identify and verify customers' identities.[2282] This obligation has been extended to include the identification of the BOs of legal entities.[2283] The BSA also requires FIs to maintain accurate records,[2284] and to comply with reporting requirements.[2285] Civil and criminal penalties may be imposed for noncompliance.[2286]

The BSA imposes four key reporting requirements.[2287] Currency Transactions Reports (CTRs) must be filed by a FI on all transactions in excess of $10,000 made by one person, 'by, through, or to such FI' in one day.[2288] Furthermore, cash reports must be filed by businesses other than

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[2275] Department of Justice, 'Tax Division Directive No.99 Re: Clarification of Tax Division Policy Concerning the Charging of Tax Crimes as Mail Fraud, Wire Fraud, or Bank Fraud (18 U.S.C. §§ 1341, 1343, 1344) or as Predicates to a RICO Charge or as the Specified Unlawful Activity Element of a Money Laundering Offense' (30 March 1993) <https://www.justice.gov/tax/criminal-tax-manual-300-policy-directives-and-memoranda#99> accessed 12 August 2020; Department of Justice, 'Tax Division Directive No. 128 (supersedes Directive No. 99) Charging Mail Fraud, Wire Fraud or Bank Fraud Alone or as Predicate Offenses in Cases Involving Tax Administration' (29 October 2004) <https://www.justice.gov/archives/usam/tax-resource-manual-14-tax-division-directive-no-128> accessed 12 August 2020; see also United States Justice Manual, Title 6: Tax, 6-4.00 – Criminal Tax Case Procedures, 6-4.210 Tax-Related Mail, Wire, or Bank Fraud, RICO, or Money Laundering Charges. Available from: <https://www.justice.gov/jm/jm-6-4000-criminal-tax-case-procedures#6-4.210> accessed 12 August 2020

[2276] RC Alexander, '"Cost Savings" As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom' (2011) 45 Int'l Law 749, 791.

[2277] B Zagaris, 'Practitioners Discuss Defects of Criminalizing International Tax Fraud as a Separate Money Laundering Offence' (2009) 25(5) Int'l Enforcement L Rep 181, 181

[2278] Money Laundering Control Act 1986 Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 18 U.S.C. §§ 1956-57 (1988); The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970 (also known as the Bank Secrecy Act 1970) Pub. L. No. 91-508, 84 Stat. 1114-2 (codified at 31 U.S.C. §5311 *et seq.*, 12 U.S.C. §1829b & §§1951-1959). The BSA Regulations are codified in 31 C.F.R. Chapter X

[2279] The term financial institution is defined in 31 U.S.C. §5312(a)(2)

[2280] 31 U.S.C. §5318(h), 12 C.F.R §21.21(c)&(d). This must include the implementation of internal policies, procedures, and controls, an employee training program and the appointment of a compliance officer, as well as independent auditing of the program.

[2281] 31 C.F.R. §1020.210, see also 31 C.F.R. §§1010.610-620

[2282] 31 C.F.R. §1020.220

[2283] 31 C.F.R. §1010.230

[2284] 31 C.F.R. §1010.410

[2285] 31 C.F.R. Subpart C

[2286] See for instance, 31 C.F.R. §§1010.820 &1010.840

[2287] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §1.02

[2288] 31 U.S.C. § 5313, 31 CFR §1010.310-15

FIs,[2289] when the business receives cash exceeding $10,000.[2290] It is an offence for a person to structure transactions to avoid the application of the reporting requirements.[2291] Transportation of Currency or Monetary Instruments Reports (CMIR) must be filed by persons upon the importation or exportation of over $10,000 into or out of the US.[2292] Foreign Banks and Financial Accounts (FBAR) Reports must be submitted by all US persons who have an interest in or signatory authority over, a foreign financial account exceeding $10,000.[2293] SARs must be submitted by FIs,[2294] to FinCEN.[2295] when the institution 'knows, suspects, or has reason to suspect'[2296] that a transaction involving or aggregating $5,000 is derived from, or intended to conceal, illegal activities, to evade any of the BSA Regulations, or has 'no business or apparent lawful purpose' and is not typical.[2297] Institutions must also report any known or suspected Federal criminal violation committed against or through the bank ,[2298] involving more than $5,000 when the suspect can be identified, or $25,000 otherwise.[2299] It is an offence for the institution or its employee to inform the customer that a SAR has been submitted.[2300]

Money laundering offences were introduced in the MCLA 1986. §1956 introduces three categories of money laundering offence,[2301] namely, transaction money laundering,[2302] transportation money laundering,[2303] and sting money laundering.[2304] Transaction money laundering offences are committed when an individual, with knowledge that the property involved represents the proceeds of a SUA,[2305] conducts or attempts to conduct such a financial

[2289] The requirement applies to any 'person', as defined in 26 U.S.C. 7701(a)(1), who receives the cash in the course of a trade or business, 31 CFR §1010.330.
[2290] By one person in one day, whether in one or multiple transactions, 31 U.S.C §5331, 31 CFR §1010.330
[2291] 31 U.S.C. §5324, 31 CFR §1010.314
[2292] 31 U.S.C. §5316, 31 CFR §1010.340, 'monetary instrument' is defined in 31 CFR § 1010.100(dd)
[2293] 31 U.S.C § 5314, 31 CFR §1010.350
[2294] 31 U.S.C § 5318(g), 31 CFR § 1010.320, 31 CFR § 1020.320, 12 CFR § 21.11. The term 'financial institution' is defined in 31 U.S.C. §5312(a)(2). Following the USA PATRIOT Act, the list of 'financial institutions' was extended to include a number of DNFPBs, although not all are required to submit SARs, see M Simpson, N Smith, A Srivastava, *International Guide to Money Laundering Law and Practice* (3rd edn, Bloomsbury Professional 2010) p.1117
[2295] 31 CFR § 1020.320(b)(2)
[2296] US courts do not yet appear to have defined suspicion for the purposes of the BSA. However, interestingly, the definition of suspicion in *Terry v Ohio* 392 U.S. 1 (1968) 449, a US case regarding the definition of suspicion in the context of stop and search powers, was suggested by the CPS as a preferable formulation to the definition of suspicion in the UK AML Framework. Law Commission, *Anti-Money Laundering: The SARs Regime* (Law Com No 384, 2019) p.100.
[2297] 31 CFR § 1020.320(a)(2), 12 CFR § 21.11(c)(4)
[2298] 12 CFR § 21.11(c)
[2299] 12 CFR § 21.11(c)(2)&(3)
[2300] 31 CFR § 1020.320(e)(1), 12 CFR § 21.11(k)(1)
[2301] M McBride, 'Money Laundering' (2020) 57 Am Crim L Rev 1045, 1047
[2302] 18 U.S.C. §1956(a)(1)
[2303] 18 U.S.C. §1956(a)(2)
[2304] 18 U.S.C. §1956(a)(3)
[2305] As defined in 18 U.S.C. §1956(c)(7)

transaction,[2306] which in fact involves the proceeds of a SUA.[2307] In addition, the individual must act with one of the requisite intents, specifically, the intent to promote the carrying on of SUA, the intent to engage in conduct constituting a tax evasion offence under the Internal Revenue Code (IRC), or knowing that the transaction is designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of SUA, or to avoid a reporting requirement.[2308] Transportation, or international, money laundering is committed when an individual transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds into or out of the US, with the required intent.[2309] The intent component is very similar to that required for the transactional offence, with the exception of the intent to violate the IRC.[2310] The sting offence is intended to facilitate sting operations,[2311] and is committed when an individual conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of SUA with one of the requisite intentions.[2312] §1957 contains the 'money spending' offence,[2313] which is committed when an individual knowingly engages or attempts to engage in a monetary transaction exceeding $10,000, which is derived from SUA.[2314] The offence is considered draconian in comparison to the §1956 offences, as it does not require any intent.[2315]

US money laundering offences are more restrictive than their UK equivalents. The UK offences contain a broader *actus reus*, with the mere possession of criminal proceeds potentially giving rise to a money laundering offence.[2316] Additionally, there is no intent requirement in the UK

[2306] As defined in18 U.S.C. § 1956(c)(3) & (4). The term is very broad, encompassing 'virtually anything that can be done with money', SD Cassella, 'The Money Laundering Statutes (18 U.S.C. §§ 1956 and 1957)' (2007) 55(5) United States Attorneys' Bulletin 21, 21
[2307] 18 U.S.C. §1956(a)(1)
[2308] 18 U.S.C. §1956(a)(1)(A)&(B)
[2309] 18 U.S.C. §1956(a)(2)
[2310] 18 U.S.C. §1956(a)(2)(A)&(B)
[2311] M McBride, 'Money Laundering' (2020) 57 Am Crim L Rev 1045, 1050
[2312] 18 U.S.C. §1956(a)(3)
[2313] 'Section 1957 is frequently referred to as the "spending statute" because its purpose is to make the criminal's money worthless by making it a felony just to spend it.' SM May, 'Merger Issues in Money Laundering Cases' (2019) 67 DOJ J Fed L & Prac 253, 291
[2314] 18 U.S.C. §1957(a)
[2315] 'This draconian law, so powerful by its elimination of criminal intent, freezes the proceeds of specific crimes out of the banking system'. *United States v Rutgard* 116 F.3d 1270, 1298 (9th Cir. 1997)
[2316] As such, the US technically fails to comply with this aspect of the international AML framework FATF, 'Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America' (23 June 2006) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf> accessed 4 august 2020, at p.31. However, the US has explained that mere possession of criminal proceeds is excluded to avoid issues surrounding over-criminalisation, FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.181

money laundering offences, potentially leading to the conclusion that the UK offences are similar to the §1957 offence.[2317] However, §1957 imposes higher thresholds than the corresponding UK offences, both in terms of the proceeds involved,[2318] and the culpability of the offender, with §1957 requiring knowledge rather than mere suspicion of criminality.[2319] Nonetheless, the enactment of reporting obligations or, more accurately, the attendant structuring offences,[2320] potentially provide US authorities with an easier method to prosecute money laundering activities;[2321] a method that is unavailable to its UK counterparts. This is because the structuring offence does not require proof that the funds involved are derived from SUA,[2322] nor that the individual concerned had an illicit motive in committing the offence.[2323] However, owing to the controversial use of the offence to recover legal funds,[2324] the use of forfeiture in structuring cases is restricted to funds derived from illegal activity.[2325]

In contrast, the US reporting obligations are broader than in the UK, encompassing both CTRs and SARs. However, the utility of large volumes of CTRs has been questioned,[2326] with many

[2317] RC Alexander, '"Cost Savings" As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom' (2011) 45 Int'l Law 749, 762.
[2318] The transaction must exceed $10,000, 18 U.S.C. §1957(a).
[2319] Both §1956 and §1957 require 'actual knowledge', *United States v. Sayakhom*, 186 F.3d 928, 943 n.8 (9th Cir. 1999), although 'wilful blindness' or a 'conscious avoidance of knowledge' will suffice, *United States v. Flores*, 454 F.3d 149, 155-56 (3d Cir. 2006). M McBride, 'Money Laundering' (2020) 57 Am Crim L Rev 1045, 1054.
[2320] 31 U.S.C. §5324, 31 CFR §1010.314
[2321] CJ Linn, 'Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring' (2010) 50 Santa Clara L Rev 407, 434
[2322] *United States v. Gabel*, 85 F.3d 1217, 1223 (7th Cir. 1996). Although, the origin of the funds may help to demonstrate knowledge and intent to avoid the reporting requirement, *United States v. MacPherson*, 424 F.3d 183, 193 (2d Cir. 2005).
[2323] 'The focus of the statute is on the structuring person's conduct, not on the reason why he did not want the transaction report filed,' *United States v. Gibbons*, 968 F.2d 639, 645 (8th Cir. 1992).
[2324] Out of 278 structuring investigations initiated by the IRS, only 26 cases involved illegal activity or illegal funds and only 21 involved tax violations. In the 231 legal source cases, '$17.1 million was seized and forfeited to the Government'. Treasury Inspector General for Tax Administration, 'Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses' (30 March 2017) <https://www.treasury.gov/tigta/auditreports/2017reports/201730025fr.pdf> accessed 7 August 2020, p.8-10
[2325] New York Times, 'Statement of Richard Weber, Chief of I.R.S. Criminal Investigation' (25 October 2014) <https://www.nytimes.com/2014/10/26/us/statement-of-richard-weber-chief-of-irs-criminal-investigation.html> accessed 7 August 2020; US Department of Justice, 'Attorney General Restricts Use of Asset Forfeiture in Structuring Offenses' (Office of Public Affairs, Press Release 15-400,31 March 2015) <https://www.justice.gov/opa/pr/attorney-general-restricts-use-asset-forfeiture-structuring-offenses> accessed 7 August 2020; This change in policy was codified in the Clyde-Hirsch-Sowers RESPECT Act, passed as part of the Taxpayer First Act 2019, Pub. L. No. 116-25, 981 Stat. 133, Subtitle C, §1201 amending 31 U.S.C. §5317(c)(2)
[2326] See for instance, B Luetkemeyer, 'It's Time to Modernize the Bank Secrecy Act' (2018) 183(114) American Banker 1; MJ Parrish, 'The Burden of Currency Transaction Reporting on the Deposit Institutions and the Need for Regulatory Relief' (2008) 43 Wake Forest L Rev 559; LML Maroldy, 'Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers is Not the Answer' (1991) 66 Notre Dame L. Rev. 863

likening the attempt to detect criminal activity using CTRs to an attempt to search for a needle in a haystack.[2327] Indeed, over 16million CTRs are filed each year.[2328] US LEAs are routinely criticised for making inadequate use of CTRs.[2329] CTRs may simply be viewed as a record-keeping tool, which deters criminals from using the financial system,[2330] their limited role in the detection of crime renders it questionable whether the significant costs incurred in submitting CTRs outweigh these minor benefits.[2331] In2019, CTR filers collectively spent an estimated $54million to comply with this obligation alone.[2332] Although some action has been taken to increase the number of exemptions for CTRs,[2333] attempts to increase the threshold for CTRs have been rejected.[2334]

[2327] Ibid (Maroldy) at p.888. Ryder notes 'The fundamental flaw with this approach was graphically illustrated in 2000 when a wire transfer to one of the al-Qaeda terrorists involved in the attacks of September 2001 was subject to a currency transaction report, yet it was one of over one million such reports filed that month.' N Ryder, *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge 2012) p.63; The Chief of FINCEN's Systems Development Division stated the task is more like "looking for a needle in a stack of other needles"' *Role of US Correspondent Banking in International Money Laundering: Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs United States Senate*, 107th Cong, 1st Sess. 1 (2001) p.77

[2328] Department of the Treasury, Financial Crimes Enforcement Network, 'Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of the Bank Secrecy Act Reports of Transactions in Currency Regulations at 31 CFR 1010.310 Through 1010.314, 31 CFR 1021.311, and 31 CFR 1021.313, and FinCEN Report 112—Currency Transaction Report' (2020) 85(94) Federal Register 29022, 29023

[2329] See for instance, Treasury Inspector General for Tax Administration, 'The Internal Revenue Service Still Does Not make Effective Use of Currency Transaction Reports' (21 September 2018) <https://www.treasury.gov/tigta/auditreports/2018reports/201830076fr.pdf> accessed 7 August 2020

[2330] CJ Linn, 'Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring' (2010) 50 Santa Clara L Rev 407, 434

[2331] The UK decided against implementing a form of CTR on this basis before the enactment of POCA, FATF, 'Third Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism: The United Kingdom of Great Britain and Northern Ireland' (29 June 2007) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UK%20FULL.pdf> accessed 11 January 2020, p.146

[2332] Department of the Treasury, Financial Crimes Enforcement Network, 'Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of the Bank Secrecy Act Reports of Transactions in Currency Regulations at 31 CFR 1010.310 Through 1010.314, 31 CFR 1021.311, and 31 CFR 1021.313, and FinCEN Report 112—Currency Transaction Report' (2020) 85(94) Federal Register 29022, 29029

[2333] In 1994, the Secretary of the Treasury was compelled to reduce the number of CTRs filed by increasing the scope of exemptions, Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, § 402, 108 Stat. 2160 (1994). Following a GAO report in 2008, recommending increased use of exemption provisions, FinCEN has issued two final rules (73 FR 74010 and 77 FR 33638) amending the exemptions contained in 31 CFR 1020.315(b), as well as guidance on their application, see FINCEN 'Guidance on Determining Eligibility for Exemption from Currency Transaction Reporting Requirements' (11 June 2012) <https://www.fincen.gov/resources/statutes-regulations/guidance/guidance-determining-eligibility-exemption-currency> accessed 7 August 2020

[2334] See for instance, H.R.6068 - Counter Terrorism and Illicit Finance Bill, 115th Cong., 2d. (2017-2018). Luetkemeyer notes that the $10,000 threshold for CTR reporting was enacted in 1970 and would be equivalent to around $60,000 today, B Luetkemeyer, 'It's Time to Modernize the Bank Secrecy Act' (2018) 183(114) American Banker 1, 1.

SARs are widely regarded as a more effective tool.[2335] However, the US SAR regime suffers from similar weaknesses to its UK counterpart. The definition of suspicion lacks clarity in the US,[2336] leading to defensive reporting, and a concomitant obligation for US LEAs to investigate large volumes of worthless reports.[2337] FinCEN received over 1million SARs from depositary institutions alone in 2019.[2338] Nonetheless, the US SAR regime is more limited in scope.Although both regimes are triggered by suspicion, in the US, suspicious transactions must exceed $5,000 before the reporting obligation applies.[2339] This will reduce the number of trivial reports in the US, alleviating some of the issues experienced by UK authorities. However, there is a risk that useful intelligence is not being received by US authorities.[2340] Indeed, the US has also been criticised for its exclusion of many DNFBPs, such as lawyers, accountants, trust and corporate service providers, and real estate agents, from most aspects of its AML framework, including the reporting obligation.[2341] For instance, although US lawyers may be convicted of primary money laundering offences,[2342] and are supposed to comply with

[2335] M Levi, P Reuter, 'Money Laundering' (2006) 34 Crime and Just 289, 340

[2336] N Ryder, *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge 2012) p.62; The FFIEC BSA/AML Examination Manual simply notes that 'The decision to file a SAR is an inherently subjective judgment' FFIEC, 'BSA/AML Examination Manual: Assessing Compliance with BSA Regulatory Requirements: Suspicious Activity Reporting' <https://bsaaml.ffiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/04.pdf> accessed 7 August 2020, p.68

[2337] United States Government Accountability Office, 'Bank Secrecy Act: Suspicious Activity Report Use is Increasing, but FinCEN Needs to Further Develop and Document Its Form Revision Process' (February 2009) <https://www.gao.gov/new.items/d09226.pdf> accessed 7 August 2020; *Suspicious Activity and Currency Transaction Reports: Balancing Law Enforcement Utility and Regulatory Requirements: Hearing before the Subcommittee on Oversight and Investigations of the Committee on Financial Services US House of Representatives,* 110th Con., 1st Sess. 1 (2007) p.22; Financial Crimes Enforcement Network, 'Remarks of William J Fox, Director of the Financial Crimes Enforcement Network United States Department of the Treasury Provided to the American Banking Association/American Bar Association Money Laundering Enforcement Seminar' (25 October 2004) <https://www.fincen.gov/news/speeches/remarks-william-j-fox-director-financial-crimes-enforcement-network-united-states-0> accessed 7 August 2020; Interestingly, the US experiences a high level of defensive reporting, even though submitting a SAR does not provide a defence to money laundering in the US, MR Hall, 'An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report' (1996) 84(3) Kentucky Law Journal 643, 671

[2338] United States Department of the Treasury, 'FinCEN Suspicious Activity Report (Form 111) Exhibit 1: Filings by Year & Month by Depository Institutions' (31 December 2019) <https://www.fincen.gov/reports/sar-stats/sar-filings-industry> accessed 7 August 2020

[2339] 12 CFR § 21.11(c)(4)

[2340] This was the primary reason why the Law Commission declined to recommend introducing a threshold for reporting in the UK. At present, only banks in the UK are exempt from reporting some suspicious transactions, but the threshold is a mere £250. Law Commission, *Anti-Money Laundering: The SARs Regime Report* (Law Com No 384, 2019) p.128-129

[2341] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.7

[2342] See for instance, *United States v. King*, 865 F.3d 848 (6th Cir. 2017), *In re Blair*, 40 A.3d 883 (D.C. 2012), *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001)

voluntary guidance issued by the American Bar Association (ABA),[2343] there is no compulsory obligation for lawyers to comply with most of the AML framework,[2344] including the obligation to submit SARs.[2345] Accordingly, the narrow scope of several aspects of the US AML framework must be considered in any evaluation of its utility in combatting tax offences.

5.5.3 Tax Evasion as a Predicate Offence

The Primary Money Laundering Offences

The most commonly charged money laundering offences require the prosecution to prove that the proceeds involved derived from, or were intended to further, a SUA.[2346] The list of SUAs includes a number of foreign offences, providing the transaction occurred in the US.[2347] Tax evasion is not explicitly identified in the list of foreign SUAs, but may be encompassed owing to the fact that the list includes offences 'with respect to which the US would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution.'[2348] In addition, although some tax-related offences are identified in the list of domestic SUAs, tax evasion is notably excluded.[2349] This was a deliberate decision by the US legislature, which wished to avoid the use of money laundering offences in preference to the

[2343] American Bar Association, 'Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing' (23 April 2010) <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voluntary_good_practices_guidance.pdf> accessed 7 August 2020. See also, American Bar Association Standing Committee on Ethics and Professional Responsibility, 'Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing' (23 May 2013) <https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf> accessed 7 August 2020; International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe, 'A Lawyer's Guide to Detecting and Preventing Money Laundering' (October 2014) <https://www.actec.org/assets/1/6/A-Lawyers-Guide-to-Detecting-and-Preventing-Money-Laundering-October-2014.pdf> 7 August 2020. Including the Recommendations, these are the key documents in the US to educate lawyers on money laundering risks. LS Terry, 'U.S. Legal Profession Efforts to Combat Money Laundering and Terrorist Financing' (2014) 59 NY L Sch L Rev 487, 510

[2344] Lawyers must comply with the obligation to submit reports of cash payments exceeding $10,000 in 31 U.S.C §5331, 31 CFR §1010.330. The ABA guidance is intentionally purely voluntary, see D Nougayrède, 'Anti-Money Laundering and Lawyer Regulation: The Response of the Professions' (2019) 43 Fordham Int'l L.J. 321, 332

[2345] The SAR requirement is particularly controversial, ibid at p.328; Indeed, the ABA takes the view that filing a SAR would be contrary to the ABA's Model Rules of Professional Conduct, DE Osborne, 'The Financial Action Task Force and the Legal Profession' (2015) 59 N.Y.L. Sch. L. Rev. 421, 431

[2346] SM May, 'Merger Issues in Money Laundering Cases' (2019) 67 DOJ J. Fed. L. & Prac. 253, 253

[2347] 18 U.S.C. §1956(c)(7)(B), §1957(f). The US AML framework applies extraterritorially to conduct by US citizens, or conduct by non-US citizens in the US, if the transaction exceeds $10,000, 18 U.S.C. §1956(f).

[2348] 18 U.S.C. §1956(c)(7)(B)(vi), §1957(f); FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, p.182

[2349] 18 U.S.C. §1956(c)(7)

traditional criminal tax offences in the IRC.[2350] This is because money laundering offences not only have lower intent requirements than tax offences, but are also likely to result in higher sentences, the freezing of assets and forfeiture.[2351] There is a general belief in the US that forfeiture should not typically be used in tax evasion cases, which should merely result in a tax debt to the US.[2352] Nevertheless, due to the broad nature of wire and mail fraud statutes,[2353] tax evasion may be prosecuted using these offences.[2354] For instance, an individual may be charged with a wire or mail fraud offence for mailing or transmitting a false tax return to the IRS.[2355] Both wire and mail fraud offences are SUAs for the purposes of the money laundering offences,[2356] indirectly bringing tax evasion within the scope of the AML framework. Although US courts initially prevented the use of mail fraud statutes for this purpose,[2357] on the basis that this would be contrary to Congressional intent,[2358] later decisions have readily supported the use of mail and wire fraud charges as predicate offences in tax cases.[2359] In *Pasquantino v U.S.*, the Supreme Court held that attempts to deprive foreign governments of revenue may be prosecuted using the wire fraud statute.[2360] The Court resolved a circuit conflict in relation to the application of the Revenue Rule,[2361] holding that the Rule did not prohibit the application of wire fraud or money laundering offences to foreign tax crimes.[2362] Accordingly, the US AML framework may also apply to foreign tax evasion offences.

[2350] Committee on the Judiciary, *The Money Laundering Crimes Act of 1986*, S. Rep. 433, 99th Cong., 2d Sess (1986), p.11-12.
[2351] K Keneally, 'Turning the Tide: The US Addresses its Role as a Tax Haven' (2016) 10 Champion 26,29; B Zagaris, 'Practitioners Discuss Defects of Criminalizing International Tax Fraud as a Separate Money Laundering Offense' (2009) 25(5) Int'l Enforcement L Rep 181, 181
[2352] 'The forfeiture laws should not be used to seize and forfeit personal property such as wages, salaries, and compensation for services rendered that is lawfully earned and whose only relationship to criminal conduct is the unpaid tax due and owing on the income.' Department of Justice, 'Tax Division Directive No.145 Restraint, Seizure and Forefeiture Policy in Criminal and Tax-Related Investigations and Prosecutions' (30 January 2014) <https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/tax00039.pdf> accessed 12 August 2020
[2353] PD Hardy, S Michel, F Murray, 'Is the United States Still a Tax Haven? The Government Acts on Tax Compliance and Money Laundering Risks' [2016] Journal of Tax Practice and Procedure 33, 38
[2354] See for instance, *United States v. Kellogg*, 955 F2d 1244 (9th Cir. 1992), *United States v. Helmsley*, 941 F2d 71, 94 (2d Cir.), cert. denied, 502 US 1091 (1991)
[2355]I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §11.02[2][b][ii].
[2356] 18 U.S.C. §1956(c)(7)(A), §1961(1)
[2357] *United States v. Henderson*, 386 F. Supp. 1048, 1052–1054 (SDNY 1974).
[2358] Ibid, K Keneally, 'The US Prosecutes Foreign Tax Evasion as a Domestic Crime – With Far Reaching Consequences' (1998) 88 J Tax'n 224, 228
[2359] *United States v. Yusuf*, 536 F3d 178 (3d Cir. 2008)
[2360] *Pasquantino v. United States*, 544 US 349, 125 S.Ct. 1766 (2005)
[2361] *United States v. Trapilo*, 130 F3d 547 (2d Cir. 1997) *cf United States v. Boots*, 80 F3d 580 (1st Cir. 1996)
[2362] *Pasquantino v. United States*, 544 US 349, 125 S.Ct. 1766, 1781 (2005); See also, JS Friedman, 'Whiskey and the Wires: The Inadvisable Application of the Wire Fraud Statute to Alcohol Smuggling and Foreign Tax Evasion' (2006) 96 J Crim L & Criminology 911, 922

Although tax crimes may be characterised as SUAs, US courts have contended with the issue of whether the offences apply to sums retained through tax evasion, as distinct to sums obtained through tax fraud.[2363] The US money laundering offences apply to the 'proceeds' of SUA; a term left undefined for 30 years, causing considerable ambiguity.[2364] Initially, US courts held that the term 'proceeds' could encompass 'cost savings',[2365] i.e. 'costs saved through the committing of a criminal offence'.[2366] However, in *U.S. v Maali*,[2367] the court held that the term proceeds did not encompass cost savings, and thus did not encompass sums retained through the evasion of federal and state taxes.[2368] The Eleventh Circuit upheld the decision in *Maali* in *U.S v Khanani*.[2369] Conversely, in *U.S. v Yusuf*,[2370] the Court of Appeals for the Third Circuit held that funds derived from a legitimate source, yet retained through tax evasion, constituted the proceeds of unlawful activity.[2371] *Yusuf* followed *U.S. v Santos*,[2372] which held that the term proceeds should be restricted to the profits, as opposed to the receipts, of SUA,[2373] and accordingly *Yusuf* held that sums derived from tax evasion could constitute the 'profits' of a defendant's mail fraud.[2374] The decisions in *Khanani* and *Yusuf* have created a circuit conflict in the US,[2375] which the Supreme Court has refused to resolve.[2376] To overrule the decision in *Santos*,[2377] Congress provided a definition of the term proceeds, which now encompasses 'any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.'[2378] Although the court in *Yusuf*

[2363] Indeed, many common law countries have grappled with this issue, K Foo, 'Does Tax Evasion Generate Criminal Proceeds' (2019) 31 SAcLJ 845, 849
[2364] JK Villa, *Bank Crimes: Fraud, Money Laundering and Embezzlement* (Clark Boardman Callaghan, 2019) § 8:15
[2365] See for instance, *United States v. Tyson Foods*, No. 4:01-CR-061, 2003 U.S. Dist. LEXIS 26385 (E.D. Tenn. Feb. 4, 2003).
[2366] RC Alexander, '"Cost Savings" As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom' (2011) 45 Int'l Law 749, 777.
[2367] United States v. Maali, 358 F. Supp. 2d 1154 (MD Fla. 2005)
[2368] Ibid, at p.1160
[2369] United States v. Khanani, 502 F3d 1281, 1295–1296 (11th Cir. 2007)
[2370] *United States v. Yusuf*, 536 F3d 178 (3d Cir. 2008)
[2371] Ibid, at p.185
[2372] *United States v Santos*, 553 US 507 (2008)
[2373] Ibid, at p.514
[2374] *United States v. Yusuf*, 536 F3d 178, 190 (3d Cir. 2008)
[2375] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) §11.02[2][d][i]
[2376] Andreozzi et al note 'The U.S. Supreme Court denied certiorari in Yusuf on June 8, 2009 (129 S. Ct. 2764 (2009))' RP Andreozzi, ML Salzman, AM Hibschweiler, 'False Tax Returns, Mail Fraud and Money Laundering' (1 February 2011) *The Tax Adviser* <https://www.thetaxadviser.com/issues/2011/feb/salzman-feb11.html#fn_34> Accessed 12 August 2020
[2377] LA Dickinson, 'Revisiting the "Merger Problem" in Money Laundering Prosecutions Post-Santos and the Fraud Enforcement and Recovery Act of 2009' (2014) 28 Notre Dame J.L. Ethics & Pub. Pol'y 579, 596
[2378] Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1616, §2(f), amending 18 U.S.C. §1956(c)(9)

relied on *Santos*, the effect of the amendment on the decision in *Yusuf* is unclear. The use of the word 'retained' brings funds retained through tax evasion within the scope of the money laundering offences when characterised as wire or mail fraud.[2379] Indeed, Alexander suggests that this was Congress' intention.[2380] However, some district courts have disagreed with this interpretation.[2381] Therefore, tax crimes may be prosecuted using money laundering offences. However, the US is reluctant to use the AML framework for this purpose..[2382]

The US has a long-standing policy of restricting the use of mail and wire fraud statutes in tax cases, both independently and as predicate offences to money laundering, requiring authorisation.[2383] Initially, the Department of Justice (DOJ) only granted authorisation in 'exceptional circumstances', noting that the omission of tax evasion from the list of SUAs was a 'deliberate Congressional decision'.[2384] The policy was relaxed in 2004 and is now more akin to an 'expression of self-imposed restraint that will yield in particular circumstances'.[2385]

[2379] RC Alexander, '"Cost Savings" As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom' (2011) 45 Int'l Law 749, 785

[2380] Ibid.

[2381] See, *United States v Delgado-Ovalle* 2013 US Dist LEXIS 181000 (D Kan, 2013), *United States v Keith Countess* 2015 US Dist LEXIS 150936 (D Kan, 2015), discussed in K Foo, 'Does Tax Evasion Generate Criminal Proceeds' (2019) 31 SAcLJ 845, 869

[2382] For instance, when amending the definition of proceeds, Congress rejected a proposal to amend the transportation money laundering offence, which would have extended the intent requirement to include the intent to engage in conduct constituting a tax evasion offence under the IRC. As the transportation offence does not require the monetary instrument or funds involved to derive from SUA, including intent to violate the IRC would bring foreign and offshore tax evasion within the scope of the transportation offence. As such, this rejection clearly demonstrates the intention of the US Congress to exclude tax evasion from the AML framework. Originally contained in The Fraud Enforcement and Recovery Act, §2(g). Duringthe legislative process, Congress deleted the provision, B Zagaris, 'U.S. Congress Passes Fraud Enforcement Bill after Removing International Tax Crime Provisions' (2009) 25(7) Int'l Enforcement L Rep 277, 277. FERA was ultimately enacted as the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1616.

[2383] Comisky, Feld and Harris note that the first set of IRS guidelines were issued in response to the controversial Princeton Newport prosecution, where the defendants were charged with RICO violations for mailing false tax returns. I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §11.02[2][b][iii]. During the case, the Justice department received sustained criticism on the grounds that the 'racketeering statute is being abused by overzealous prosecutors', S Labaton, 'Jail Sentences in Princeton/Newport Case' (New York Times. 7 November 1989) <https://www.nytimes.com/1989/11/07/business/jail-sentences-in-princeton-newport-case.html> accessed 12 August 2020. In addition, the forfeiture orders imposed in this case were held to be disproportionate. For instance, one defendant, Regan, was 'ordered to forfeit a partnership interest valued at $13,336,000 and a salary of $1,759,000', yet 'the tax benefits obtained by Regan were $96,717, with an additional $134,804 in deferred taxes'. *United States v. Regan*, 726 F. Supp. 447, 459 (SDNY 1989), 937 F2d 823 (2d Cir. 1991), discussed in I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §13.04[8][a].

[2384] Department of Justice, 'Tax Division Directive No.99 Re: Clarification of Tax Division Policy Concerning the Charging of Tax Crimes as Mail Fraud, Wire Fraud, or Bank Fraud (18 U.S.C. §§ 1341, 1343, 1344) or as Predicates to a RICO Charge or as the Specified Unlawful Activity Element of a Money Laundering Offense' (30 March 1993) <https://www.justice.gov/tax/criminal-tax-manual-300-policy-directives-and-memoranda#99> accessed 12 August 2020

[2385] PD Hardy, S Michel, F Murray, 'Is the United States Still a Tax Haven? The Government Acts on Tax Compliance and Money Laundering Risks' [2016] Journal of Tax Practice and Procedure 33, 39

Permission to use wire and mail fraud charges is likely to be given when there are 'unusual circumstances', as well as 'a significant benefit to bringing the charges instead of or in addition to Title 26 Violations.'[2386] Nevertheless, authorisation will not be provided to use 'mail, wire or bank fraud charges to convert routine tax prosecutions into RICO or money laundering cases.'[2387] An example of such unusual circumstances may be found in the indictment brought against four individuals following the publication of Panama Papers.[2388] Although commentators question whether this case truly involves unusual circumstances and fear it may be 'part of an emerging trend' of using money laundering laws to address tax evasion,[2389] it must be remembered that the indictment was issued in the wake of the Panama Papers, at a time when the US desired to be seen as tough on offshore tax evasion.[2390]

Therefore, the US money laundering offences may be used to combat tax evasion, yet, in practice, will rarely be used. In this respect, the US AML framework may be regarded as less effective than its UK counterpart. However, in taking this approach, the US avoids issues surrounding 'uncritical over-criminalization',[2391] whereby tax evaders are additionally punished using the AML framework, despite failing to undertake any additional criminality.[2392] This is particularly important, where consecutive, rather than concurrent, sentences are the

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[2386] Department of Justice, 'Tax Division Directive No. 128 (supersedes Directive No. 99) Charging Mail Fraud, Wire Fraud or Bank Fraud Alone or as Predicate Offenses in Cases Involving Tax Administration' (29 October 2004) <https://www.justice.gov/archives/usam/tax-resource-manual-14-tax-division-directive-no-128> accessed 12 August 2020; see also United States Justice Manual, Title 6: Tax, 6-4.00 – Criminal Tax Case Procedures, 6-4.210 Tax-Related Mail, Wire, or Bank Fraud, RICO, or Money Laundering Charges. Available from: <https://www.justice.gov/jm/jm-6-4000-criminal-tax-case-procedures#6-4.210> accessed 12 August 2020

[2387] Ibid. 'Title 18 fraud statutes such as wire fraud and mail fraud cannot be used to convert a traditional Title 26 legalsource income tax case into a fraud offense even if the IRS is deemed to be the victim of tax fraud.' Department of Justice, 'Tax Division Directive No.145 Restraint, Seizure and Forefeiture Policy in Criminal and Tax-Related Investigations and Prosecutions' (30 January 2014) <https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/tax00039.pdf> accessed 12 August 2020

[2388] *United States v. Ramses Owens, Dirk Brauer, Richard Gaffey, Harald Joachim Von Der Goltz,* Southern District of New York, 2018, 18 Crim 693. <https://www.justice.gov/usao-sdny/press-release/file/1117201/download> accessed 12 August 2020. The defendants used the services of Mossack Fonseca to evade, or facilitate the evasion, of US taxation and were charged with offences including conspiracy to commit tax evasion, wire fraud and money laundering. Interestingly, issues surrounding the definition of proceeds were avoided by the DOJ's use of transportation money laundering charges, which do not depend on 'proceeds', but rather, transportation with the intent to promote the carrying on of SUA, such as wire fraud, ibid. At the time of writing, at least two of the defendants have pled guilty to the charges, IRS, 'Guilty Plea of U.S. Accountant in Panama Papers Investigation' (28 February 2020) <https://www.irs.gov/compliance/criminal-investigation/guilty-plea-of-us-accountant-in-panama-papers-investigation> accessed 12 August 2020

[2389] Ibid

[2390] CFS Del Mundo, 'How Countries Seek to Strengthen Anti-Money Laundering Laws in Response to the Panama Papers, and the Ethical Implications of Incentivizing Whistleblowers' (2019) 40 Nw. J. Int'l L & Bus 87, 103

[2391] V Mitsilegas, N Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23 *Maastricht Journal of European and Comparative Law* 261, 267

[2392] Ibid

norm[2393] and where money laundering convictions dramatically increase the sentences imposed.[2394] US courts have attempted to deal with over-criminalization in money laundering cases generally using the merger-doctrine,[2395] and Congress has attempted to deal with this issue by requiring prosecutors to obtain approval t in merger cases.[2396] However, these measures will not prevent most tax evaders from additionally facing money laundering charges, as well a drastic increase in sentence, should tax evasion be considered a SUA.[2397] As such, although the FATF considered the US' failure to include tax evasion as a predicate offence to be a weakness of its AML framework,[2398] by requiring prosecutors to use the offences explicitly enacted to criminalise tax evasion, the US approach pays greater respect to the Rule of Law and offers greater protection for individuals.

Reporting Obligations

In contrast to the primary money laundering offences, the BSA reporting obligations play a prominent role in the detection and prosecution of tax crimes.[2399] BSA reports may be accessed by IRS employees through FinCEN Query,[2400] an on-line database application designed to permit LEAs to access data held by FinCEN.[2401] As many of the BSA reports were explicitly enacted to facilitate tax investigations and proceedings,[2402] IRS employees are able to access

[2393] RC Alexander, '"Cost Savings" As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom' (2011) 45 Int'l Law 749, 812.
[2394] B Zagaris, 'Practitioners Discuss Defects of Criminalizing International Tax Fraud as a Separate Money Laundering Offence' (2009) 25(5) Int'l Enforcement L Rep 181, 181
[2395] May explains that US courts have dealt with two merger issues, specifically, whether an offence that hasn't been completed can generate proceeds, and whether an action completed in furtherance of a SUA can form the basis of a second money laundering conviction, SM May, 'Merger Issues in Money Laundering Cases' (2019) 67 DOJ J Fed L & Prac 253, 259
[2396] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1616, s.2(g)
[2397] This is because the status of the merger doctrine is uncertain post *Santos* and the consequent amendments to FERA, and at any rate only applies in a limited range of circumstances, see generally SM May, 'Merger Issues in Money Laundering Cases' (2019) 67 DOJ J Fed L & Prac 253. Similarly, the requirement for prosecutors to seek approval only applies in a limited range of circumstances, ibid. For examples see, Department of Justice, 'Criminal Resource Manual s.2187 New Approval And Reporting Requirements For Certain Money Laundering Prosecutions' (6 January 2010) < https://www.justice.gov/archives/jm/criminal-resource-manual-2187-new-approval-and-reporting-requirements-certain-money-laundering> accessed 14 August 2020
[2398] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.8.
[2399] SM Levy, *Federal Money Laundering Regulation: Banking, Corporate and Securities Compliance* (2nd edn, Aspen 2020) § 1.15
[2400] Formerly the Web Currency and Banking Retrieval System (WebCBRS)
[2401] Internal Revenue Service, 'Internal Revenue Manual, Part 4. Examining Process, Chapter 26. Bank Secrecy Act, Section 14. Disclosure' (July 2020) <https://www.irs.gov/irm/part4/irm_04-026-014#idm140489682130576> accessed 12 August 2020, at 4.26.14.1.2
[2402] The BSA requires 'reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism', 31 U.S.C. §5311.

most reports for tax purposes.[2403] The IRS makes significant use of this power, being one of the largest users of BSA data,[2404] and conducting approximately 126,000 database inquiries annually.[2405] Indeed, BSA reports play a role in around 24% of all IRS investigations into criminal tax, money laundering and BSA violations.[2406] In particular, the CTR has enabled the IRS to recover significant sums. For instance, between 2007 and 2009, the IRS initiated audits generating over $13.6million based on compliance checks of CTRs, as well as over $68 million by auditing individuals with significant combined CTRs.[2407] Additionally, from 2015 to 2018, the IRS' use of BSA reports led to audits generating approximately $189.1 million.[2408] Moreover, BSA reports, such as FBARs and CTRs have regularly provided intelligence enabling the prosecution of tax evaders, many of whose activities would not have been detected without these reports.[2409] Therefore, although BSA reports, are expensive, they do generate significant benefits to tax authorities. Nevertheless, the IRS is routinely criticised for making inadequate use of CTRs,[2410] and these benefits could be enhanced through 'systemic use of CTR data in examinations'.[2411]

[2403] Internal Revenue Service, 'Internal Revenue Manual, Part 4. Examining Process, Chapter 26. Bank Secrecy Act, Section 14. Disclosure' (July 2020) <https://www.irs.gov/irm/part4/irm_04-026-014#idm140489682130576> accessed 12 August 2020, at 4.26.14.3.2

[2404] Internal Revenue Service, IRS: 'Criminal Investigation Annual Report 2019' <https://www.irs.gov/pub/irs-utl/2019_irs_criminal_investigation_annual_report.pdf> accessed 14 August 2020, at p.27

[2405] Financial Crimes Enforcement Network, 'Prepared Remarks of FinCEN Director Kenneth A. Blanco, delivered at the 12th Annual Las Vegas Anti-Money Laundering Conference' (August 13, 2019) <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-12th-annual-las-vegas-anti> accessed 14 August 2020

[2406] Ibid

[2407] Treasury Inspector General for Tax Administration, 'Currency Report Data Can Be a Good Source for Audit Leads' (17 September 2010) <https://www.treasury.gov/tigta/auditreports/2010reports/201030104fr.html> accessed 14 August 2020

[2408] Treasury Inspector General for Tax Administration, 'The Internal Revenue Service Still Does Not Make Effective Use of Currency Transaction Reports' (21 September 2018) <https://www.treasury.gov/tigta/auditreports/2018reports/201830076fr.pdf> accessed 13 August 2020

[2409]The NYSBA notes that of the reported cases concerning FBARs, most also involved prosecutions of tax offences or civil tax violations, New York State Bar Association Tax Section, 'Report on the Rules Governing Reports on Transactions with Foreign Financial Agencies (FBARs)' (30 October 30 2009) <https://nysba.org/app/uploads/2020/03/1194-Report.pdf> accessed 14 August 2020, p.22. The TIGTA provides several examples of cases where CTRs led to convictions for tax evasion. These cases would have otherwise gone undetected by the IRS, Treasury Inspector General for Tax Administration, 'Currency Report Data Can Be a Good Source for Audit Leads' (17 September 2010) <https://www.treasury.gov/tigta/auditreports/2010reports/201030104fr.html> accessed 14 August 2020

[2410] Treasury Inspector General for Tax Administration, 'Currency Report Data Can Be a Good Source for Audit Leads' (17 September 2010) <https://www.treasury.gov/tigta/auditreports/2010reports/201030104fr.html> accessed 14 August 2020; Treasury Inspector General for Tax Administration, 'The Internal Revenue Service Still Does Not Make Effective Use of Currency Transaction Reports' (21 September 2018) <https://www.treasury.gov/tigta/auditreports/2018reports/201830076fr.pdf> accessed 13 August 2020

[2411] Ibid

The IRS believes that SARs 'represent excellent leads for money laundering and BSA investigations and tax administration issues'.[2412] This is because the submission of a SAR does not depend upon suspicion of SUA, but rather, suspicion that the transaction involves, or attempts to disguise funds derived from illegal activity, attempts to evade the BSA reporting requirements, or has no 'business or lawful apparent purpose'.[2413] As such, SARs are regularly submitted by FIs concerning tax evasion.[2414] Nevertheless, SARs are unlikely to capture as many instances of tax evasion as their UK counterparts. This is primarily due to the more restrictive scope,[2415] but may also be influenced by the interpretation afforded to the SAR requirement by FIs.[2416] For instance, as the transaction must be 'derived from, or intended to conceal, illegal activities', Berger argues that banks may interpret the provision as excluding tax evasion.[2417] This interpretation is supported by the exclusion of tax evasion as a separate category on the US SAR form.[2418] Then again, in practice, it is clear that many FIs regularly submit reports concerning tax evasion.[2419] In addition, SARs must be submitted when a transaction attempts to evade BSA reporting requirements, or has no 'business or lawful apparent purpose',[2420] regardless of the predicate offence,[2421] - criteria which are likely to encompass transactions designed to evade taxation.[2422] As such, SARs were are not specifically

[2412] Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 5. Investigative Process, Section 5. Money Laundering and Currency Crimes' (February 2015) <https://www.irs.gov/irm/part9/irm_09-005-005> accessed 14 August 2020, at 9.5.5.3.3.1.5
[2413] 31 CFR § 1020.320(a)(2), 12 CFR § 21.11(c)(4)
[2414] SM Levy, *Federal Money Laundering Regulation: Banking, Corporate and Securities Compliance* (2nd edn, Aspen 2020) § 1.15
[2415] Including the monetary thresholds for submitting SARS, as well as the application of the SAR requirement to a limited number of DNFPBs.
[2416] MA Berger, 'Not So Safe Haven: Reducing Tax Evasion by Regulation Correspondent Banks Operating in the United States' (2013) 12(1) Journal of International Business and Law 51, 82
[2417] Ibid
[2418] FIs are asked to select a 'type of suspicious activity' from a list that includes several categories of money laundering and fraud, but does not include tax evasion, see Financial Crimes Enforcement Network, 'FinCEN Suspicious Activity Report: (FinCEN SAR) Electronic Filing Instructions' (October 2012, Version 1.2) <https://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf>accessed 14 August 2020, p.96-99
[2419] For instance, in 2011, tax fraud or evasion was the second most common activity cited in the 'other' category, Financial Crimes Enforcement Network, 'The SAR Activity Review: Trends, Tips & Issues' (Issue 23, May 2013) <https://www.fincen.gov/sites/default/files/shared/sar_tti_23.pdf> accessed 14 August 2020, p.30
[2420] 31 CFR § 1020.320(a)(2), 12 CFR § 21.11(c)(4)
[2421] 'Banks are not obligated to investigate or confirm the underlying crime' FFIEC, 'BSA/AML Examination Manual: Assessing Compliance with BSA Regulatory Requirements: Suspicious Activity Reporting' <https://bsaaml.ffiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/04.pdf> accessed 7 August 2020, p.68.
[2422] In 2019, 'suspicion concerning the source of funds', 'transaction(s) below CTR threshold', and 'transaction with no apparent economic, business, or lawful purpose' were the three most common types of SAR submitted by FIs, see United States Department of the Treasury, 'FinCEN Suspicious Activity Report (Form 111) Exhibit 1: Filings by Year & Month by Depository Institutions' (31 December 2019) <https://www.fincen.gov/reports/sar-stats/sar-filings-industry> accessed 7 August 2020

designed to detect tax evasion in the US, but may contribute to tax investigations as a 'collateral benefit' of the SAR regime.[2423]

SARs may be used to provide intelligence for tax investigations and they have led to the conviction of tax evaders.[2424] However, while the IRS may access SARs for BSA, or criminal tax purposes,[2425] the IRS only has restricted access to SARs for civil tax purposes.[2426] Following an agreement with FINCEN,[2427] the IRS is able to request access to SAR information for civil tax matters in limited circumstances.[2428] Several restrictions are imposed on making requests - access to SARs will only be given when the request relates to 'active examination and collection cases'[2429] and IRS examiners are not allowed to 'browse' SAR data.[2430] These constraints restrict the potential to detect and recover evaded taxation using SARs; a point evidenced by the significant sums recovered through HMRC's unconstrained use of SAR data. Yet, attempts to expand IRS access to SAR data have not been successful.[2431] Still, the US position reflects an attempt to balance the heightened infringement of rights to privacy

[2423] Financial Crimes Enforcement Network, '1st Review of the Suspicious Activity Reporting System' (April 1998) <https://www.fincen.gov/index.php/1st-review-suspicious-activity-reporting-system-sars> accessed 14 August 2020

[2424] FinCEN used to regularly publicise cases involving SARs that led to convictions for tax offences. See for instance, Financial Crimes Enforcement Network, 'The SAR Activity Review: Trends, Tips & Issues (Issue 20, October 2011) <https://www.fincen.gov/sites/default/files/shared/sar_tti_20.pdf> accessed 14 August 2020, p.43

[2425] Internal Revenue Service, 'Internal Revenue Manual, Part 4. Examining Process, Chapter 26. Bank Secrecy Act, Section 14. Disclosure' (July 2020) <https://www.irs.gov/irm/part4/irm_04-026-014#idm140489682130576> accessed 12 August 2020, at 4.26.14.3.2. IRS examiners are not permitted to use BSA investigations to obtain information for Title 26 tax investigations, ibid at 4.26.14.3.1, see also *United States v. Deak-Perera*, 566 F. Supp. 1398 (D.D.C. 1983).

[2426] 31 U.S.C. §5319; OECD, 'Access for Tax Authorities to Information Gathered by Anti-Money Laundering Authorities' (September 2007) <http://www.oecd.org/tax/exchange-of-tax-information/2389989.pdf> accessed 14 August 2020, at p.37

[2427] Internal Revenue Service, 'Memorandum of Understanding between the Financial Crimes Enforcement Network and the Internal Revenue Service' (24 September 2010) <https://www.irs.gov/irm/part4/irm_04-026-014#idm140489682134208> accessed 14 August 2020

[2428] The IRM states that SAR information 'may be helpful in examination and collection activities' when 'FinCEN Query (FCQ) reflects a Currency Transaction Report (CTR); Routine means of locating banking information is exhausted; Potential fraud indicators are present; or It appears the taxpayer may be engaging in an unusually large number of cash transactions or cash transactions of unusually large amounts to avoid proper reporting of income or to evade collection.' Internal Revenue Service, 'Internal Revenue Manual, Part 4. Examining Process, Chapter 26. Bank Secrecy Act, Section 14. Disclosure' (July 2020) <https://www.irs.gov/irm/part4/irm_04-026-014#idm140489682130576> accessed 12 August 2020, at 4.26.14.3.3

[2429] Ibid

[2430] 'Suspected browsing of SAR data is subject to unauthorized access (UNAX) rules and is reported to TIGTA,' ibid at 4.26.14.6.4

[2431] In 2009, the Stop Tax Haven Abuse Act was introduced by Senator Carl Levin. A provision of the Act attempted to enable the IRS to access SARs for the purposes of civil tax law enforcement, S.506 Stop Tax Haven Abuse Act, 111th Cong. 1st Sess. (2009-10), s.205(c). Several versions of the Act have been introduced since, without much success JG Gravelle, *Tax havens: International Tax Avoidance and Evasion* (15 January 2015, Congressional Research Service) <https://fas.org/sgp/crs/misc/R40623.pdf> accessed 14 August 2020, p.3. The Act was last introduced in 2019 and contained the same provision, H.R.1712 - Stop Tax Haven Abuse Act, 116th Cong. 1st Sess. (2019-20), s.208(c)

engendered by the application of SARs to tax evasion.[2432] Indeed, the IRS notes that SARs are treated differently owing to their 'confidential nature'.[2433] Although challenges to the US SAR regime on constitutional grounds have failed,[2434] the introduction of SARs generated fierce debate around privacy in the US,[2435] as well as sustained objections to the creation of a plethora of gatekeepers and informants,[2436] which still exists to this day.[2437] Therefore, it is unsurprising that there are significant restrictions on the use of SAR data by the IRS.

Nonetheless, it appears axiomatic to refuse to use information on privacy grounds, which has already been lawfully collected. It is essential for LEAs to make the most of the information collected via the AML framework for the significant costs to generate any sizeable benefit, otherwise the scope of the framework should be reduced. As in the UK, the US AML framework imposes a costly burden on FIs, which are estimated to spend $26.4billion each year.[2438] To comply with the SAR obligation alone, reporting institutions spend at least 5million hours and over $200million each year.[2439] The UK demonstrates that by failing to make full use of the reporting obligations to combat tax evasion, the US is missing out on

[2432] See the discussion at pp. above

[2433] Internal Revenue Service, 'Internal Revenue Manual, Part 4. Examining Process, Chapter 26. Bank Secrecy Act, Section 14. Disclosure' (July 2020) <https://www.irs.gov/irm/part4/irm_04-026-014#idm140489682130576> accessed 12 August 2020, at 4.26.14.3.1

[2434] The part of the decision in *Stark v. Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972) that declared the reporting requirement unconstitutional on privacy grounds, was reversed in *California Bankers Association v. Shultz*, 416 U.S. 21 (1974). The BSA reporting requirements have been held to be consistent with constitutional rights and protections ever since, see for instance, *United States v. Richter*, 610 F. Supp. 480, 491-93 (D. Ii. 1985). The reporting requirements have also survived challenges based on the Right to Financial Privacy Act of 1978, Pub. L. 95-630, 92 Stat. 3697, see *Velasquez-Campuzano v. Marfa National Bank*, 896 F. Supp. 1415, 1420-22 (W.D. Tex. 1995)

[2435] MR Hall, 'An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report' (1996) 84(3) Kentucky Law Journal 643, 661.

[2436] 'The concern is not simply with the Leviathan state assuming further features of the surveillant "Big Brother" found in George Orwell's Nineteen Eighty-Four, it is the explicit enlistment of citizens to become our "little brothers" to tattle and report anything that they feel is suspicious.' W Vleck, 'Leviathan Rejuvenated: Surveillance, Money Laundering, and the War on Terror' (2008) 20 International Journal of Politics, Culture, and Society 21, 21

[2437] See the collection of documents written by the ABA to protest the extension of AML obligations to lawyers, American Bar Association, 'Gatekeeper Regulations on Attorneys' <https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ > accessed 7 August 2020

[2438] LexisNexis, 'LexisNexis Risk Solutions 2019 True Cost of AML Compliance Study: United States and Canada Edition' (2019) <https://risk.lexisnexis.com/insights-resources/research/2019-true-cost-of-aml-compliance-study-for-united-states-and-canada> accessed 7 August 2020, at p.4

[2439] FinCEN acknowledges that several costs are missing from its estimate and invites the submission of other factors that should be considered in the analysis, Department of the Treasury, Financial Crimes Enforcement Network, 'Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of the Bank Secrecy Act Reports by Financial Institutions of Suspicious Transactions at 31 CFR 1020.320, 1021.320, 1022.320, 1023.320, 1024.320, 1025.320, 1026.320, and 1029.320, and FinCEN Report 111— Suspicious Activity Report' (2020) 85(101) Federal Register 31598, 31612-31613.

tangible benefits that could be derived from the AML framework and which could in turn make the substantial costs imposed on FIs more worthwhile.

5.5.4 Forfeiture of the Proceeds of Crime

Introduction

The US has utilised civil forfeiture for over 200 years,[2440] with Internal Revenue Code civil forfeitures considered to have an 'ancient lineage'.[2441] Yet, the first *in personam* criminal forfeiture statutes were not enacted until 1970,[2442] with the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Comprehensive Drug Abuse Prevention and Control Act providing for the forfeiture of property involved in racketeering and drug trafficking enterprises respectively.[2443] However, these provisions were ineffective, as they only targeted high level criminals, the drug 'kingpins' and initiators of RICO enterprises.[2444] Accordingly, forfeiture was extended to the instrumentalities and proceeds of any felony drug offence,[2445] followed by money laundering offences.[2446] Subsequently, forfeiture provisions were 'added piecemeal',[2447] although many crimes were excluded until the Civil Asset Forfeiture Reform Act (CAFRA) in 2000.[2448] CAFRA enabled civil forfeiture of the proceeds of any SUA,[2449]

[2440] C Doyle, 'Crime and Forfeiture' (Congressional Research Service Report 7-5700, 22 January 2015) <https://fas.org/sgp/crs/misc/97-139.pdf> accessed 21 August 2020, p.1.
[2441] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §12.02[1]
[2442] Ibid at §13.04[1][a]; see also, HJ Garretson, 'Federal Criminal Forfeiture: A Royal Pain in the Assets' (2008) 18(1) Federal Criminal Forfeiture 45, 46
[2443] Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (Oct. 15, 1970), Title IX, § 901(a), codified at 18 USC § 1961. Comprehensive Drug Abuse Prevention and Control Act Pub. L. No. 91-513, 84 Stat. 1265 (Oct. 27, 1970), Title II, § 408, codified at 21 USC § 848(a).
[2444] JB Weld, 'Forfeiture Laws and Procedures in the United States of America' (UNAFEI 146th International Training Course Visiting Experts' Papers, Resource Material Series No.83, 2011) <https://www.unafei.or.jp/publications/pdf/RS_No83/No83_06VE_Weld1.pdf> accessed 21 August 2020, at p.19
[2445] Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2044 (1984), § 303 (codified at 21 U.S.C § 853)
[2446] Money Laundering Control Act 1986, enacted as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). The forfeiture provisions are codified at 18 U.S.C. §§ 981 and 982.
[2447] JB Weld, 'Forfeiture Laws and Procedures in the United States of America' (UNAFEI 146th International Training Course Visiting Experts' Papers, Resource Material Series No.83, 2011) <https://www.unafei.or.jp/publications/pdf/RS_No83/No83_06VE_Weld1.pdf> accessed 21 August 2020, at p.19
[2448] Civil Asset Forfeiture Reform Act of 2000, Pub. L. 106-185, 114 Stat. 202 (2000). 'Before CAFRA, many federal crimes carried forfeiture authority, but a greater number did not. In particular, there was no forfeiture authority for such common crimes as mail and wire fraud, extortion and bribery.' SD Cassella, 'The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties' (2015) 27(1) Journal of Legislation 97, 116
[2449] Ibid § 20, amending 18 USC § 981(a)(1)(C).

without any need to prove money laundering itself,[2450] and enables criminal forfeiture for any offence for which civil forfeiture is authorised.[2451] The scope of forfeiture was also expanded by the USA PATRIOT Act, for certain violations of the BSA.[2452] As Cassella notes, 'one of the truly lamentable features of federal forfeiture law' is that the US forfeiture provisions have not been amalgamated into a single statute.[2453] However, taken together, the laws are broad, providing for criminal, civil and administrative forfeiture procedures for most criminal offences.[2454] There is no 'hierarchy of preference' in the use of forfeiture procedures in the US,[2455] and civil and criminal forfeiture procedures may be used against the same defendant.[2456] The US also complies with the requirements for the recovery of the proceeds of crime expressed in the international AML framework. This section provides a critical evaluation of relevant US forfeiture legislation, highlighting US reluctance to apply forfeiture provisions to the proceeds of tax crimes.

Criminal Forfeiture

Criminal forfeiture is imposed following a criminal conviction and is part of the defendant's sentence.[2457] As there is no single forfeiture statute in the US, the applicable statute determines the scope of forfeiture.[2458] Criminal forfeiture is provided for money laundering,[2459] and RICO offences,[2460] as well as offenses specified as SUAs for money laundering purposes,[2461] including wire fraud, mail fraud, and BSA reporting violations.[2462] In contrast to the UK, US

[2450] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §13.04[2]
[2451] Civil Asset Forfeiture Reform Act of 2000, Pub. L. 106-185, 114 Stat. 202, 221 (2000), §16, amending 28 USC § 2461
[2452] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Public Law 107-56, 115 Stat. 272, 338–339 (Oct. 26, 2001), §372, amending 31 USC § 5317. The forfeiture must follow the procedures set out in 18 USC § 981(a)(i)(A).
[2453] SD Cassella, *Asset Forfeiture Law in the United States* (Juris, 2007) p.742
[2454] Department of Justice, 'Criminal Tax Manual: 26.00 Forfeiture in Criminal Tax Cases' (2015) <https://www.justice.gov/sites/default/files/tax/legacy/2015/03/25/CTM%20Chapter%2026.pdf> accessed 20 August 2020, at 26.01[1]
[2455] In contrast to the former UK position, see A Kennedy, 'Civil Recovery Proceedings under the Proceeds of Crime Act 2002: The Experience So Far' (2006) 9(3) JMLC 245, 260
[2456] Parallel administrative and criminal forfeiture proceedings are permitted, 18 U.S.C. § 983(a)(1)(A)(iii)(I). This does not conflict with the Double Jeopardy Clause of the Constitution, *United States v. Ursery*, 116 S. Ct. 2135 (1996).
[2457] *Libretti v. United States*, 516 U.S. 29, 38-39 (1995). SD Cassella, 'Making Forfeiture Part of Your Criminal Case' (2013) 61(5) United States Attorneys' Bulletin 12, 12
[2458] HJ Garretson, 'Federal Criminal Forfeiture: A Royal Pain in the Assets' (2008) 18(1) Federal Criminal Forfeiture 45, 48-49
[2459] 18 USC § 982(a)(1)
[2460] 18 USC § 1963
[2461] 28 USC § 2461, 18 USC § 981(a)(1)(C)
[2462] 18 USC § 1956(c)(7)(A), 18 USC § 1961

criminal money laundering forfeiture provisions do not contain lifestyle assumptions. Most criminal forfeiture provisions only enable the forfeiture of property 'constituting, or derived from, any proceeds' traceable to an offence.[2463] However, forfeiture following money laundering convictions extends to any property 'involved in such offense, or any property traceable to such property'.[2464] As such, the money laundering forfeiture provisions are much broader in scope, encompassing not only proceeds and laundered sums, but also, any untainted property used to facilitate or conceal the offence.[2465] As forfeiture is considered an element of sentencing, hearsay evidence is accepted.[2466] In addition, the government only needs to establish that the property is forfeitable based on a preponderance of the evidence standard of proof,[2467] with the burden then falling to the defendant to demonstrate that the assets are not forfeitable.[2468] If forfeitability is established, the government must decide whether it wishes to confiscate the property or seek a money judgment.[2469] If the defendant has dissipated forfeitable property, substitute assets may be forfeited.[2470] In contrast to the UK, US courts are not permitted to consider the defendant's available assets;[2471] a money judgment will be issued for the full amount and 'remains in effect until satisfied'.[2472]

Criminal forfeiture provisions are controversial,[2473] with commentators lamenting that forfeiture provides 'the government almost unbridled power to seize nearly any assets related

[2463] See for instance, 18 USC § 982(a)(2), 28 USC § 2461, 18 USC § 981(a)(1)(C).
[2464] 18 USC § 982(a)(1)
[2465] *United States v McGauley*, 279 F.3d 62, 77 (1st Cir. 2002), SM Welsh, 'Financial Tracing in Asset Forfeiture Cases' (2019) 67 United States Attorneys' Bulletin 65, 70. Congress intended to include 'the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.' S Ralston, MA Fazio, 'The Post-Honeycutt Landscape of Asset Forfeiture' (2019) 67 US Att'ys Bull 33, 48
[2466] *United States v. Ali*, 619 F.3d 713, 720 (7th Cir. 2010); *United States v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007), SD Cassella, 'Making Forfeiture Part of Your Criminal Case' (2013) 61(5) United States Attorneys' Bulletin 12, 16
[2467] *Libretti v. United States*, 516 U.S. 29, 38-39 (1995).
[2468] B Applebaum, 'Criminal Asset Forfeiture and the Sixth Amendment After "Southern Union" and "Alleyne": State-Level Ramifications' (2015) 68(2) Vanderbilt Law Review 549, 560
[2469] C Doyle, 'Crime and Forfeiture' (Congressional Research Service Report 7-5700, 22 January 2015) <https://fas.org/sgp/crs/misc/97-139.pdf> accessed 21 August 2020 at p.18.
[2470] *United States v. Vampire Nation*, 451 F.3d 189, 201-3 (3d Cir. 2006); SD Cassella, 'Civil Asset Recovery: The American Experience' in B Rider (Ed), *Research Handbook on International Financial Crime* (Edward Elgar 2015) p.498
[2471] 'Mandatory forfeiture is concerned not with how much an individual has but with how much he received in connection with the commission of the crime.' *United States v. Awad*, 598 F.3d 76, 78-79 (2d Cir. 2010). The US takes this approach to avoid incentivising criminals from discarding their proceeds of crime, S Cohen Levin, S Ramachandran, 'The Interplay Between Forfeiture and Restitution in Complex Multivictim White-Collar Cases' (2013) 26 Fed R 10, 11
[2472] SD Cassella, *Asset Forfeiture Law in the United States* (2nd edn, Juris 2013) p.699
[2473] DJ Fried, 'Rationalizing Criminal Forfeiture' (1988) 79 J. Crim. L. & Criminology 328, 330

to illegal activities.'[2474] This is due to the eradication of the protections inherent in criminal proceedings, but also because the broad criminal forfeiture provisions often result in the imposition of forfeiture over property in excess of any value the offender actually gained from the offence. For instance, the RICO forfeiture provisions enable the forfeiture of a defendant's 'entire interest in the RICO enterprise'.[2475] Furthermore, the broad money laundering forfeiture provisions reach any property 'involved in' an offence,[2476] the defendant is not required to possess, let alone benefit from the property,[2477] and even legitimately earned property that has been comingled with property derived from a criminal offence may be encompassed.[2478] Further, even when the forfeiture provisions only extend to proceeds,[2479] US courts have joined their UK counterparts in determining that offenders who obtain proceeds jointly or successively with others obtain the entire proceeds of the conspiracy for the purposes of forfeiture.[2480] US courts have also construed the term proceeds to encompass gross receipts, rather than net profits,[2481] at least when illegal goods, services, or activities are involved.[2482] In addition, restitution payments have not been taken into account in determining the extent of forfeiture orders.[2483] Moreover, forfeited property is still liable to taxation,[2484] and loss deductions will not be permitted.[2485]

[2474] D Kim, 'Asset Forfeiture: Giving Up Your Constitutional Rights' (1997) 19(2) Campbell Law Review 527, 529

[2475] 18 U.S.C. § 1963, SD Cassella, 'Asset Forfeiture Law in the United States' in C King, C Walker, J Gurulé. (Eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave MacMillan, London, 2018) p.431.

[2476] *United States v. Watts*, 786 F.3d 152, 174 (2d Cir. 2015)

[2477] Ibid at 175, see B Gillig, 'Nexus Rethought: Toward a Rational Factual Standard for Federal Criminal Forfeitures' (2016) 102 Iowa Law Review 289, 305

[2478] Ibid. *United States v McGauley*, 279 F.3d 62, 77 (1st Cir. 2002), *United States v. Schlesinger*, 396 F. Supp. 2d 267, 271 (E.D.N.Y. 2005). See also, SM Welsh, 'Financial Tracing in Asset Forfeiture Cases' (2019) 67 United States Attorneys' Bulletin 65, 70

[2479] See for instance, 18 USC § 982(a)(2), 28 USC § 2461, 18 USC § 981(a)(1)(C).

[2480] For the purposes of both money laundering and RICO forfeitures, see *United States v. Hurley*, 63 F3d 1, 22–23 (1st Cir. 1995), *United States v. Pitt*, 193 F3d 751, 764–766 (3d Cir. 1999), *United States v. Corrado*, 286 F3d 934 (6th Cir. 2002)

[2481] See for instance, *United States v. Farkas*, 2011 WL 5101752 (ED Va. 2011), *United States v. Peters*, 732 F3d 93 (2d Cir. 2013)

[2482] Some US courts apply the civil definition of proceeds in 18 USC § 981(a)(2)(A)&(B), see *United States v. Nacchio*, 573 F3d 1062, 1087–1090 (10th Cir. 2009), *United States v. Mahaffy*, 693 F3d 113, 136–138 (2d Cir. 2012)

[2483] *United States v. Feldman*, 853 F2d 648, 663–664 (9th Cir. 1988), United States v. Navarette, 667 F.3d 886, 887--88 (7th Cir. 2012) *United States v. Newman*, 659 F.3d 1235, 1242--43 (9th Cir. 2011). Forfeited funds may be used for restoration purposes, 18 USC §981(b)(1), 21 U.S.C. § 853(i), 18 USC §981(e) but only when the offender has insufficient funds available to satisfy both orders, *United States v. Pescatore*, 637 F.3d 128, 137 (2d Cir. 2011), see SC Levin, S Ramachandran, 'The Interplay Between Forfeiture and Restitution in Complex Multivictim White-Collar Cases' (2013) 26 Fed Sent R 10, 20

[2484] *Carione v. Commissioner of Internal Revenue*, TCM 2008-262 (2008), *Ianniello v Commissioner of Internal Revenue* 98 TC 165 (1992)

[2485] Ibid, *Nacchio v. United States*, 824 F3d 1370, 1377–1382 (Fed. Cir. 2016), cert. denied, US, 137 S. Ct. 2239 (2017).

The criminal forfeiture provisions have been challenged based on infringements of the Sixth Amendment.[2486] However, US courts have determined that the limitations of the Eighth Amendment's Excessive Fines Clause (EFC) apply to criminal forfeitures,[2487] including forfeitures resulting from RICO,[2488] and reporting violations.[2489] In *Bajakajian*, the Supreme Court held that criminal forfeitures violate the EFC if considered 'grossly disproportional to the gravity of a defendant's offense'.[2490] Nonetheless, although *Bajakajian* may prevent the most egregious of forfeitures, the decision is limited in application,[2491] and may not apply to proceeds forfeitures.[2492] Unlike the UK, the US admits that forfeiture is punitive and thus, any forfeiture must only be proportional to the gravity of the offence committed.[2493] *Bajakajian* does not provide courts with total discretion and only enables the mitigation of forfeiture by an amount necessary to prevent a violation.[2494] As such, 'few circuit courts have found a criminal forfeiture disproportionate before or after *Bajakajian*'.[2495] Furthermore, some courts have restricted the scope of forfeiture through statutory interpretation. In *Honeycutt,*[2496] the court held that when the statute requires the defendant to 'obtain' proceeds, the defendant will not be held liable for the entire proceeds of a conspiracy, but only the proceeds personally obtained.[2497] However, as money laundering forfeitures also encompass property 'involved in' an offence, it is unlikely that the decision will apply to money laundering forfeitures.[2498] Some courts have afforded a narrow interpretation to the term proceeds, which has largely been since

[2486] See for instance, *Libretti v. United States*, 516 U.S. 29, 38-39 (1995), *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) and *United States v. Monsanto*, 491 U.S. 600 (1989)
[2487] *Austin v. United States*, 509 U.S. 602, 609–10 (1993), *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The Excessive Fines Clause also applies to state forfeiture, see *Timbs v Indiana* 139 S. Ct. 682 (2019)
[2488] *United States v. Busher*, 817 F2d 1409, 1413–1416 (9th Cir. 1987), *United States v. Regan,* 726 F. Supp. 447, 459 (SDNY 1989)
[2489] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).
[2490] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).
[2491] For instance, subjecting the defendant to both forfeiture and restitution payments is not considered to violate the Excessive Fines Clause, United States v. Kalish, 626 F3d 165, 169 (2d Cir. 2010)
[2492] United States v. Jalaram, 599 F3d 347, 351–357 (4th Cir. 2010), United States v. Wild, 47 F3d 669, 673–676 (4th Cir 1995); United States v. Alexander, 108 F3d 853, 858 (8th Cir. 1997)
[2493] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). BL Johnson, 'Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture after United States v. Bajakajian' (2000) 2000 U Ill L Rev 461, 494. 'The Court employed a rhetoric of extreme caution and restraint in application of the Excessive Fines Clause analysis, adopting a gross disproportionality standard that, in its familiar Cruel and Unusual Punishments Clause applications, is tantamount to complete judicial abdication of meaningful proportionality review' ibid at p.515.
[2494] SD Cassella, 'The Forfeiture of Property Involved in Money Laundering Offenses' (2004) 7(2) Buffalo Criminal Law Review 583, 600
[2495] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §13.04[8][a]
[2496] *Honeycutt v United States*, 137 S. Ct. 1626 (2017).
[2497] Ibid at 1632-33
[2498] S Ralston, MA Fazio, 'The Post-Honeycutt Landscape of Asset Forfeiture' (2019) 67 US Att'ys Bull 33, 45-51

the enactment of CAFRA, which defined the term proceeds for the purposes of civil forfeiture as net profits, if the underlying goods or services involved are lawful, or as gross receipts, if the offence involves illegal goods, services or activities.[2499] Some courts have applied the CAFRA definition in criminal forfeiture cases to restrict the scope of forfeiture to net profits,[2500] whilst others have held that following the amended definition of proceeds in FERA,[2501] the term proceeds must be construed as gross receipts for the purposes of criminal forfeiture.[2502] Accordingly, the draconian nature of the US forfeiture measures must be considered in any assessment of their use in recovering the proceeds of tax offences. As illustrated below, this is important in a tax evasion context, as the most far-reaching forfeiture provisions, specifically, the money laundering and RICO forfeiture provisions, apply to this financial crime.

Civil Forfeiture

Civil forfeiture is more widely used than criminal forfeiture,[2503] yet it is more contentious.[2504] This is due to the lack of procedural protections and the absence of a requirement for a criminal conviction.[2505] Initially, civil forfeiture laws were based on the rationale that the property itself was guilty, or 'tainted by its unlawful use'.[2506] This historical foundation means that civil forfeiture actions are brought against the property itself.[2507] As a proprietary action, any increase in value is included in the forfeiture,[2508] and the government can trace the property

[2499] 18 USC § 981(a)(2)(A)&(B)
[2500] *United States v. Nacchio*, 573 F3d 1062, 1087–1090 (10th Cir. 2009), *United States v. Mahaffy*, 693 F3d 113, 136–138 (2d Cir. 2012)
[2501] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1616, §2(f), amending 18 U.S.C. §1956(c)(9)
[2502] See for instance, *United States v. Farkas*, 2011 WL 5101752 (ED Va. 2011), *United States v. Peters*, 732 F3d 93 (2d Cir. 2013)
[2503] 'Just 13 percent of Department of Justice forfeitures from 1997 to 2013 were criminal forfeitures; 87 percent were civil forfeitures', DM Carpenter II, L Knepper, AC Erickson, J McDonald, *Policing for Profit: The Abuse of Civil Asset* Forfeiture (2nd edn, Institute for Justice 2015) p.5
[2504] 'Since civil forfeiture requires less evidence and offers fewer protections than criminal forfeiture, the former is more vulnerable to abuse than the latter', DY Rothschild, WE Block, 'Don't Steal; The Government Hates Competition: The Problem with Civil Asset Forfeiture (2016) 31(1) The Journal of Private Enterprise 45, 46
[2505] D Pimentel, 'Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?' (2017) 25 Geo Mason L Rev 173, 176
[2506] TG Reed, 'On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture' (1994) 39 N Y L Sch L Rev 255, 259
[2507] This is contemporarily understood to be merely a 'procedural device' to facilitate forfeiture SD Cassella, 'Asset Forfeiture Law in the United States' in C King, C Walker, J Gurulé. (Eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave MacMillan, London, 2018) p.436.
[2508] In *Betancourt*, the defendant was ordered to forfeit over $5million won on the lottery, as the winning ticket was bought with drug proceeds, *United States v Betancourt* 422 F.3d 420, 242 (5th Cir. 2005). See, SM Welsh, 'Financial Tracing in Asset Forfeiture Cases' (2019) 67 United States Attorneys' Bulletin 65, 77

into 'substitute assets' in certain circumstances.[2509] Civil forfeiture is provided for money laundering,[2510] BSA,[2511] and RICO offences,[2512] as well as offences specified as SUAs for money laundering purposes,[2513] such as wire fraud and mail fraud.[2514] The IRS has the authority to investigate violations of the laundering offences, as well as to use the forfeiture statutes, when the offence involves a violation of the IRC or the BSA.[2515] There are also specific civil forfeiture provisions in the IRC, which enable the forfeiture of property that has escaped taxation,[2516] as well as property used, or intended for use, in violating the IRC.[2517] Customs forfeiture statutes apply to property involved or traceable to a CMIR violation,[2518] as well as property illegally imported, or involved in illegal importation.[2519]

The civil money laundering forfeiture provisions are similar to their criminal counterparts encompassing any property 'involved in a transaction or attempted transaction' violating §§1956, 1957 or 1960, 'or any property traceable to such property'.[2520] Therefore, the civil money laundering forfeiture provisions are also wide in scope, encompassing both proceeds and laundered sums, as well as any untainted property used to facilitate or conceal the laundering offence.[2521] Additionally, although the government must demonstrate that the property has a 'substantial connection' to the illegal activity,[2522] it does not necessarily need to link the property to a particular transaction.[2523] This has resulted in cases whereby a substantial

[2509] If the forfeiture action is brought within one year of the offence, and the offence involves cash, monetary instruments in bearer form, funds deposited in an account in a financial institution, or precious metals, 'it shall not be necessary for the Government to identify the specific property involved in the offense that is the basis for the forfeiture; and it shall not be a defense that the property involved in such an offense has been removed and replaced by identical property.' The identical property is subject to forfeiture, 18 USC § 984.
[2510] 18 USC § 981(a)(1)(A)
[2511] 31 USC § 5317, § 5324
[2512] 18 USC § 1964
[2513] 18 USC § 981(a)(1)(C)
[2514] 18 U.S.C. §1956(c)(7), §1957(f)
[2515] See generally, Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 7. Asset Seizure and Forfeiture, Section 1. Roles, Responsibilities, and Authorities' (March 3, 2015) <https://www.irs.gov/irm/part9/irm_09-007-001> accessed 27 August 2020; See also, Treasury Directive 15-42 (January 21, 2010, reaffirmed December 21, 2016)
[2516] 26 USC § 7301
[2517] 26 USC § 7302
[2518] 31 USC § 5317
[2519] 19 USC §1607 et seq.
[2520] 18 USC § 981(a)(1)(A)
[2521] *United States v. Real Property Located at 1407 North Collins Street*, 901 F3d 268, 274–275 (5th Cir. 2018). Some circuits have rejected or questioned the facilitation theory's application to civil money laundering forfeitures, see I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §13.01[3][e]
[2522] 18 USC § 983(c)(3)
[2523] *United States v. U.S. Currency in the Amount of $150,660*, 980 F2d 1200, 1205–1206 (8th Cir. 1992), I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §13.01[3][b]

connection to criminality has been proven simply using a 'net worth' approach,[2524] or by comparing bank deposits with reported income.[2525] Civil forfeitures pertaining to SUAs are more restrictive in scope, applying to 'any property, real or personal, which constitutes or is derived from proceeds' of SUA.[2526] CAFRA defined the term proceeds for the purposes of civil forfeiture as net profits, if the underlying goods or services involved are lawful, or as gross receipts, if the offence involves illegal goods, services or activities.[2527] In contrast, the IRC forfeiture statutes do not apply to proceeds and only enable the forfeiture of property involved in an offence.[2528] The tracing of property into substitute assets is not permitted.[2529]

Early civil forfeiture provisions were particularly draconian in nature, only requiring the government to demonstrate that the property was subject to forfeiture to a 'probable cause' standard of proof,[2530] essentially allocating the burden to the individual contesting the forfeiture.[2531] In addition, the rationale for civil forfeiture, taken together with the relation back doctrine,[2532] often resulted in the forfeiture of property held by innocent owners.[2533] Moreover, the civil nature of the proceedings often resulted in a wider range of evidence being admitted, including hearsay evidence.[2534] Following criticism of this approach,[2535] CAFRA was introduced to remedy some of these perceived abuses.[2536] CAFRA raised the burden of proof

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[2524] *United States v. One Parcel of Real Property*, 921 F2d 370, 377 (1st Cir. 1990)
[2525] *United States v. Funds From Prudential Sec.*, 362 F. Supp. 2d 75, 81–83 (DDC 2005)
[2526] 18 USC § 981(a)(1)(C)
[2527] 18 USC § 981(a)(2)(A)&(B)
[2528] Internal Revenue Service, 'Internal Revenue Manual, Part 9 Criminal Investigation, Chapter 7 Asset Seizure and Forfeiture, Section 13 Title 26 Seizures for Forfeiture' (May 2012) <https://www.irs.gov/irm/part9/irm_09-007-013> accessed 25 August 2020, at 9.7.13.1
[2529] Ibid
[2530] SD Cassella, 'The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties' (2001) 27(1) Journal of Legislation 97, 109
[2531] Ibid. 'This allocation of the burden of proof came to be seen as a basic feature of the customs system' C Nelson, 'The Constitutionality of Civil Forfeiture' (2016) 125 The Yale Law Journal 2447, 2484-5
[2532] The relation back doctrine provides that the government owns the property from the date of the offence, although only perfects its title on the date of the forfeiture order, *United States v. U.S. Currency in the Amount of $228,536.00*, 895 F.2d 908, 916 (2d Cir. 1990), *United States v Stowell*, 133 US 1 (1890). It is now codified at for instance, 18 USC §§ 981&2. The doctrine also applies to criminal forfeitures, see *United States v. McHan*, 345 F3d 262, 270–272 (4th Cir. 2003).
[2533] See for instance, *The Palmyra* 25 U.S. (12 Wheat.) 1 (1827), *Harmony v. United States* 43 U.S. (2 How.) 210 (1844), *Bennis v. Michigan*, 516 US 442 (1996). 'The Court has relied heavily on this rationale to reject the innocent owner defense to forfeitures for over a century' PD Houtz, 'The Innocent Owner Defense to Civil Forfeiture Proceedings' (1997) 31(1) U Rich L Rev 257, 264
[2534] *United States v. $12,390*, 956 F.2d 801, 811 (8th Cir. 1992).
[2535] 'Civil libertarians on both sides of the political aisle in the United States have expressed outrage at the practice', D Pimentel, 'Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?' (2017) 25 Geo Mason L Rev 173, 173
[2536] Civil Asset Forfeiture Reform Act of 2000, Pub. L. 106-185, 114 Stat. 202 (2000). Representative Hyde noted that CAFRA intended to return 'civil asset forfeiture to the ranks of respected law enforcement tools that can be used without risk to the civil liberties and property rights of American Citizens' 146 Cong. Rec. 5227-28 (2000), cited in SJ Moss, 'Clear and Convincing Civility: Applying the Civil Commitment Standard of Proof to Civil Asset Forfeiture' (2019) 68 Am U L Rev 2257, 2271

to a 'preponderance of the evidence' standard,[2537] and prevented the government from using some types of evidence, including hearsay evidence.[2538] CAFRA also provided some protection for a limited category of innocent owners.[2539] However, these reforms did not go far enough to provide full protection for the rights of individuals.[2540] CAFRA does not strictly apply to code forfeitures,[2541] which technically still only require the IRS to prove its case to a probable cause standard,[2542] and does not provide protection for innocent owners.[2543] Consequently, civil forfeiture provisions still result in forfeitures being imposed on those who are regarded as having 'done nothing wrong' and are widely criticised.[2544] A key point of contention is the financial incentive provided to US LEAs to pursue forfeiture actions.[2545] Indeed, US LEAs receive a much higher percentage of funds recovered than their UK counterparts,[2546] and often

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[2537] 18 USC § 983(c). During the legislative debate, several representatives attempted to enact a higher 'clear and convincing standard', but were ultimately defeated, SD Cassella, 'The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties' (2001) 27(1) Journal of Legislation 97, 108

[2538] *United States v. $92,203*, 537 F.3d 504, 509 (5th Cir. 2008), 18 USC § 983. A Crawford, 'Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and its Impact on Indigent Property Owners' (2015) BCJL & Soc Just 257, 268

[2539] If the property interest existed at the time of the offence, the term 'innocent owner' means an owner who 'did not know of the conduct giving rise to forfeiture; or upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property'. If the property interest was acquired after the offence, the term 'innocent owner' means a person who, at that time 'was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and did not know and was reasonably without cause to believe that the property was subject to forfeiture', 18 USC § 983(d)(2)&(3).

[2540] 'Despite [CAFRA's] protections, United States citizens are still unjustly deprived of their property every year', L Suarez, 'Guilty until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense' (2019) 5 Tex A&M J Prop L 1001, 1006. 'CAFRA may have been "significant," but it was not comprehensive', D Pimentel, 'Forfeitures Revisited: Bringing Principle to Practice in Federal Court' (2012) 13 Nevada Law Journal 1, 15.

[2541] 18 USC 983(i), see also *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 414 F.3d 416, 418 (6th Cir. 2006); *United States v. TRW Rifle 7.26X51MM Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 689 (9th Cir. 2006).

[2542] Internal Revenue Service, 'Internal Revenue Manual, Part 9 Criminal Investigation, Chapter 7 Asset Seizure and Forfeiture, Section 13 Title 26 Seizures for Forfeiture' (May 2012) <https://www.irs.gov/irm/part9/irm_09-007-013> accessed 25 August 2020 at 9.7.13.3.2

[2543] Who must instead avail themselves of statutory remission and mitigation procedures, see generally, I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §12.02[9]

[2544] D Pimentel, 'Forfeiture Policy in the United States: Is There Hope for Reform?' (2018) 17 Criminology & Pub. Pol'y 129, 130

[2545] Introduced by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 310, 98 Stat. 2052, codified at 28 U.S.C. § 524(c). 'The message, and the incentives, for law enforcement are troubling', D Pimentel, 'Forfeitures Revisited: Bringing Principle to Practice in Federal Court' (2012) 13 Nevada Law Journal 1, 15. 'The government's aggressive use of civil forfeiture has been plagued by persistent abuses that are motivated by self-gain', LS Rulli, 'Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive from Excessive Punishment in Civil Forfeiture?' (2017) 19(5) Journal of Constitutional Law 1111, 1117

[2546] 'Many statutes allow law enforcement agencies to keep all— or a substantial portion—of those proceeds' E Luna, 'The Perils of Civil Asset Forfeiture' 43 Harvard Journal of Law & Public Policy 23, 26. More than half of US states require 100% of the proceeds of state forfeitures to be returned to LEAs, DM Carpenter II, L Knepper, AC Erickson, J McDonald, *Policing for Profit: The Abuse of Civil Asset* Forfeiture (2nd edn, Institute

seem to allow these incentives to distort enforcement decisions.[2547] Proceeds recovered through code forfeitures are not deposited into the Treasury Forfeiture Fund, [2548] but proceeds recovered through other forfeiture mechanisms will be.[2549]

Several constitutional challenges have been made to the civil forfeiture provisions, including challenges based on the infringements of protections provided by the Due Process Clause[2550] and the Double Jeopardy Clause of the Fifth Amendment.[2551] While most challenges have failed, US courts have applied some of the protections provided by the Sixth Amendment,[2552] and have held that the EFC applies to civil forfeitures.[2553] Several states have attempted to limit the use of federal forfeiture provisions and have enacted forfeiture laws with higher safeguards.[2554] Attempts at further reform of federal law pertaining to forfeiture have not been successful thus far.[2555]

Forfeiture of the Proceeds of Tax Offences

Although IRC forfeitures may seem the most relevant when considering the forfeiture of sums connected to tax offences, code forfeitures have largely been restricted to property involved in the evasion of excise taxes, duties, or tax fraud schemes,[2556] as well as some reporting violations.[2557] This is because, 'although 26 USC §7302 authorizes the seizure and forfeiture

for Justice 2015) p.14. Participants in the Equitable Sharing Programme, which allows state LEAs to benefit from federal forfeitures, receive up to 80% of proceeds, ibid at p.6.

[2547] Ibid at p.15-16, *cf.* BD Kelly, M Kole, 'The Effects of Asset Forfeiture on Policing: A Panel Approach' (2015) 54 Econ Inq 558

[2548] US Department of the Treasury, 'Treasury Executive Office for Asset Forfeiture (TEOAF)' <https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/treasury-executive-office-for-asset-forfeiture-teoaf > accessed 24th August 2020. See also, Internal Revenue Service, 'Internal Revenue Manual, Part 9 Criminal Investigation, Chapter 7 Asset Seizure and Forfeiture, Section 13 Title 26 Seizures for Forfeiture' (May 2012) <https://www.irs.gov/irm/part9/irm_09-007-013> accessed 25 August 2020 at 9.7.13.4

[2549] Ibid at 9.7.8.1

[2550] In regards to the protection of innocent owners, see *Bennis v. Michigan*, 516 US 442 (1996).

[2551] *United States v. Ursery*, 518 US 267 (1996)

[2552] For instance, illegally obtained evidence has been excluded from forfeiture proceedings, see *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 701 (1965). However, some states have refused to apply the exclusionary rule to state forfeiture statutes, *State v. One (1) 2004 Lincoln Navigator*, 494 S.W.3d 690, 697 (2016). Some commentators believe that the decision in *One 1958 Plymouth Sedan* has been 'implicitly overruled' by the Supreme Court, see J Lewellyn, 'Losing Your Navigator: Why the Exclusionary Rule Should Not Apply to Civil Asset Forfeiture Proceedings' (2018) 13 Liberty University Law Review 153, 177

[2553] *United States v. Ursery*, 518 US 267 (1996), *United States v. One Single Family Residence Located at 18755 N. Bay Rd.*, 13 F3d 1493 (11th Cir. 1994), *Austin v. United States*, 509 US 602 (1993). Codified at 18 USC § 983(g).

[2554] See generally, D Pimentel, 'Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?' (2017) 25 Geo Mason L Rev 173

[2555] See for instance, Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2013-14)

[2556] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §12.02[7]

[2557] 'Theoretically, 26 USC §7302 can be used to forfeit assets attributable to violations of IRC 6050I (Form 8300, Report of Cash Payment over $10,000 Received in a Trade or Business, filing requirements).' Although,

of any property used, or intended to be used to violate any of the Internal Revenue laws, it is not to be used as a substitute to the collection of taxes.'[2558] In addition, code forfeitures are restricted to property involved in an offence,[2559] and do not encompass proceeds, real property, or substitute assets.[2560] Accordingly, code forfeitures are relatively rare.[2561] If code forfeitures are not applicable, forfeiture of sums associated with tax evasion may be sought under the money laundering or RICO statutes, which provide for both criminal and civil forfeiture.[2562] As discussed above, tax evasion is not a SUA for money laundering purposes, but may be characterised and charged as wire fraud or mail fraud for the purposes of the money laundering,[2563] or RICO, statutes.[2564] Further, tax evaders may be convicted of BSA violations.[2565] As such, the non-tax forfeiture statutes discussed above may be used to forfeit property connected to this offence.

In using the RICO or money laundering forfeiture provisions, prosecutors circumvent the issues surrounding the application of the term proceeds to sums retained through tax evasion, as these statutes encompass 'a defendant's entire interest in the RICO enterprise', or any property 'involved in' the money laundering offence.[2566] In line with case law, the breadth of this terminology has led to forfeitures following tax offences that have greatly exceeded any benefit received by the offender. For instance, in *Regan* the government sought the forfeiture of an entire partnership interest worth over $13million when the defendant only received a tax benefit

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this is difficult to achieve in practice, see Internal Revenue Service, 'Internal Revenue Manual, Part 9 Criminal Investigation, Chapter 7 Asset Seizure and Forfeiture, Section 13 Title 26 Seizures for Forfeiture' (May 2012) <https://www.irs.gov/irm/part9/irm_09-007-013> accessed 25 August 2020, at 9.7.13.2.2

[2558] Ibid, at 9.7.13.2.2

[2559] However, the term 'involved in' is often given an expansive interpretation, encompassing any property remotely connected to the offence. For instance, in motor fuels excise tax cases, the IRS notes that 'any equipment that is used (such as computers used to track sales) under 26 USC §7301(c), any storage facilities for fuel under 26 USC §7301(d), and any trucks that are used to transport fuel under 26 USC §7301(e), are all forfeitable if the fuel excise tax has been, or is intended to be, evaded', ibid at 9.7.13.2.1

[2560] Ibid at 9.7.13.1 and 9.7.13.3

[2561] Department of Justice, 'Criminal Tax Manual: 26.00 Forfeiture in Criminal Tax Cases' (2015) <https://www.justice.gov/sites/default/files/tax/legacy/2015/03/25/CTM%20Chapter%2026.pdf> accessed 20 August 2020, at p.2

[2562] Internal Revenue Service, 'Internal Revenue Manual, Part 9 Criminal Investigation, Chapter 7 Asset Seizure and Forfeiture, Section 13 Title 26 Seizures for Forfeiture' (May 2012) <https://www.irs.gov/irm/part9/irm_09-007-013> accessed 25 August 2020 at 9.7.13.4.4.2

[2563] *United States v. Yusuf,* 536 F3d 178 (3d Cir. 2008)

[2564] *United States v. Busher,* 817 F2d 1409, 1413–1416 (9th Cir. 1987), *United States v. Regan,* 726 F. Supp. 447, 459 (SDNY 1989)

[2565] *United States v Sperrazza,* 804 F.3d 1113 (11th Cir. 2015), *United States v. Ahmad,* 213 F.3d 805 (4th Cir.) cert. denied, 531 US 1014 (2000)

[2566] 18 USC §§ 1963&1964, 18 USC §§ 981(a)(1)(C) & 982(a)(1)

of $96,717.[2567] In *Ianniello*,[2568] the defendants were ordered to forfeit all of the profits skimmed from a restaurant, not merely the tax evaded, as representing their interests in the RICO enterprise.[2569] In Yusuf, the government sought the forfeiture of all property involved in the offence, specifically, '$60 million in cash, several parcels of real property, an investment account, and every operating asset, as well as all earnings, of the retail grocery business.'[2570] These sums greatly exceed the $2.9million that was evaded.[2571] Following convictions for reporting violations, the US sought to recover the full amount undeclared or structured by the defendant, even when the sums involved were derived from legal sources.[2572] Structuring forfeitures in legal source cases are now prohibited by policy,[2573] and the EFC is likely to apply to all legal source forfeitures.[2574] However, the restrictions will not apply when the sums are connected to a tax evasion offence and US courts have held that the forfeiture of all sums involved in a reporting offence are not excessive if the offence is motivated by tax evasion or fraud.[2575]

Even when the forfeiture targets the proceeds of an offence, it is likely that tax evasion is encompassed, as the term includes 'cost savings',[2576] and sums 'retained' through the

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[2567] Plus $134,804 in deferred taxes, *United States v. Regan*, 726 F. Supp. 447, 459 (SDNY 1989), 937 F2d 823 (2d Cir. 1991)
[2568] *Ianniello v Commissioner of Internal Revenue* 98 TC 165 (1992)
[2569] ibid
[2570] RP Andreozzi, ML Salzman, AM Hibschweiler, 'False Tax Returns, Mail Fraud and Money Laundering' (1 February 2011) *The Tax Adviser* <https://www.thetaxadviser.com/issues/2011/feb/salzman-feb11.html#fn_34> Accessed 12 August 2020
[2571] Ibid
[2572] Out of 278 structuring investigations initiated by the IRS, only 26 cases involved illegal activity or illegal funds and only 21 involved tax violations. In the 231 legal source cases, '$17.1 million was seized and forfeited to the Government'. Treasury Inspector General for Tax Administration, 'Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses' (30 March 2017) <https://www.treasury.gov/tigta/auditreports/2017reports/201730025fr.pdf> accessed 7 August 2020, p.8-10
[2573] New York Times, 'Statement of Richard Weber, Chief of I.R.S. Criminal Investigation' (25 October 2014) <https://www.nytimes.com/2014/10/26/us/statement-of-richard-weber-chief-of-irs-criminal-investigation.html> accessed 7 August 2020; US Department of Justice, 'Attorney General Restricts Use of Asset Forfeiture in Structuring Offenses' (Office of Public Affairs, Press Release 15-400,31 March 2015) <https://www.justice.gov/opa/pr/attorney-general-restricts-use-asset-forfeiture-structuring-offenses> accessed 7 August 2020; This change in policy was codified in the Clyde-Hirsch-Sowers RESPECT Act, passed as part of the Taxpayer First Act 2019, Pub. L. No. 116-25, 981 Stat. 133, Subtitle C, §1201 amending 31 U.S.C. §5317(c)(2)
[2574] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §13.01[3][e]
[2575] *United States v Sperrazza*, 804 F.3d 1113 (11th Cir. 2015), United States v Six Negotiable Checks in Various Denominations Totaling One Hundred Ninety One Thousand Six Hundred Seventy One Dollars and Sixty Nine Cents, 389 F.2d 813 (E.D. Mich., 2005), *United States v. Ahmad*, 213 F.3d 805, 812–819 (4th Cir.) cert. denied, 531 US 1014 (2000)
[2576] *United States v Tyson Foods Inc*., 2003 WL 21095580, (E.D. Tenn, January 28, 2003). See also, *United States v Two Hundred Fifty-Six Thousand Two Hundred Thirty-Five Dollars and Ninety-Seven Cents* 691 F.2d

commission of an offence.[2577] Most courts use a 'but for test', where the term proceeds encompasses any property the defendant would not have but for the offence,[2578] a test that often captures sums both obtained and retained through tax offences.[2579] Indeed, in *Yusuf,*[2580] the government proceeded on the basis that the court's decision on the interpretation of the term proceeds for the money laundering offences resolved the issue for the purposes of forfeiture.[2581] In cases concerning tax offences, several US courts have held the term proceeds to mean gross receipts, rather than net profits.[2582] In cases comparable to *R v Smith (David Cadman),*[2583] US courts have held that forfeiture should be based on the wholesale value of the cigarettes, not simply the tax evaded.[2584] Other courts have required defendants to forfeit the gross proceeds of an entire conspiracy to commit mail fraud, wire fraud, and money laundering, arising from scheme to traffic untaxed cigarettes.[2585] Following the conclusion of a criminal case, the IRS is able to assess and collect restitution payments,[2586] which will not be taken into account in determining the amount of any forfeiture.[2587] Additionally, while taxes already paid will not be included in any proceeds forfeiture,[2588] forfeited profits derived from contraband,[2589] and even from a lawful business,[2590] cannot be deducted for the purposes of assessing tax liability.

932, fn 3 (N.D. Iowa. 2010), '"proceeds" includes cost-saving measures that allowed Agriprocessors to enjoy a commercial advantage over its competitors that employed a legal work force'.

[2577] *United States v Esquenazi*, 752 F.3d 912, 936 (11th Cir. 2014), *United States v Torres*, 703 F.3d 194, 199-200 (2d Cir. 2012) SM Welsh, 'Financial Tracing in Asset Forfeiture Cases' (2019) 67 United States Attorneys' Bulletin 65, 68

[2578] See for instance, *United States v Horak*, 833 F.2d 1235, 1243 (7th Cir. 1987)

[2579] *United States v Patel*, 949 F.2d 642, 653 (WD Va, 2013) *United States v. Daugerdas*, 2012 WL 5835203, *2-3 (S.D.N.Y. Nov 7, 2012)

[2580] *United States v. Yusuf*, 536 F3d 178 (3d Cir. 2008)

[2581] United States Department of Justice, 'Supreme Court Brief: Yusuf v. United States – Opposition' (Docket Number: 08-981, 2008) <https://www.justice.gov/osg/brief/yusuf-v-united-states-opposition-0> accessed 25 August 2020

[2582] United States v. Hasan, 718 F3d 338, 345–347 (4th Cir. 2013), United States v. Funds From First Regional Bank Account No. XXXXX1859 Held in Name of R K Co., Inc., 639 F.2d 1203 (W.D. Wash, 2009)

[2583] *R v Smith (David Cadman)* [2001] UKHL 68; [2002] 1 WLR 54

[2584] See for instance, *United States v Noorani*, 2006 WL 1759618, (11th Cir. June 28, 2006)

[2585] *United States v. Maddux*, 229 F.3d 591 (E.D. Ky 2017)

[2586] 26 USC §6201(4). An aider and abetter may be ordered to restore the taxes owed by another, see *Bontrager v. Commissioner*, 151 TC No. 12 (2018), L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters 2020) at §12.06[5][a].

[2587] 'Even if MR. Cutillo has ultimately paid more than what he gained from his illegal dealings, however, this Court does not find that the $350,000 forfeiture was an excessive fine in violation of the Eighth Amendment. As the Third Circuit has recently noted, "paying restitution plus forfeiture at worst forces the offender to disgorge a total amount equal to twice the value of the proceeds of the crime […] this is in no way disproportionate to the harm inflicted"', *United States v Three Hundred and Fifty Thousand Dollars*, 1996 WL 706821 (E.D.N.Y 1996)

[2588] *United States v Babich*, 2020 WL 1235536 (D Mass. March 13 2020), see also *United States v Chin* 2018 U.S. Dist. LEXIS 29513

[2589] *Wood v United States*, 2002 WL 31973260, (SD. Fla. December 17, 2002), *King v United States*, 152 F.3d 1200, (9th Cir. 1998), *McNichols v. Commissioner*, 13 F.3d 432 (1st Cir. 1993)

[2590] *Ianniello v Commissioner of Internal Revenue* 98 TC 165 (1992), *Nacchio v. United States*, 824 F3d 1370, 1377–1382 (Fed. Cir. 2016), cert. denied, US, 137 S. Ct. 2239 (2017).

Moreover, in *McCorkle,*[2591] an individual deposited $2million with the IRS for unpaid taxes, but, after this sum was transferred following conviction and forfeiture for money laundering, the IRS was permitted to reassess and collect the full outstanding tax liability.[2592] Although the Excessive Fines Clause has mitigated the impact of some of these forfeitures,[2593] it is limited in application.

Therefore, US forfeiture laws result in tax evaders being deprived of property far in excess of any benefit received from an offence. However, the US recognises these consequences and restricts the use of forfeiture in tax evasion cases. A US DOJ Tax Division Directive provides that forfeiture laws should not be used to deprive individuals of property derived from lawful sources, 'whose only relationship to criminal conduct is the unpaid tax due and owing on the income.'[2594] Moreover, it warns 'Title 18 fraud statutes such as wire fraud and mail fraud cannot be used to convert a traditional Title 26 legal-source income case into a fraud case'.[2595] The IR Manual further provides that Title 18 forfeiture provisions should only be used in 'egregious circumstances', such as, when 'significant assets have been identified', 'IRS civil collection methods cannot adequately protect the assets subject to forfeiture' and 'Title 26 seizure/forfeiture provisions are not applicable.'[2596]

Administrative Forfeiture

An administrative forfeiture process is available for code forfeitures not exceeding $100,000.[2597] Civil money laundering forfeitures may be started using an administrative process, when the property does not exceed $500,000.[2598] Property that can be forfeited includes, but is not limited to, cash and bank accounts,[2599] yet excludes real property.[2600]

[2591] *McCorkle v Commissioner of Internal Revenue* 124 TC 56 (2005)
[2592] Ibid
[2593] See for instance, *United States v. Maddux*, 229 F.3d 591 (E.D. Ky 2017), *United States v. Regan*, 726 F. Supp. 447, 459 (SDNY 1989), 937 F2d 823 (2d Cir. 1991)
[2594] Department of Justice, 'Tax Division Directive No.145 Restraint, Seizure and Forefeiture Policy in Criminal and Tax-Related Investigations and Prosecutions' (30 January 2014) <https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/tax00039.pdf> accessed 12 August 2020
[2595] Ibid
[2596] Internal Revenue Service, 'Internal Revenue Manual, Part 9 Criminal Investigation, Chapter 7 Asset Seizure and Forfeiture, Section 13 Title 26 Seizures for Forfeiture' (May 2012) <https://www.irs.gov/irm/part9/irm_09-007-013> accessed 25 August 2020 at 9.7.13.4.4.2
[2597] 26 USC § 7325.
[2598] 19 USC § 1607(a)(1). There is no threshold if the forfeiture concerns currency or a monetary instrument, which is defined in 31 USC § 5312(a)(3).
[2599] Ibid, see also US Department of Justice Criminal Division, Money Laundering and Asset Recovery Section, 'Asset Forfeiture Policy Manual 2019' <https://www.justice.gov/criminal-afmls/file/839521/download> accessed 28 August 2020, p.82-83
[2600] 18 USC § 985(a)

Administrative forfeiture is available for a wider range of property than in the UK. In the US, approximately 80% of forfeitures are uncontested and dealt with using the administrative process.[2601] In this respect, administrative forfeiture provides 'simpler, quicker, less expensive' method to recover the proceeds of crime.[2602] Nonetheless, while this statistic may be perceived as demonstrating the validity of the forfeitures involved, there is a risk that forfeiture is not being challenged, simply because of the costs and complexity of the process outweigh the value of the property at stake.[2603]

Taxation

The 16th Amendment to the US Constitution enabled Congress to tax 'incomes from whatever source derived',[2604] which led to the passage of the first national income tax.[2605] However, the taxing statute initially only applied to income derived from lawful sources.[2606] Only three years later, this restriction was removed,[2607] and US courts began to recognise the inclusion of some types of unlawful income,[2608] effectively enabling the prosecution of criminals for tax crimes.[2609] US courts have not faced the same problems as their UK counterparts, specifically, the difficulties in ascribing criminal income to a particular schedule or source of income. Instead, US courts initially grappled with the issue of whether money the criminal is obligated to repay may be considered as income.[2610] Early decisions to draw 'fine and somewhat artificial

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[2601] SD Cassella, 'Asset Forfeiture Law in the United States' in C King, C Walker, J Gurulé. (Eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave MacMillan, London, 2018) p.435. 'Among DOJ civil forfeitures, 88 percent took place "administratively."' DM Carpenter II, L Knepper, AC Erickson, J McDonald, *Policing for Profit: The Abuse of Civil Asset* Forfeiture (2nd edn, Institute for Justice 2015) p.5

[2602] *In re: Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 310 (1st Cir. 1988)

[2603] L Suarez, 'Guilty until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense' (2019) 5 Tex A&M J Prop L 1001, 1008, D Pimentel, 'Forfeitures Revisited: Bringing Principle to Practice in Federal Court' (2012) 13 Nevada Law Journal 1, 30

[2604] J Glover, 'Taxing the Proceeds of Crime' (1997) 1(2) JMLC 117, 117

[2605] Revenue Act of 1913, 38 Stat. 114, 166, ch.16, §2. Before this, taxation was 'checkered' and Congress struggled to impose an effective income tax, see SM Wolfe, 'Recovery from Halper: The Pain from Additions to Tax is Not the Sting of Punishment' (1996) 25(1) Hofstra Law Review 162, 168

[2606] Ibid

[2607] Revenue Act of 1916, 39 Stat 757, ch. 463, § 2(a). Congress did not explain the reason behind the amendment, see BI Bittker, 'Taxing Income from Unlawful Activities' (1974) 25 Case Western Law Review 130, 131

[2608] Including, 'gain from illegal prize fight pictures, bribes, misapplied funds of a client by an attorney, lotteries, unlawful insurance policies, protection payments, and ransom money taxable to the receiver' DD Eckhardt, 'Illegal Income as a Defense in Criminal Tax Prosecution (1955) 38(4) Marquette Law Review 262, 263

[2609] *United States v Sullivan*, 274 U.S. 259 (1927)

[2610] C Manolakas, 'The Taxation of Thieves and Their Victims: Everyone Loses But Uncle Sam' (2016) 13 Hastings Bus LJ 31, 34. This caused US courts to determine that funds derived from robbery, burglary and embezzlement were not subject to taxation, see DD Eckhardt, 'Illegal Income as a Defense in Criminal Tax Prosecution (1955) 38(4) Marquette Law Review 262, 263

distinctions' between crimes such as extortion and embezzlement,[2611] holding that only the former was subject to taxation.[2612] These decisions were overruled in *James v United States,*[2613] which confirmed the taxation of income derived from illegal sources, regardless of the crime.[2614] The obligation to submit a tax return in respect of illegal income does not violate the protections afforded by the Fifth Amendment.[2615]

Therefore, the US has subjected income from all illegal sources to taxation for almost 60 years. Owing to this characterisation, the US regularly assess taxes and imposes penalties for tax evaded on illegal income.[2616] As in the UK, the US permits limited deductions to be made from tax assessments for restitution payments,[2617] and expenses, as long as the payment itself is not illegal,[2618] or incurred by a drug trafficking business.[2619] However, the US regularly uses the taxing power to recover more than just the tax evaded on illicit earnings, incorporating substantial penalties.[2620] The US subjects illegal income to taxation on the basis that equity requires parity of treatment between the taxation of legal and illegal earnings.[2621] However, many commentators have vehemently criticised the US approach, on the basis that government claims to property often supersede those of victims.[2622] Additionally, the US approach has been regarded as inflicting double punishment,[2623] permitting prosecution, punishment and assessmentfor tax and penalties.[2624] Nonetheless, US courts have held that the imposition of civil tax penalties following a criminal conviction serves a remedial rather than a punitive

[2611] SM Wolfe, 'Recovery from Halper: The Pain from Additions to Tax is Not the Sting of Punishment' (1996) 25(1) Hofstra Law Review 162, 173
[2612] See for instance, *Commissioner v Wilcox*, 327 U.S. 404 (1946), *Rutkin v United States*, 343 U.S. 130 (1952)
[2613] *James v United States*, 366 U.S. 213 (1961)
[2614] Ibid at 221.
[2615] *United States v Sullivan*, 274 U.S. 259, 263 (1927)
[2616] C Manolakas, 'The Taxation of Thieves and Their Victims: Everyone Loses But Uncle Sam' (2016) 13 Hastings Bus LJ 31, 45
[2617] *James v United States*, 366 U.S. 213, 220 (1961), *Stephens v Commissioner*, 905 F.2d 667, 670 (1990)
[2618] 26 USC § 162(c)
[2619] 26 USC § 280E. The inability to deduct illegal business expenses has been considered as a 'punishment that is applied on arbitrary standards', DA Kahn, H Bromberg, 'Provisions Denying a Deduction for Illegal Expenses and Expenses of an Illegal Business Should be Repealed' (2016) 18(5) Fla. Tax Rev. 207, 233
[2620] The civil fraud penalty is currently equal to 75% of the proportion of the underpayment attributable to fraud, see 26 USC §6663
[2621] SM Wolfe, 'Recovery from Halper: The Pain from Additions to Tax is Not the Sting of Punishment' (1996) 25(1) Hofstra Law Review 162, 176
[2622] D DePass, 'Reconsidering the Classification of Illegal Income' (2013) 66(3) The Tax Lawyer 771, 782
[2623] Ibid at p.780
[2624] See for instance, *United States v Alt*, 83 F.3d 779 (6th Cir. 1996), *Thomas v Commissioner*, 62 F.3d 97 (4th Cir. 1995), *McNichols v. Commissioner*, 13 F.3d 432 (1st Cir. 1993). Indeed, 'if a taxpayer is convicted of criminal charges, the conviction almost certainly will prevent the taxpayer from contesting civil liability for taxes due on the same facts or from contesting assessment of tax fraud penalties' PH Bucy, 'Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves' (1997) 29 Ariz St LJ 639, 702

purpose, and consequently, does not infringe the protections provided by the Fifth or Eight Amendments.[2625]

The US approach to the taxation of illegal income also results in tax evasion charges being 'piggybacked' onto other offences, such as RICO and money laundering offences,[2626] raising concerns regarding over-criminalisation. In addition, the taxation of illegal income also lead to pretextual prosecutions, specifically, the prosecution of notorious criminals for less severe offences, such as tax evasion, owing to the lack of sufficient evidence to secure a conviction for the criminal's substantive offence.[2627] Indeed, the US has used its tax laws to convict a plethora of organised criminals, including suspected racketeers, bootleggers, and even terrorists.[2628] The prosecution of tax offences in the US, is assisted by the methods used to establish a tax deficiency, which is an essential element of most tax offences.[2629] Indirect methods have been frequently used in pretextual prosecutions,[2630] as these methods enable the government to demonstrate the acquisition of illegal income even when books and records are unavailable.[2631] Indirect methods encompass the 'net worth', 'cash expenditures' and 'bank deposits' methods of proof, all of which enable the government to prove its case using circumstantial evidence.[2632]

Ultimately, the taxation of criminal earnings provides the US with a method to address the behaviour of dangerous criminals that could not otherwise be brought to justice.[2633] However,

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[2625] Ibid
[2626] PH Bucy, 'Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves' (1997) 29 Ariz St LJ 639, 669
[2627] DC Richman, WJ Stuntz, 'Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution' (2005) 105 Colum L Rev 583, 583-4
[2628] Including Al Capone, Anthony Accardo, Meyer Harris 'Mickey' Cohen and Meyer Lansky. The US also prosecuted Muhamed Mubayyid for several offences, including tax evasion, to prevent his funding of terrorist activities. See, SD Shimick, 'Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero' (2014) 50 Tulsa L Rev 43, 51
[2629] PH Bucy, 'Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves' (1997) 29 Ariz St LJ 639, 644
[2630] LS Eads, 'From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof' (1991) 79 Cal L Rev 1421, 1426-7
[2631] C Manolakas, 'The Taxation of Thieves and Their Victims: Everyone Loses But Uncle Sam' (2016) 13 Hastings Bus LJ 31, 42-43.
[2632] See generally, Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 5. Investigative Process, Section 9. Methods of Proof' (19 March 2012) <https://www.irs.gov/irm/part9/irm_09-005-009> accessed 1st September 2020
[2633] SD Shimick, 'Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero' (2014) 50 Tulsa L Rev 43, 72

the US fails to adequately consider the impact of this approach on the labelling and signalling functions of the criminal law.[2634]

Powers to Preserve Property and Obtain Information

US law provides LEAs with several powers to facilitate the forfeiture of the proceeds of crime, including powers to seize[2635] and preserve property.[2636] However, a detailed analysis of these powers is beyond the scope of this chapter.

Unexplained Wealth Orders

The US has not introduced UWOs. In 2011, a report was commissioned by the DoJ to investigate the benefits of UWOs.[2637] The report concluded that several key features of UWOs would be controversial, specifically, the targeting of unexplained wealth, without any requirement to demonstrate its connection to a particular criminal offence,[2638] as well as the reverse burden and standard of proof.[2639] This is demonstrated by the criticism preceding CAFRA, which raised the standard of proof for civil forfeiture from the low standard of probable cause; a similar standard to that currently employed in applications for UWOs in the UK.[2640] Nevertheless, although the US has not explicitly enacted UWOs, the US does provide for measures to address unexplained wealth. In particular, the US approach to the taxation of illegal income enables unexplained wealth to be recovered through the application of the tax laws, as well as addressed through prosecutions for tax crimes.[2641] However, while this approach may seemingly provide individuals with greater procedural protections,[2642] the consequences of the US approach to unexplained wealth are much more severe than in the UK.

[2634] DC Richman, WJ Stuntz, 'Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution' (2005) 105 Colum L Rev 583, 597-99

[2635] See for instance, 21 USC § 853(f), 18 USC § 981(b)

[2636] See for instance, 21 USC § 853(e), 18 USC § 983(j)

[2637] Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders' (Report Prepared for the US Department of Justice National Institute of Justice, 31 October 2011) <https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf> accessed 30 August 2020

[2638] Ibid at p.167

[2639] Ibid at p.161

[2640] 'Before the enactment of the CAFRA, federal forfeiture statutes required that the government meet the lower standard of a criminal proceeding, probable cause, which was slightly higher than a mere suspicion that the property constituted proceeds or instrumentality of an offense', ibid.

[2641] In rejecting the need for an illicit enrichment offence in the US, as required by the Inter-American Convention against Corruption, the ABA note 'the net worth method of proof in prosecuting tax evasion cases under 26 U.S.C. § 7201 has been used for years in the Unites States as a recognized means of addressing a form of unjust enrichment' American Bar Association, 'American Bar Association Section of International Law and Practice Report to the House of Delegates: Inter-American Convention Against Corruption' (1997) 31(4) The International Lawyer 1121, 1126

[2642] JR Boles, 'Criminalising the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations' (2014) 17 New York University Journal of Legislation and Public Policy 835, 880

In this respect, the US approach potentially results in not only in the deprivation of property, but also, the deprivation of liberty, simply because individuals are unable to offer a convincing explanation for the source of their wealth.

International Cooperation

US law provides for international cooperation in respect of the forfeiture of the proceeds of crime.[2643] Overseas authorities may seek assistance using formal MLA, for the enforcement of a confiscation or forfeiture judgment.[2644] Furthermore, the US is able to restrain property and commence civil forfeiture actions on behalf of a foreign government,[2645] and regularly repatriates assets,[2646] sharing $257million with 47 countries since 1989.[2647] However, due to the US' technical exclusion of tax evasion from the list of SUAs it has rejected MLA, and extradition requests, in cases involving the laundering of sums associated with tax evasion, instead requiring countries to use tax cooperation agreements.[2648] Nevertheless, cases such as *Pasquantino,*[2649] demonstrate that if any part of the offence took place in the US, the overseas tax offence could be prosecuted, and/or the proceeds forfeited, as part of a domestic wire or mail fraud offence.[2650]

US forfeiture laws enable the US to commence criminal and civil forfeiture actions against property held abroad,[2651] and the US is able to make requests to overseas authorities for assistance in conserving or recovering the property.[2652] Indeed, there only needs to be a minimal connection between the crime and the US to establish US jurisdiction to forfeit

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[2643] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.163

[2644] 28 USC § 2467

[2645] Under 18 U.S.C. § 981(a), see US Department of Justice Criminal Division, 'Asset Forfeiture Policy Manual 2019' <https://www.justice.gov/criminal-afmls/file/839521/download> accessed 18 August 2020, at p.127

[2646] 18 USC § 981(i), 19 USC § 1616a, 21 USC § 881(e)(1)(E), 31 USC § 9705(h)(2)

[2647] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.167

[2648] Ibid at p.165. 'As a general rule, the U.S. cannot disclose to foreign government officials tax information obtained by officers or employees of a Federal agency pursuant to a court order (26 USC §6103(i)), except for tax administration purposes pursuant to a treaty, convention, or information exchange agreement (26 USC §6103(k)(4))', ibid at p.167.

[2649] *Pasquantino v. United States*, 544 US 349, 125 S.Ct. 1766 (2005)

[2650] Ibid

[2651] 21 USC § 853(l), 18 USC § 981(b)(3), 28 USC § 1355(b)(2)

[2652] Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 7. Asset Seizure and Forfeiture, Section 10. International Seizures and Forfeitures' (23 October 2013) <https://www.irs.gov/irm/part9/irm_09-007-010> accessed 18 August 2020, US Department of Justice Criminal Division, 'Asset Forfeiture Policy Manual 2019' <https://www.justice.gov/criminal-afmls/file/839521/download> accessed 18 August 2020, at p.127

assets.[2653] As in the UK, the successful use of this power will depend on the ability and willingness of other countries to recognise US forfeiture orders.[2654] However, the US is often able to act unilaterally against property held overseas, by compelling defendants to repatriate assets.[2655] The US is also able to unilaterally target proceeds held in foreign bank accounts, by forfeiting an equivalent sum from a correspondent or interbank account in the US owned by the relevant foreign FI.[2656] The US has used this power to convince a Swiss bank to transfer over $12million to the IRS, which had previously been held in undisclosed bank accounts set up by a convicted facilitator of tax crimes.[2657] Accordingly, while the US will use money laundering and forfeiture laws to target property connected to tax crimes held overseas, the US is unlikely to enable other jurisdictions to use its laws for this purpose.

5.5.5 Forfeiture of the Proceeds of Tax Crime

The US recovers significant sums through forfeiture, with over $2.2billion deposited into the Asset Forfeiture Fund.[2658] Unfortunately, the US does not publish a statistical breakdown according to the underlying offence.[2659] Consequently, it is unclear what proportion of this sum represents the forfeiture of property associated with tax crime. Some insight into the use of forfeiture in tax cases may be gleaned from the awards made to whistleblowers who assist the IRS in the detection, trial and punishment of those who violate the internal revenue laws.[2660] This is because the awards entitle whistleblowers to be paid a percentage of any proceeds collected.[2661] In 2019, whistleblowers were paid a percentage of $616,773,127, of which

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[2653] RW Henoch, BJA Sauter, 'Innocent Foundations Beware: The US Government's Far-Reaching Power of Civil Asset Forfeiture, and What Innocent Foundations and Other Fiduciaries Need to Know to Prepare' (2016) 22(6) T&T 605, 609

[2654] US Department of Justice Criminal Division, 'Asset Forfeiture Policy Manual 2019' <https://www.justice.gov/criminal-afmls/file/839521/download> accessed 18 August 2020, at p.127

[2655] 21 USC § 853(e)(4)

[2656] 18 USC § 981(k)

[2657] *United States v Approximately $12,000,000 in US Currency*, 14-cv-2460 (SDNY 8 April 2014), see RW Henoch, BJA Sauter, 'Innocent Foundations Beware: The US Government's Far-Reaching Power of Civil Asset Forfeiture, and What Innocent Foundations and Other Fiduciaries Need to Know to Prepare' (2016) 22(6) T&T 605, 609

[2658] United States Department of Justice, 'FY2019 Asset Forfeiture Fund Reports to Congress' <https://www.justice.gov/afp/fy2019-asset-forfeiture-fund-reports-congress> 30 August 2020

[2659] Ibid; see also FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.76

[2660] Under 26 USC § 7623(b)

[2661] *Whistleblower 21276 v 13W*, 147 T.C. at 139-140. The decision was codified with an amendment to 26 USC § 7623(c) in 2018. The section now defines proceeds to include 'penalties, interest, additions to tax, and additional amounts provided under the internal revenue laws', as well as 'any proceeds arising from laws for which the Internal Revenue Service is authorized to administer, enforce, or investigate, including criminal fines, civil forfeitures and violations of reporting requirements'. See, SW Carman, 'More Cheese for the Rats: Tax

$110,003,100 related to criminal fines, civil forfeitures, and violations of reporting requirements, and $506,770,027 to Title 26 violations.[2662] Although proceeds relating to whistleblower awards only represent a small sample of the sums recovered by the US following tax crimes,[2663] they provide an illustration of the role of forfeiture in this endeavour; while traditional mechanisms are more widely used, the money laundering and RICO forfeiture provisions play a secondary role, addressing some of the most egregious cases.

Owing to the lack of available data, it is impossible to determine the effectiveness of US forfeiture provisions in addressing tax crimes. However, US enforcement policies restricting the use of forfeiture for this purpose will undoubtedly ensure that US forfeiture laws will not provide the same benefits as their UK equivalents. Nonetheless, although US forfeiture laws may not be as effective in addressing this financial crime, they are arguably more appropriate. This is because forfeiture laws not only eradicate many of the procedural protections afforded to an accused during a criminal trial, but also, result in excessive punishment, through the deprivation of property far in excess of any sum the defendant benefited from, or even obtained, through the commission of the offence. In this respect, the traditional mechanisms used to recover evaded taxation are more appropriate for this purpose.

5.5.6 Beneficial Ownership

The US recognises the role of opaque legal structures and arrangements in facilitating financial crimes, such as money laundering, terrorism financing and tax evasion,[2664] and, since 2007, all US States have prohibited bearer shares.[2665] The Treasury found that legal entities were involved in a 'substantial proportion' of IRS cases involving tax evasion and fraud from 2016-2019.[2666] Nevertheless, the US has long been regarded as only partially compliant, or non-compliant with the FATF Recommendations pertaining to BO.[2667] According to the World

Court and Congress Give Big Win to Whistleblowers with Broad Definition of Proceeds' (2018) 83 Mo L Rev 155, 161

[2662] Internal Revenue Service, 'Internal Revenue Service Progress Update: Fiscal Year 2019 Putting Taxpayers First' (January 2020) <https://www.irs.gov/pub/irs-pdf/p5382.pdf> accessed 30 August 2020, p.21

[2663] Not all tax investigations will be initiated or supported by the assistance of a whistleblower. Of those that are, awards are only mandatory when the proceeds involved exceed $2million, 26 USC § 7623(b)(5).

[2664] United States Department of the Treasury, 'National Strategy for Combating Terrorist and other Illicit Financing 2020' (6th February 2020) <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf> accessed 12 August 2020, p.13

[2665] Tax Justice Network, 'Financial Secrecy Index 2020: Narrative Report on United States of America' (18 February 2020) < https://fsi.taxjustice.net/PDF/UnitedStates.pdf> accessed 18 August 2020, at p.7

[2666] Ibid at p.14

[2667]FATF, 'Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America' (23 June 2006) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf> accessed 4 august

Bank, the US was found to be the 'worst performer' in ascertaining and verifying the identity of clients seeking incorporation services.[2668] This is because companies are formed at state level, yet states only require the provision of minimal information to establish a company.[2669] Not one US state requires identification of BOs.[2670] In addition, this omission has not been rectified by the CDD obligations contained within the US AML framework. As seen above, the US AML framework has limited application to DNFBPs.[2671] Moreover, until 2018, FIs were only required to identify BOs of accounts in limited circumstances.[2672] In a tax evasion context, this persistent weakness of the AML framework is somewhat alleviated by IRS reporting requirements, which require the identification of those responsible for certain legal entities and arrangements. However, the reporting requirements are regarded as ineffective and information obtained by the IRS is often inaccessible to other LEAs.[2673] Consequently, several attempts have been made to improve the availability and accessibility of BO information in the US.

Companies

2020, at p.226-239; FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.22-28; FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating' (March 2020) <http://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-United-States-March-2020.pdf > accessed 4 August 2020, at p.8.

[2668] E van der Does de Willebois, AM Halter, RA Harrison, J Won Park, JC Sharman, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to do About It* (The World Bank 2011) p.92

[2669] Often less information than required to obtain a library card, Global Financial Integrity, 'The Library Card Project: The Ease of Forming Anonymous Companies in the United States' (March 2019) <https://www.gfintegrity.org/wp-content/uploads/2019/03/GFI-Library-Project_2019.pdf> accessed 17 August 2020

[2670] Ibid

[2671] Transparency International, 'Beneficial Ownership Transparency Country Report: United States' (2015) <https://www.transparency.org/files/content/publication/2015_BOCountryReport_US.pdf> accessed 17 August 2020, p.3

[2672] 31 CFR § 1010.610(b)(1)(iii) & 31 CFR § 1010.620(b). However, the FATF notes that 'in practice, many FIs do collect (although the do not verify) such information in certain circumstances based on joint regulatory guidance issued in March 2010' FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.158

[2673] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.224

In 2016,[2674] FINCEN issued a CDD Rule requiring FIs[2675] to identify the BO of legal entities[2676] that open new accounts.[2677] The term BO has a similar meaning as that employed in the UK, using a similar threshold and encompassing both an ownership and control prong.[2678].[2679] Given the risks posed by opaque legal entities in facilitating and concealing tax evasion offences, the Rule will have a positive impact on the US' ability to combat this financial crime. However, this impact will only be modest as the rule is widely regarded as ineffective by both those who support and oppose enhanced CDD obligations.[2680] This is because the CDD requirements only apply to new accounts,[2681] and the extent to which BO information should be updated is unclear.[2682] Additionally, the definition of BO is problematic, in that, the threshold under the ownership prong is too high[2683] and the control prong may encompass individuals who are merely nominees.[2684] Moreover, although FIs need to verify the identity of the purported

[2674] Financial Crimes Enforcement Network, 'Customer Due Diligence Requirements for Financial Institutions' (2016) 81 Fed Reg 29, 397. The rule came into force on 11 May 2018.
[2675] As defined in 31 CFR § 1010.230(f) & § 1010.605(e)(1)
[2676] A legal entity 'means a corporation, limited liability company, or other entity that is created by the filing of a public document with a Secretary of State or similar office, a general partnership, and any similar entity formed under the laws of a foreign jurisdiction that opens an account' 31 CFR § 1010.230(e)(1), unless excluded under 31 CFR § 1010.230(e)(2).
[2677] 31 CFR § 1010.230(a)&(b)
[2678] PD Hardy, S Michel, F Murray, 'Is the United States Still a Tax Haven: The Government Acts on Tax Compliance and Money Laundering Risks' (2016) 18 J Tax Prac & Proc 25, 27. Specifically, a beneficial owner is any individual who directly, or indirectly, owns 25% or more of the equity interests in the entity, and the 'single individual with significant responsibility to control, manage, or direct a legal entity customer' 31 CFR § 1010.230(d)(1). Including, 'An executive officer or senior manager (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer)' or 'any other individual who regularly performs similar functions.' 31 CFR § 1010.230(d)(2)
[2679] Including, 'An executive officer or senior manager (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer)' or 'any other individual who regularly performs similar functions.' 31 CFR § 1010.230(d)(2)
[2680] See for instance, 'Letter from Carl Levin, Chairman of the Permanent Subcommittee on Investigations, to Jennifer Skasky Calvery, Director of the Financial Crimes Enforcement Network, RE: Customer Due Diligence Requirements for Financial Institutions' (10 December 2014) <https://www.regulations.gov/document?D=FINCEN-2014-0001-0141> accessed 17 August 2020; 'Letter from Robert G Rowe III, Vice President & Associate Chief Counsel, Regulatory Compliance American Bankers Association, Tod R Burwell, President & Chief Executive Officer BAFT to the Financial Crimes Enforcement Network' (3 October 2014) <https://www.regulations.gov/document?D=FINCEN-2014-0001-0133> accessed 17 August 2020
[2681] 31 CFR § 1010.230(b)(1), Financial Crimes Enforcement Network, 'Customer Due Diligence Requirements for Financial Institutions' (2016) 81 Fed Reg 29, 404
[2682] AS Coto, 'Customer Due Diligence: FinCEN and the Beneficial Ownership Requirement for Legal Entity Customers' (2016) 20 North Carolina Banking Institute 145, 158
[2683] As discussed above, at p. , tax evaders can dilute their ownership interests to avoid reaching this threshold. See also, JA Cassara, 'Countering International Money Laundering: Total Failure is "Only a Decimal Point Away"' (Fact Coalition, August 2017) < https://thefactcoalition.org/wp-content/uploads/2019/12/Countering-International-Money-Laundering-Report-August-2017-FINAL.pdf> accessed 17th August 2020, at p.22
[2684] 'Letter from Carl Levin, Chairman of the Permanent Subcommittee on Investigations, to Jennifer Skasky Calvery, Director of the Financial Crimes Enforcement Network, RE: Customer Due Diligence Requirements for Financial Institutions' (10 December 2014) <https://www.regulations.gov/document?D=FINCEN-2014-0001-0141> accessed 17 August 2020, p.2; International Monetary Fund, 'IMF Country Report No. 15/174 United States Financial Sector Assessment Program Anti-Money Laundering and Combating the Financing of

BO,[2685] FIs are not required to verify that individual's status as a BO,[2686] which may lead to the collection of inaccurate information. For these reasons, the Rule does not bring the US into full compliance with the BO requirements of the international AML framework.[2687]

The Rule is intended to provide several benefits, including, enhancing both the quality and quantity of investigations for financial crimes,[2688] as well as resulting prosecutions and asset recovery actions.[2689] In addition, the Rule is intended to assist tax compliance in the US, by revealing the true owners of assets,[2690] as well as in foreign countries, through the implementation of FATCA on a reciprocal basis.[2691] The Treasury predicts that these benefits will outweigh the substantial costs imposed on FIs of approximately $1-2billion over ten years,[2692] by decreasing criminal activity by at least 0.6%.[2693] However, the UK's PSC Register demonstrates that these benefits are unlikely to be realised without adequate verification and monitoring systems in place. Besides, even if the CDD Rule were effective, the Rule only applies to FIs,[2694] which means that legal entities that do not obtain bank accounts will be excluded from scope.[2695] Accordingly, several attempts have been made to introduce a BO register in the US.

Senator Carl Levin has attempted to introduce legislation requiring the collection of BO information since 2006,[2696] introducing the Incorporation Transparency and Law Enforcement Assistance Act several times from 2008-2013, which would have required states to obtain BO

Terrorism (AML/CFT) – Technical Note' (July 2015) <https://www.imf.org/external/pubs/ft/scr/2015/cr15174.pdf> accessed 17 August 2020, at p.11.

[2685] 31 CFR § 1010.230(b)(2)

[2686] 'Provided that it has no knowledge of facts that would reasonably call into question the reliability of such information', ibid.

[2687] International Monetary Fund, 'IMF Country Report No. 15/174 United States Financial Sector Assessment Program Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) – Technical Note' (July 2015) <https://www.imf.org/external/pubs/ft/scr/2015/cr15174.pdf> accessed 17 August 2020, at p.11. This is implied by FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating' (March 2020) <http://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-United-States-March-2020.pdf > accessed 4 August 2020, at p.8.

[2688] Financial Crimes Enforcement Network, 'Customer Due Diligence Requirements for Financial Institutions' (2016) 81 Fed Reg 29, 400

[2689] Ibid at p.443

[2690] Ibid

[2691] Ibid at p.401. The Rule is intended to assist in closing a loophole which allows individuals to avoid FATCA by holding accounts through an entity resident in the US, see Chapter 4, p.

[2692] Ibid at p.434

[2693] Ibid at p.446

[2694] As defined in 31 CFR § 1010.230(f) & § 1010.605(e)(1)

[2695] M Read Moore, *A New World Order for Estate Planners (Or Why Is It So Hard to Open A Bank Account?)* (American Law Institute Continuing Legal Education, 2017) at A.2

[2696] Ibid at E.1.b

information.[2697] The Bill also would have amended the BSA to require those providing incorporation services to comply with AML obligations, including lawyers when engaged in such activities.[2698] The Bill was consistently opposed.[2699] A plethora of legislation has since been introduced, all of which aims to create a repository of BO information pertaining to legal entities at the state or federal level.[2700] In 2017, the Corporate Transparency Act was introduced, which would require companies to disclose their BOs to FINCEN, unless states put an incorporation system in place that requires the disclosure and updating of BO information.[2701] However, the Bill would have been futile in combatting tax evasion, for the Bill provided that the information should not be disclosed to the IRS.[2702] The Bill was reintroduced in 2019.[2703] Some argue that a BO register is unnecessary in the US because the IRS already obtains this information.[2704] However, this is untrue. All legal entities in the US must register for an Employee Identification Number (EIN) if they have income, employees, or wish to open a bank account.[2705] While the entity must identify a 'responsible party' to obtain an EIN,[2706] this is not equivalent to identifying a BO.[2707] Additionally, no penalties are imposed

[2697] Incorporation Transparency and Law Enforcement Assistance Act of 2008 (ITLEAA), Senate Bill 2956 (110th Cong., 2d Sess.); ITLEAA of 2011, Senate Bill 1483 (112th Cong., 1st Sess.); ITLEAA of 2013, Senate Bill 1465 (113th Cong., 1st Sess.). After Senator Carl Levin retired, several legislators continued to reintroduce the ITLEAA, with little success, ibid.
[2698] Ibid
[2699] Including the National Association of Secretaries of State and the ABA. National Association of Secretaries of State, 'Company Formation Task Force: Report and Recommendations on Assisting Law Enforcement in Fighting the Misuse of Corporate Entities' (September 2012) <https://www.nass.org/sites/default/files/surveys/2017-08/report-nass-company-formation-task-force-092112.pdf> accessed 17 August 2020; 'Letter from Paulette Brown, President of the American Bar Association, to Chairman Fitzpatrick and Ranking Member Lynch of the Task Force to Investigate Terrorism Financing, Committee on Financial Services, RE: Today's Hearing on "Stopping Terror Finance: A Coordinated Government Effort" and Concerns Over H.R. 4450, the "Incorporation Transparency and Law Enforcement Assistance Act," and Other Similar Legislation' (24 May 2016) <https://amlawdaily.typepad.com/0000brownletter.pdf> accessed 17 August 2020
[2700] See recently, H.R.2513 - Corporate Transparency Act of 2019 (116th Cong., 1st Sess.), S.2563 - ILLICIT CASH Act of 2019 (116th Cong., 1st Sess.), S.1889 - TITLE Act (116th Cong., 1st Sess.).
[2701] H.R.3089 - Corporate Transparency Act of 2017 (115th Cong., 1st Sess.)
[2702] Ibid, § 3(a)(1), inserting 31 USC §5333(a)(3)
[2703] H.R.2513 - Corporate Transparency Act of 2019 (116th Cong., 1st Sess.)
[2704] See for instance, National Association of Secretaries of State, 'Company Formation Task Force: Report and Recommendations on Assisting Law Enforcement in Fighting the Misuse of Corporate Entities' (September 2012) <https://www.nass.org/sites/default/files/surveys/2017-08/report-nass-company-formation-task-force-092112.pdf> accessed 17 August 2020, p.7
[2705] 26 USC § 6109(a)(1)(ii)(C) & § 6109(b), 26 CFR § 301.6109-1, 31 CFR 1020.220(a)(1)(i)(A)(4).
[2706] An EIN is obtained using Form SS-4 - Application for Employer Identification Number, which requires the identification of a 'responsible party', Internal Revenue Service, 'Form SS-4 - Application for Employer Identification Number' (Revised December 2019) <https://www.irs.gov/pub/irs-pdf/fss4.pdf> accessed 17 August 2020
[2707] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.224

for failing to update this information.[2708] Further, some legal entities are not even required obtain an EIN,[2709] although this obligation has recently been extended to foreign-owned 'disregarded entities'.[2710] Domestic foreign-owned corporations and disregarded entities must report their BOs to the IRS.[2711] However, there are few equivalent measures for domestic legal entities wholly owned by US citizens.[2712]

The lack of BO information has led to the introduction of measures targeting real estate transactions. The BSA provides FINCEN with the power to issue Geographic Targeting Orders (GTOs) requiring any FI or DNFBP in a certain area to undertake additional recordkeeping and reporting obligations.[2713] GTOs have long been used to target drug offences,[2714] but, since 2016, FINCEN has used GTOs to target real estate purchases.[2715] The most recent GTO requires US title insurance companies to identify the BOs of companies purchasing real estate exceeding $300,000 in eleven areas in the US.[2716] The GTOs have been effective, revealing transactions conducted by individuals who have already been the subject of SARs,[2717] and

[2708] Aside from the 'non-receipt of a deficiency notice or tax demand notice from the IRS', ibid at p.158
[2709] 'Private companies formed to hold land have no need to register with either the SEC or IRS. An EIN is also not required for a company that does not have a bank account with a U.S. FI or that does not have income, employees or is otherwise not required to file any documents with the IRS'. FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.158
[2710] Internal Revenue Service, 'Treatment of Certain Domestic Entities Disregarded as Separate From Their Owners as Corporations for Purposes of Section 6038A "including foreign-owned single-member limited liability companies (LLCs)"' (2016) 81 FR 898 49, 26 USC § 6038A, 26 CFR §§ 1.6038A-2 & 3
[2711] 26 USC §§ 6038A & C, 26 CFR §1.6038A-1(c)(1); 26 CFR § 301.7701-2(c)(2)(vi).
[2712] For instance, publicly traded companies that list securities on a US stock exchange, or otherwise offer securities to the public, must report the beneficial ownership of persons that hold certain classes and percentages of securities, FATF, 'Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America' (23 June 2006) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf> accessed 4 august 2020, at p.226.
[2713] 31 USC §5326(a), 31 CFR §1010.370. This power was introduced in the Anti-Drug Abuse Act of 1988, P.L. 100-690, Tit. VI, §6185(c), 102 Stat. 4355.
[2714] L White, 'The Anti-Money Laundering Complex in the Modern Era' (2016) 133(10) The Banking Law Journal 1, 20
[2715] RS Miller, LW Rosen, 'Beneficial Ownership Transparency in Corporate Formation, Shell Companies, Real Estate, and Financial Transactions' (Congressional Research Service, 8 July 2019) <https://fas.org/sgp/crs/misc/R45798.pdf> accessed 17 August 2020, at p.10; Financial Crimes Enforcement Network, 'FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami' (13 January 2016) <https://www.fincen.gov/news/news-releases/fincen-takes-aim-real-estate-secrecy-manhattan-and-miami> accessed 17 August 2020
[2716] Boston; Chicago; Dallas-Fort Worth; Honolulu; Las Vegas; Los Angeles; Miami; New York City; San Antonio; San Diego; San Francisco; and Seattle. Financial Crimes Enforcement Network, 'FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas' (8 May 2020) <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-1> accessed 17 August 2020
[2717] United States Department of the Treasury, 'National Strategy for Combating Terrorist and other Illicit Financing 2020' (6th February 2020) <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf> accessed 12 August 2020, p.16

decreasing the use of shell companies in cash real-estate purchases.[2718] However, criminals can easily circumvent the GTO disclosure requirements, for instance, by failing to purchase title insurance.[2719] In addition, GTOs only apply to a certain area, for a limited period of time.[2720] The Treasury also has the power to require FIs to take special measures, if reasonable grounds exist for concluding that a foreign jurisdiction or FI, classes of transactions involving foreign jurisdictions or certain types of accounts, are 'of primary money laundering concern'.[2721] The special measures may involve requiring FIs to collect BO information.[2722] However, this specific measure has never been imposed.[2723]

In 2020, the US finally took action to introduce a BO register via the Corporate Transparency Act.[2724] The Act requires US companies to file reports with FINCEN, identifying their BOs.[2725] The Act is a positive step, which will allow US authorities to identify the BOs behind US shell companies used to comit financial crimes, including tax evasion. The US register adopts a similar 25% threshold to the UK, but will not be available to the public.[2726] It is unclear whether the obligations extend to trusts and partnerships, which would otherwise be a significant loophole.[2727]

Trusts

[2718] One study found a 70% reduction in such purchases after the first GTO, S Hundtofte, V Rantala, 'Anonymous Capital Flows and U.S. Housing Markets' (University of Miami Business School Research Paper No. 18-3, 28 May 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186634> accessed 17 August 2020

[2719] United States Department of the Treasury, 'National Strategy for Combating Terrorist and other Illicit Financing 2020' (6th February 2020) <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf> accessed 12 August 2020, p.18

[2720] For instance, the latest GTO only applies to 12 Metropolitan Areas until 5 November 2020, Financial Crimes Enforcement Network, 'FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas' (8 May 2020) <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-1> accessed 17 August 2020

[2721] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Public Law 107-56, 115 Stat. 272, § 311, 31 USC § 5318A

[2722] 31 USC § 5318A(b)(2)

[2723] RS Miller, LW Rosen, 'Beneficial Ownership Transparency in Corporate Formation, Shell Companies, Real Estate, and Financial Transactions' (Congressional Research Service, 8 July 2019) <https://fas.org/sgp/crs/misc/R45798.pdf> accessed 17 August 2020, at p.10

[2724] Corporate Transparency Act 2020, enacted as part of the National Defense Authorization Act of 2021, Public Law 116-283, HR 6395—1217, §6401-6403

[2725] Ibid

[2726] A Knobel. 'The US Beneficial Ownership Law has Its Weaknesses, but It's a Seismic Shift' (Tax Justice Network, 20 January 2021) <https://www.taxjustice.net/2021/01/20/the-us-beneficial-ownership-law-has-its-weaknesses-but-its-a-seismic-shift/> accessed 26th April 2021

[2727] Ibid

This is because there are no specific legal provisions requiring the disclosure of the BOs of trusts and other legal arrangements.[2728] Trusts are governed by state statute or common law, which imposes fiduciary duties on trustees.[2729] These duties may include record keeping obligations, but do not typically extend to identifying the BOs of the trust.[2730] Accordingly, while LEAs have the power to compel information from trustees, this information may not be available.[2731] In addition, US law does not oblige trustees to disclose their status, often leaving FIs and LEAs unable to identify trustees.[2732] As with legal entities, trusts are required to obtain an EIN.[2733] Additionally, trust income must be reported to the IRS using Form 1041, which must include the tax identification number and name of every beneficiary that has received a distribution.[2734] The UK demonstrates that a register of the BOs of trusts could be valuable in monitoring compliance with IRS reporting requirements. However, as noted above, it is unclear whether the Corporate Transparency Act will apply to trusts, and if it does, this information will not be available to the public.[2735]

The US approach affords greater protection to privacy and data protection; issues that have plagued the introduction of BO registers in Europe. However, the US refusal to enable LEAs, including the IRS, to access concerning the BO of legal entities and arrangements hindered efforts to combat financial crime. Indeed, the role of legal entities in tax offences has been persistently demonstrated by the US Government's own research.[2736] The US position also appeared hypocritical, considering its vocal opposition to the tolerance of opaque structures in offshore jurisdictions.[2737] In this respect, the Corporate Transparency Act is a positive

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[2728] Transparency International, 'Beneficial Ownership Transparency Country Report: United States' (2015) <https://www.transparency.org/files/content/publication/2015_BOCountryReport_US.pdf> accessed 17 August 2020, p.2

[2729] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.226

[2730] Ibid at p.227

[2731] Ibid.

[2732] Ibid.

[2733] FATF, 'Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America' (23 June 2006) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf> accessed 4 august 2020, at p.238

[2734] Ibid

[2735] A Knobel. 'The US Beneficial Ownership Law has Its Weaknesses, but It's a Seismic Shift' (Tax Justice Network, 20 January 2021) <https://www.taxjustice.net/2021/01/20/the-us-beneficial-ownership-law-has-its-weaknesses-but-its-a-seismic-shift/> accessed 26th April 2021

[2736] United States Department of the Treasury, 'National Strategy for Combating Terrorist and other Illicit Financing 2020' (6th February 2020) <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf> accessed 12 August 2020, p.13

[2737] See chapter three. See for instance, US Senate Permanent Subcommittee on Investigations, *Tax Haven Abuses: The Enablers, The Tools and Secrecy* S.Hrg. 109-797 (1 August 2006); US Senate Permanent

development, which balances the US desire to protect the rights of its citizens, while investigating and preventing the facilitation of financial crimes through legal entities. However, important questions remain about its scope.

US Overseas Territories

In contrast to the UK, the US has faced less criticism in regards to its responsibility for the role of its OTs in facilitating financial crime. This is because these criticisms are directed at the US itself, particularly, certain US states such as Delaware, Nevada and Wyoming, which provide incorporation services that 'rival those offered in some of the most notorious offshore tax and financial secrecy havens'.[2738] The US inability to obtain accurate information concerning the BOs of legal entities and arrangements will be diffused to the legal system of its OTs. This is because, 'the same AML/CFT legal framework that applies to the continental US also generally applies to US territories'.[2739]

Bank Accounts

The US has introduced an Enhanced CDD Rule requiring FIs to identify the BOs of accounts held by legal entities.[2740] However, unlike the UK, the US has not introduced a central automated mechanism for requesting this information from FIs, relying instead on traditional investigatory powers.[2741] This contrasts with the position held in respect of foreign accounts, which will be reported under FATCA.[2742] In addition, the US requires US persons to self-report interests in foreign accounts, the value of which exceeds $10,000.[2743] As in the UK, it is

Subcommittee on Investigations, *Tax Haven Banks and US Tax Compliance* S.Hrg. 110-614 (17 and 25 July 2008)

[2738] Senator Norm Coleman, cited in Tax Justice Network, 'Financial Secrecy Index 2020: Narrative Report on United States of America' (18 February 2020) < https://fsi.taxjustice.net/PDF/UnitedStates.pdf> accessed 18 August 2020, at p.7

[2739] Indeed, the US has objected to the EU's categorisation of some of its territories as 'significant threats' to the EU financial system on this basis, US Department of the Treasury, 'Treasury Statement on European Commission List of Jurisdictions with Strategic AML/CFT Deficiencies' (13 February 2019) <https://home.treasury.gov/news/press-releases/sm610> accessed 17 August 2020

[2740] Financial Crimes Enforcement Network, 'Customer Due Diligence Requirements for Financial Institutions' (2016) 81 Fed Reg 29, 397. The rule came into force on 11 May 2018.
31 CFR § 1010.230(a)&(b)

[2741] FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Mutual Evaluation Report (December 2016) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf> accessed 4 August 2020, at p.239. FinCEN has the power to request FIs to search its records for accounts associated with a particular individual or transaction, but it must have 'credible evidence' that the individual has engaged in terrorist activity or money laundering, see Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Public Law 107-56, 115 Stat. 272, § 314(a), 31 CFR § 1010.520.

[2742] See ch. 4, pp.

[2743] 31 U.S.C § 5314, 31 CFR §1010.350

difficult to determine the rationale for the discrepancy in the treatment between onshore and offshore accounts.

5.6 Comparison of the UK and US AML Frameworks

Both the UK and US have introduced extensive measures to combat money laundering. However, in contrast to the UK, the US excludes tax evasion from the list of SUAs for money laundering purposes, theoretically preventing the use of money laundering offences to address tax crimes. However, tax evasion may be prosecuted as a money laundering offence and sums associated with the evasion forfeited using this framework, when the underlying activity is characterised as wire or mail fraud. This approach is only used for egregious cases, and US policy largely prevents the application of money laundering offences and forfeiture provisions to ordinary tax evasion offences. In this respect, the US fails to obtain many of the benefits that the UK has gained from including all tax offences within the scope of its AML framework. However, while the US approach may be less effective in combatting tax evasion, it is arguably more appropriate. This is because money laundering and asset recovery laws in both jurisdictions erode traditional criminal procedural safeguards leading to a failure to adhere to fundamental legal principles in theory, as well as harsh and arguably unjust outcomes for defendants in practice. The application of money laundering and asset recovery laws to tax offences has resulted in excessive punishment through the imposition of different convictions for the same conduct and/or the deprivation of property far in excess of the defendant's benefit from crime. Until money laundering and forfeiture laws are applied on a more principled basis, the US is sensible to restrict the application of these laws to this financial crime. Nevertheless, like its UK counterpart, the US makes use of the tools and intelligence provided by the AML framework for the purposes of investigating this financial crime. The US could enhance the use of the AML framework for this purpose, by providing the IRS with unrestricted access to SARs and improving laws pertaining to the disclosure of the BO of legal entities and arrangements.

5.7 Conclusion

This chapter has demonstrated that both the UK and US apply the AML framework to the proceeds of tax evasion, for the purposes of detecting and addressing this financial crime. The UK AML framework demonstrates the benefits of including tax evasion as a predicate offence to laundering, specifically, the provision of an additional offence to criminalise the evasion of taxation, as well as those who facilitate this offence. Additionally, the application of the AML

framework to tax offences generates vast amounts of intelligence for law enforcement authorities, which can be used to initiate or support investigations into this offence, leading to the recovery of significant sums in evaded taxation and penalties. Moreover, confiscation, recovery and forfeiture tools have obtained significant sums for tax authorities. However, the UK also demonstrates the problems inherent in applying the AML framework to this financial crime, including conceptual and practical obstacles that generate significant costs for those convicted of this crime, as well as the regulated sector and law enforcement agencies. At the same time, the US demonstrates that the failure to include tax evasion as a predicate offence to laundering might not render the legal framework ineffective, but rather, may represent a conscious choice to combat this financial crime through a more appropriate legal framework.

Chapter 6 – Tax Evasion Legislation in the UK and US

6.1 Introduction

This chapter provides a critical comparison of the laws pertaining to tax evasion in the UK and US. This chapter identifies the criminal offences used to address tax evasion, both of common law and statutory creation, and provides a doctrinal, or internal,[2744] assessment of their effectiveness in combatting this financial crime. This section considers general and specific tax offences and the approach taken to attributing liability to corporations. In furtherance of the overarching aim of this thesis, the final part of the chapter compares the legal frameworks pertaining to tax evasion in each jurisdiction. Ultimately, this chapter provides the foundation for the external evaluation of the law pertaining to tax evasion in the UK and US, examining the law as it operates in practice, which will be conducted in chapter seven.

6.2 The Legal Framework Pertaining to Tax Evasion in the UK

6.2.1 Introduction

The UK uses a plethora of common law and statutory offences to combat tax evasion. Some of these offences are general offences whereas other offences are more specific, applying only in the context of taxation, or often only to certain taxes.[2745] This section provides an evaluation of the relevant laws in the UK, examining both individual and corporate liability.

6.2.2 Tax Evasion Offences

Cheating the Public Revenue

The common law offence of cheating the public revenue has been established for many centuries,[2746] and, unlike other common law cheats,[2747] survived abolition upon the enactment of the Theft Act 1968.[2748] This was because the revenue authorities believed that the statutory

[2744] See ch 2, pp.
[2745] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.41-46
[2746] 'The common law offence of cheating the revenue would seem to have existed at least, c 1113, long pre-dating modern income tax law (dating from 1798)', G McBain, 'Modernising the Common Law Offence of Cheating the Public Revenue' (2015) 8(1) J Pol & L 40, 76
[2747] Ibid at p.40, see also D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 628
[2748] The offence of cheating the public revenue was expressly preserved in the Theft Act 1968, s.32(1)(a), despite the recommendation of the Criminal Law Revision Committee in its *Eighth Report: Theft and Related Offences* (Cmnd. 2977, 1966)

offences were insufficient to deal with tax crimes.[2749] The offence is considered 'the most important weapon in the Revenue's armoury to deal with those who seek to evade their tax liability'.[2750] It is the most heavily utilised direct tax offence.[2751] This is attributed to the broad scope of the offence, encompassing the evasion of most taxes, through a wide range of acts and omissions,[2752] both by the individual concerned as well as any facilitators.[2753] This in turn enables prosecutors to avoid selecting inappropriate charges in tax prosecutions by charging this expansive offence.[2754] Additionally, the offence carries significantly higher penalties than prescribed for most statutory offences; as a common law offence, the maximum penalty is an unlimited fine or life imprisonment.[2755]

The first modern case to recognise the offence was *R v. Hudson,*[2756] where the court held that making false statements or sending false documents with fraudulent intent to the inspector of taxes constituted the offence of cheating the public revenue.[2757] In *R v Mavji,*[2758] the court held that the offence also captures omissions.[2759] In *R v Hunt,*[2760] the court held that cheating can be a 'conduct offence' and consequently there is no need to prove any resultant loss to the revenue.[2761] The key features of the offence were summarised in *R v Less*;[2762]

> The common law offence of cheating the public revenue does not necessarily require a false representation either by words or conduct. Cheating can include any form of fraudulent conduct which results in diverting money from the revenue and in depriving the revenue of the money to which it is entitled. It has, of course, to be fraudulent conduct. That is to say, deliberate conduct by the defendant to prejudice, or to take the

[2749] M Pigott, 'Cheating the Public Revenue' [1987] Crim LR 39, 40
[2750] G Virgo, 'Cheating the Public Revenue' (2000) 59(1) CLJ 42, 44
[2751] J Collins, 'Large Corporates and Disclosure – Beware "Cheating the Revenue"' [2016] Tax Journal 8, 8
[2752] See generally, D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627
[2753] Several facilitators have been prosecuted for this offence, see for instance, *R v Whitson-Dew and Richards* [2019] EWCA Crim 2131; [2020] 1 Cr. App. R. (S.) 56, *R v Lunn* [2017] EWCA Crim 34; [2017] 4 W.L.R. 214, *R v Kumar* [2005] EWCA Crim 1979; [2006] Crim. L.R. 271, *R v Dimsey and Allen* [2000] Q.B. 744 (CA), *R v Charlton* [1996] STC 1418 (CA)
[2754] JH Howard, 'Cheating the Public Revenue' [2010] Tax Journal 16, 16
[2755] Ibid
[2756] *R v Hudson* [1956] 2 QB 252 (CA)
[2757] Ibid at 261-2
[2758] *R v Mavji* [1987] 1 WLR 1388 (CA)
[2759] Ibid at 1392
[2760] *R v Hunt* [1994] Crim LR 747 (CA)
[2761] 'There is a distinction between cheating the public or the King, in which the resultant loss does not have to be proved and cheating a private individual where it must be', Ibid at 748. See also, *Attorney General's Ref (No 8 of 2012)* [2012] EWCA Crim 1730; [2016] Lloyd's Rep FC 359. The prosecution may need to demonstrate loss, if the offence is charged as a 'result offence', see *R v Lunn* [2017] EWCA Crim 34 at para 24.
[2762] *R v Less, The Times,* March 30, 1993

> risk of prejudicing, the Revenue's right to the tax in question, knowing that he has no right to do so.[2763]

The requirement to prove the defendant acted fraudulently consists of demonstrating that the defendant acted deliberately,[2764] dishonestly,[2765] and with knowledge of the evasion.[2766] However, owing to the exceptionally broad *actus reus*, dishonesty will often be 'the only live issue at trial',[2767] even though its application is problematic in tax cases.[2768] The wide scope of the offence has led, not only to the successful prosecution of tax evasion, but also, the prosecution of what many would regard as legal activities, specifically, failed tax avoidance schemes.[2769] The lack of clarity and certainty surrounding the offence has led to allegations that the cheating offence is incompatible with the ECHR,[2770] yet challenges brought on this basis have been unsuccessful.[2771] Additionally, commentators have called for the abolition of the offence,[2772] or for placing it on a statutory basis.[2773] However, no action has been taken by Parliament,[2774] and the courts continue to permit both the coexistence and preferential use of the common law offence in place of specific statutory offences.[2775] Overall, the offence continues to play a major and consistent role in the prosecution of tax evasion.

[2763] Ibid

[2764] '"deliberate" has a clear meaning: the defendant must have intended to evade the tax', JH Howard, 'Cheating the Public Revenue' [2010] Tax Journal 16, 16

[2765] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, confirmed in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7, modifying the test set out in *R v Ghosh* [1982] 1 QB 1053 (CA)

[2766] The defendant does not need to know the precise details of the scheme, but must have knowledge of the scheme's purpose in defrauding the revenue, see *R v Wooley* [2003] EWCA Crim 3458

[2767] D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 630

[2768] Ibid.

[2769] Ibid at 634. Most famously, *R v Charlton* [1996] STC 1418 (CA). See recently, *Anthony Ashbolt and Simon Arundell v Her Majesty's Revenue & Customs* [2020] EWHC 1588 (Admin) at para 5, where the defence argued, 'the evidence before the judge demonstrated only that the claimants had engaged in lawful tax avoidance, and not evasion, and there were no reasonable grounds for believing they had acted dishonestly.'

[2770] Specifically, the requirement for reasonable certainty in Article 7, G Virgo, 'Cheating the Public Revenue: Fictions and Human Rights' (2002) 61 CLJ 47; D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 633-634; G Virgo, 'Cheating the Public Revenue' (2000) 59(1) CLJ 42, 44-45

[2771] *R. v. Pattni, Dhunna, Soni and Poopalarajah* [2001] Crim.L.R. 570, DC Ormerod, T Rees, 'Human Rights: Requirement of Reasonable Certainty' [2001] Crim LR 570

[2772] The abolition of cheating is long over-due' D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 645

[2773] 'The need for a statutory formulation of this offence would seem unarguable'. G McBain, 'Modernising the Common Law Offence of Cheating the Public Revenue' (2015) 8(1) J Pol & L 40, 76; G Virgo, 'Cheating the Public Revenue' (2000) 59(1) CLJ 42, 45

[2774] Pigott notes that this is unsurprising for, 'any statutory definition would inevitably put some limits on so ill-defined an offence', M Pigott, 'Cheating the Public Revenue' [1987] Crim LR 39, 41

[2775] The existence of a statutory offence, encapsulating the conduct in question, does not prevent the use of the common law offence. See for instance, *R v Redford* (1989) 89 Cr App R 1.

Conspiracy to Defraud

The common law offence of conspiracy to defraud has a long history,[2776] and the common law offences were formerly used interchangeably.[2777] Indeed, the common law still recognises the offence of conspiring to cheat the public revenue.[2778] The conspiracy to defraud offence survived the abolition of other conspiracies.[2779] There are two forms or variants of the offence,[2780] specifically, 'agreeing dishonestly to prejudice another's economic interests' or 'agreeing to mislead a person with intent to cause him to act contrary to his duty.'[2781] The definition of the offence was set out in *Scott v Metropolitan Police Commissioner*,[2782] as encompassing;

> an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.[2783]

The offence is broad in nature, lacking any requirement to prove an intent to deceive,[2784] or an intent to cause loss, or even any ill-motive, merely requiring a demonstration that the victim's interests have been injured in some way.[2785] Indeed, the offence has been labelled 'one of the most controversial offences in English criminal law', as it criminalises an agreement to engage in conduct that would not be criminal if committed by an individual.[2786] However, either the purpose of the agreement or the means by which it is carried out must be unlawful.[2787]

[2776] P Jarvis, 'Conspiracy to Defraud: A Siren to Lure Unwary Prosecutors' (2014) 10 Crim LR 738, 738
[2777] *Scott v Metropolitan Police Commissioner* [1974] 3 WLR 741; [1975] AC 819, at 840 (HL)
[2778] J Lennon, A Rahman, 'Conspiracy to Defraud & Conspiracy to Cheat' (Insidetime, 16th December 2014) <https://insidetime.org/conspiracy-to-defraud-conspiracy-to-cheat-2/> accessed 10 October 2020
[2779] Criminal Law Act 1977, s.1. The common law offence of conspiracy to defraud was expressly preserved by s.5(2) of the Act.
[2780] Although the existence of two categories is disputed in *Wai Yu-Tsang v The Queen* [1992] 1 AC 269, at 277. The latter form of the offence is illustrated by cases, such as *R v Moses* [1991] Crim LR 617, *R v Terry* [1984] AC 374, *Welham v DPP* [1961] AC 103.
[2781] *R v Evans* [2014] 1 WLR 2817 (CC) at 36, quoting D Ormerod, DH Williams, *Smith's Law of Theft*, (9th edn, OUP 2007) at para 5.12.
[2782] *Scott v Metropolitan Police Commissioner* [1974] 3 WLR 741; [1975] AC 819 (HL)
[2783] Ibid at 840
[2784] Ibid
[2785] *Wai Yu-Tsang v The Queen* [1992] 1 AC 269, at 276-7, *R v Allsop* (1977) 64 Cr App R 29 (CA)
[2786] D Ormerod, K Laird, 'Ivey v Genting Casinos – Much Ado about Nothing?' (2018) 9 UK Supreme Court Yearbook 380, 393
[2787]Unless, 'aggravating circumstances (such as material fraud, misrepresentation, violence, intimidation or inducement of breach of contract)' are present, *R v Evans* [2014] 1 WLR 2817 at para 145 (CC), *R. v Goldshield Group Plc* [2008] UKHL 17; [2009] 1 W.L.R. 458, *Norris v United States* [2008] UKHL 16; [2008] 1 A.C. 920. 'conspiracy to defraud does not apply to agreements to achieve a lawful object by lawful means' *R v Barton and Booth* [2020] EWCA Crim 575; [2020] 2 Cr. App. R. 7, at 122

Accordingly, the broad *actus reus* of the offence means that the problematic *mens rea* element of 'dishonesty does all the work' in ascertaining the liability of the accused.[2788] The sheer breadth of the offence has led to questions over its compatibility with the ECHR and fundamental principles of the Rule of Law, such as the principle of legal certainty.[2789] Further, the offence has been the subject of repeated calls for its abolition by academics,[2790] and the Law Commission.[2791] Nevertheless, the offence has been retained for several reasons, including the prevention of gaps in the legal system,[2792] as well as the ability to encapsulate a course of conduct in one charge that is easy for a jury to understand.[2793] Use of the offence is now circumscribed by the AG's Guidelines.[2794]

The offence may seemingly be useful in tax evasion cases involving misrepresentation, falsification and/or concealment by several defendants,[2795] or for prosecuting the facilitators of tax evasion or tax fraud schemes.[2796] For instance, a former Public Prosecutor suggested that the offence could have been used to prosecute HSBC for the actions of its Swiss division, as

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[2788] 'It provides the solitary constraint on the application of the offence' G Wise, 'MoJ Pardon for the "Prosecutor's Darling" Offences' (2012) 176 JPN 653, 654

[2789] Joint Committee on Human Rights, *Legislative Scrutiny: Sixth Progress Report* (2005-06, HL 134, HC 955) p.13

[2790] See for instance, ATH Smith, 'Conspiracy to Defraud' [1988] Crim LR 508; JC Smith, 'Conspiracy to Defraud: Some Comments on the Law Commission's Report' [1995] Crim LR 209. Ormerod notes that during the parliamentary debates leading to the passage of the Fraud Act 2006, 'conspiracy to defraud was described as "repellent", "constitutionally" defective and as so broad that it "risk[ed] bringing the law into disrepute."' D Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] Crim. LR 193, 216

[2791] The Law Commission, *Fraud* (Law Com No.276, Cm 5560, 2002) p.57. Earlier reports recommended the retention of the offence, 'until ways can be found of preserving its practical advantages for the administration of justice' The Law Commission, *Criminal Law: Conspiracy to Defraud* (Law Com No. 228, 1994) p.63. The Law Commission, *Criminal Law: Report on Conspiracy and Criminal Law Reform* (Law Com No. 76, 1976) p.43

[2792] As Virgo notes, the LIBOR rate manipulation cases are a prime example *R v Hayes* [2015] EWCA Crim 1944; [2016] 1 Cr App R (S) 63, G Virgo, 'The Fraud Act 2006 – Ten Years On' (2017) 10 Arch. Rev. 6, 8 *cf* The Law Commission, *Fraud* (Law Com No.276, Cm 5560, 2002) p.85-6, 'To retain conspiracy to defraud on the ground that it might occasionally prove useful in such a case would in our view be an excess of caution'.

[2793] Ministry of Justice, *Post-legislative assessment of the Fraud Act 2006 Memorandum to the Justice Select Committee* (June 2012) p.7-9. See also, 'Although the continued existence of conspiracy to defraud can legitimately be considered to be unprincipled, it serves an important residuary function and continues to provide a useful safety net where the substantive offences and statutory conspiracy may not work, such that the decision to retain the common law offence was patently correct'. G Virgo, 'The Fraud Act 2006 – Ten Years On' (2017) 10 Arch. Rev. 6, 8.

[2794] Attorney General's Office, 'Use of the Common Law Offence of Conspiracy to Defraud' (November 2012) <https://www.gov.uk/guidance/use-of-the-common-law-offence-of-conspiracy-to-defraud--6> accessed 10 October 2020. Courts have also emphasised the importance of charging statutory conspiracy offences wherever possible, see *R v Rimmington* [2006] 1 AC 459 (HL) at para 30.

[2795] *R v Bache* [2014] EWCA Crim 2464; *R v Bobrovas* [2014] EWCA Crim 752; *R v Hodges, Lineker and Stacey [2006] EWCA Crim 2706R v Brown, Walton and Went* [2001] EWCA Crim 1771; *R v Hutchinson* [2001] EWCA Crim 424; [2001] 2 Cr. App. R. (S.) 74; *R v Thornhill* (1980) 2 Cr. App. R. (S.) 320; *R v Woodley, Hunter and Little* (1979) 1 Cr. App. R. (S.) 141 (CA)

[2796] See for instance, '£6.9m Payroll Fraud Ringleader Jailed for Nine-and-a-half Years' (16 August 2018) < https://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/ps6-dot-9m-payroll-fraud-ringleader-jailed-for-nine-and-a-half-years-2639074> accessed 12 October 2020

its employees actively facilitated the evasion of tax by UK citizens.[2797] However, the UK did not take action against the bank, presumably because the UK's ability to address this financial crime is also inhibited by the methods used to attribute liability to corporations in English law.[2798] The conspiracy offence may also encompass the facilitation of failed tax avoidance schemes, which will often satisfy the requirement for an unlawful agreement that intends to deprive the revenue of 'something which is his or to which he is or would be or might be entitled'.[2799] Much depends on the knowledge and honesty of the advisor.[2800] While the Guidelines suggest that statutory conspiracy offences should be used unless it is impossible or less effective to do so,[2801] the common law offence of conspiracy to cheat the public revenue is the most popular offence to charge in serious tax fraud conspiracies, due to its overly broad scope and significant penalties.[2802]

Fraud

Following calls for reform,[2803] the Fraud Act 2006 was introduced to replace the eight deception offences contained in the Theft Acts.[2804] The deception offences were 'untidy and unsatisfactory',[2805] owing to their 'over-particularisation', which enabled defendants to escape

[2797] O Bowcott, 'HSBC Should Face UK Criminal Charges, Says Former Public Prosecutor' (The Guardian, 22 February 2015) <https://www.theguardian.com/politics/2015/feb/22/hsbc-uk-criminal-charges-former-public-prosecutor-hmrc> accessed 10 October 2020

[2798] N Ryder, S Bourton, 'The Prosecution of White Collar Criminals, and the Legacy of the Coalition Government: HSBC and Tax Evasion a Case Study' (2015) 226 Crim Law 3

[2799] *Scott v Metropolitan Police Commissioner* [1974] 3 WLR 741; [1975] AC 819, 840 (HL)

[2800] *R. (on the application of Inland Revenue Commissioners) v Kingston Crown Court* [2001] EWHC Admin 581; [2001] 4 All ER 721. See also, R Mortimer, 'Five Arrested in Suspected Tax Charge Fraud' (Financial Times Adviser, 28 February 2020) <https://www.ftadviser.com/regulation/2020/02/28/five-arrested-in-suspected-tax-charge-fraud/> accessed 12 October 2020

[2801] Attorney General's Office, 'Use of the Common Law Offence of Conspiracy to Defraud' (November 2012) <https://www.gov.uk/guidance/use-of-the-common-law-offence-of-conspiracy-to-defraud--6> accessed 10 October 2020

[2802] 'In cases involving serious revenue fraud, it may, however, be proper to charge the alleged offenders with conspiracy to cheat the revenue (for which the maximum penalty is at large) rather than with conspiracy to commit individual offences under the Fraud Act 2006 (*Dosanjh* [2014] 1 WLR 1780).' Crown Prosecution Service, 'Inchoate Offences' (21 December 2018) <https://www.cps.gov.uk/legal-guidance/inchoate-offences> accessed 10 October 2020. See for instance, *R v Bache* [2014] EWCA Crim 2464; *R v Bobrovas* [2014] EWCA Crim 752, *R v May* [2005] EWCA Crim 97 [2005] 1 W.L.R. 2902; *R v Brown, Walton and Went* [2001] EWCA Crim 1771, *R v Hutchinson* [2001] EWCA Crim 424; [2001] 2 Cr. App. R. (S.) 74

[2803] See for instance, Law Commission, *Legislating the Criminal Code: Fraud and Deception: A Consultation Paper* (Law Com No 155, 1999), Law Commission, *Fraud* (Law Com No 276, 2002)

[2804] Theft Act 1968, s.15 (obtaining property), s.15A (obtaining a money transfer), s.16 (obtaining a pecuniary advantage), s.20(2) (procuring the execution of a valuable security). Theft Act 1978, s.1 (obtaining services), s.2(1)(a) (securing the remission of a liability), s.2(1)(b) (inducing a creditor to wait for or to forgo payment, s.2(1)(c) (obtaining an exemption from or abatement of liability). See D Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] Crim. LR 193, 193

[2805] E Griew, *The Theft Acts* (7th edn, Sweet & Maxwell 1995) p.141

liability for their crimes based on technical arguments.[2806] Consequently, the Fraud Act aimed to 'clarify and modernise the law' pertaining to fraud,[2807] with the creation of a general offence of fraud, which can be committed in three ways:[2808] fraud by false representation;[2809] fraud by failing to disclose information;[2810] and fraud by abuse of position.[2811] It must be proven that the defendant intended to make a gain or cause a loss,[2812] and that he acted dishonestly.[2813] The offence of fraud by false representation could be used to prosecute tax evaders who make a false statement on a tax return or in an interview with HMRC.[2814] Technically, the offence does not require the representation to be made expressly, capturing implied fraudulent representations.[2815] Accordingly, s2 could also be used to prosecute those who omit key information from a tax return, as they effectively make an implied fraudulent representation that the information contained therein is accurate. Nonetheless, the s3 offence would be more suitable. This is because the offence captures non-disclosure of information which a defendant is legally obliged to disclose,[2816] effectively encompassing the non-disclosure of information required for ascertaining tax liability.[2817]

The fraud offence is considered to be much more effective and efficient than the deception offences.[2818] Nevertheless, the sheer breadth of the offence again raises concerns surrounding its compatibility with fundamental legal principles.[2819] The offence is 'overbroad' and 'based too heavily on the ill-defined concept of dishonesty'.[2820] This is because it is an inchoate offence, whereby the prosecution does not need to prove that the defendant made any gain or

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[2806] Law Commission, *Fraud* (Law Com No 276, 2002) p.15. See also, Home Office, 'Fraud Law Reform: Consultation on Proposals for Legislation' (May 2004) <https://webarchive.nationalarchives.gov.uk/20080514123948/http://www.homeoffice.gov.uk/documents/cons-fraud-law-reform/> accessed 14 October 2020, p.7
[2807] Ministry of Justice, *Post-Legislative Assessment of the Fraud Act 2006: Memorandum to the Justice Select Committee* (Cm 8372, 2012) p.3
[2808] Fraud Act 2006, s.1
[2809] Ibid, s.2
[2810] Ibid, s.3
[2811] Ibid, s.4
[2812] Ibid, s.2(b), s.3(b), s.4(c)
[2813] Ibid, s.2(a), s.3(a), s.4(1)(b)
[2814] J Fisher, A Milne, J Bewsey, A Herd, *Arlidge and Parry on Fraud* (6th edn, Sweet & Maxwell 2020) 14-001
[2815] Fraud Act 2006, s.2(4)
[2816] Fraud Act 2006, s.3(a)
[2817] J Fisher, A Milne, J Bewsey, A Herd, *Arlidge and Parry on Fraud* (6th edn, Sweet & Maxwell 2020) 14-001
[2818] G Virgo, 'The Fraud Act 2006 – Ten Years On' (2017) 10 Arch. Rev. 6, 7; Ministry of Justice, *Post-Legislative Assessment of the Fraud Act 2006: Memorandum to the Justice Select Committee* (Cm 8372, 2012) p.10
[2819] However, the Joint Parliamentary Committee on Human Rights regarded a general fraud offence to be compliant with Art. 7 of the European Convention on Human Rights, see Joint Parliamentary Committee on Human Rights, *Fourteenth Report* (2005–06), at para.2.14
[2820] D Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] Crim. LR 193, 219

caused the victim to suffer loss.[2821] The offence is wider than the offence of conspiracy to defraud for there is no requirement for prejudice to be caused to another's interests.[2822] Indeed, the s2 offence effectively 'appears to criminalise lying', with there being no need to prove that the victim acted on, or even believed, the false representation.[2823] Moreover, the defendant only needs to know that his representation *might* be false.[2824] While Virgo defends the offence based on its seemingly unproblematic application in practice,[2825] it is concerning that so many offences pertaining to tax evasion criminalise a dishonest act or omission made to HMRC, with very little else required to impose liability. This is particularly so when considering the problems posed by the test of dishonesty, considered below.

False Accounting

The offence of false accounting applies where a person 'destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose',[2826] or produces or uses said account, record or document with knowledge that it 'is or may be misleading, false or deceptive in a material particular'.[2827] A document can be falsified by an act or omission, and the offence can be committed by both the person concerned as well as any who concur in its commission.[2828] The offence must be committed dishonestly,[2829] and with a view to making a gain or causing loss.[2830] The defendant must realise that he was falsifying a particular, yet he does not need to appreciate the materiality of that information, nor its intended purpose.[2831] The falsification will be material when the false information provided is central to

[2821] Ibid at p.196
[2822] Ibid. See also, D Ormerod, DH Williams, 'The Fraud Act 2006: Legislative Comment' (2007) 1 Arch News 6, 7
[2823] Ibid
[2824] Ibid at p.200
[2825] G Virgo, 'The Fraud Act 2006 – Ten Years On' (2017) 10 Arch. Rev. 6, 9
[2826] Theft Act 1968, s.17(1)(a). The account, record or document does not have to be produced exclusively for an accounting purpose, *Attorney General's Reference (No. 1 of 1980)* [1981] 1 WLR 34. Whether the account, record or document is required for an accounting purpose will usually be a question of fact, *R v Sundhers* [1998] EWCA Crim 255
[2827] Theft Act 1968, s.17(1)(b)
[2828] Theft Act 1968, s.17(2)
[2829] Following the test set out in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, confirmed in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7. Before *Ivey*, a *Ghosh* direction on dishonesty did not have to be provided, *R v Atkinson* [2003] EWCA Crim 3031.
[2830] Theft Act 1968, s.17(1)
[2831] D Ormerod, 'False Accounting – Meaning of "Omits a Material Particular"' (2010) 10 Crim LR 776, 778

one of the purposes of the document or record, not just its accounting purpose,[2832] and an omission will be material where it leads to a misleading impression being given.[2833]

Accordingly, the offence is likely to apply to the creation and submission of false accounts, invoices, and/or tax returns, which are falsified by the inclusion or omission of a material particular.[2834] Material particulars are unlikely to be confined to the information necessary to determine a particular tax liability.[2835] The offence captures acts or omissions carried out with the aim of fraudulently obtaining a tax relief, as well as evading taxation through the retention of otherwise lawful funds. This is because the term gain includes not only the acquisition of property, but also, the retention of pre-existing property, and the term loss covers both actual and prospective loss to HMRC.[2836] Nevertheless, as a conduct offence, no loss or gain actually needs to be incurred. Therefore, although the offence is often used to prosecute those engaged in benefit fraud,[2837] it has also been applied to those who furnish false accounting information for the purposes of evading a wide range of taxes. The offence has been used to convict an individual involved in a large-scale VAT Carousel fraud,[2838] as well as to found charges against the mastermind of a scheme that enabled contractors to evade the entirety of their income tax liability.[2839] Additionally, in *Gittins,*[2840] search warrants were issued in furtherance of a criminal investigation relating to alleged false accounting by the chief executive of an established tax consultancy, who HMRC believed implemented failed and fraudulent tax avoidance schemes for his clients.[2841] Although Gittins and the co-accused Calcutt were ultimately acquitted of the offences of cheating the public revenue and forgery,[2842] this case demonstrates the potential applicability of the offence to those who facilitate failed tax avoidance schemes, if such schemes are accompanied by fraudulent accounts and documents.

[2832] *R v Mallett* [1978] 1 WLR 820; *Attorney General's Reference (No. 1 of 1980)* [1981] 1 WLR 34
[2833] *R v Lancaster* [2010] EWCA Crim 370; *R v Mallett* [1978] 1 WLR 820
[2834] JH Howard, 'Outside the Wall' [2010] *Taxation* 18, 19
[2835] Drawing an analogy with *R v Lancaster* [2010] EWCA Crim 370, where the court held that material omissions were not restricted to those that led to the incorrect payment of housing and council tax benefit.
[2836] Theft Act 1968, s.34(2)(a)
[2837] See for instance, *R v Gbadebo* [2018] EWCA Crim 2508 (CA); *R v Johnson* [2012] EWCA Crim 1089; *R v Kireche* [2012] EWCA Crim 1787
[2838] See for instance, *Backhouse v HM Revenue & Customs Prosecution Office* [2012] EWCA Civ 1000
[2839] *R v Grossman* (1981) 73 Cr. App. R. 302 (CA).
[2840] *Gittins v Central Criminal Court* [2011] EWHC 131
[2841] Potentially leading to tax losses of over £97billion, ibid at para 13.
[2842] STEP, 'HMRC Withdraws Montpelier Prosecution during Trial' (18 September 2014) <https://www.step.org/industry-news/hmrc-withdraws-montpelier-prosecution-during-trial> accessed 12 December 2020

Value Added Tax (VAT)

VAT is more difficult to evade than the alternative adopted in the US, the Retail Sales Tax (RST), owing to its multi-stage collection process.[2843] Nevertheless, several techniques have been developed by businesses to evade VAT, as well as by organised criminals to fraudulently obtain financial advantages that they are not entitled to through the VAT system.[2844] VAT frauds have long been prosecuted with greater frequency,[2845] and attract some of the longest sentences.[2846] This is attributable to the fact that Customs and Excise formerly had responsibility for the investigation and enforcement of these offences; an authority experienced in the investigation and enforcement of offences, such as drug trafficking and smuggling.[2847] Additionally, the offence causes significant revenue losses with 32% of the tax gap attributable to VAT.[2848] The majority of this sum is attributable to VAT fraud.[2849] In fact, VAT frauds, such as missing trader frauds, have caused significant losses in both the UK and Europe.[2850] Moreover, VAT frauds often have devastating human costs, with the significant proceeds of VAT frauds being used to finance terrorism.[2851] Levels of VAT evasion and avoidance are also

[2843] M Keen, S Smith, 'VAT Fraud and Evasion: What Do We Know and What Can Be Done?' (2006) 59(4) National Tax Journal 861, 864; see also, R de la Feria, 'Tax Fraud and the Rule of Law' (Oxford University Centre for Business Taxation WP 18/02, January 2018) <http://www.oxfordfuturesforum.org.uk/sites/default/files/2018-08/WP1802.pdf> accessed 16 December 2020 at p.2

[2844] Ibid at p.6

[2845] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.58

[2846] See for instance, J Gartside, 'Carousel Fraud Ringleader Jailed for 17 years over Reselling Nonexistent Mobiles' (The Guardian, 8 July 2012) <https://www.theguardian.com/uk/2012/jul/08/carousel-tax-fraud-mobile-phones> accessed 16 December 2020

[2847] J O'Donnell, 'VAT Investigation' (2007) 57 VAT Digest 1, 2

[2848] HM Revenue & Customs, 'Measuring Tax Gaps 2020 Edition: Tax Gap Estimates for 2018 to 2019' (9 July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907122/Measuring_tax_gaps_2020_edition.pdf> accessed 15 September 2020, at p.27

[2849] European Parliament, TAX3 Committee, 'VAT Fraud: Economic Impact, Challenges and Policy Issues' (October 2018) <https://www.europarl.europa.eu/cmsdata/156408/VAT%20Fraud%20Study%20publication.pdf> at p.10

[2850] Estimates of the losses range from €20billion to over €100billion annually, European Commission, 'The Concept of Tax Gaps Report III: MTIC Fraud Gap Estimation Methodologies' (November 2018) <https://ec.europa.eu/taxation_customs/sites/taxation/files/tax_gaps_report_mtic_fraud_gap_estimation_methodologies.pdf> accessed 16th December 2020, at p.5. In 2009, a single carbon trading scheme caused losses of €5billion, A Seager, 'European Taxpayers Lose €5billion in Carbon Trading Fraud' (The Guardian, 14 December 2009) <https://www.theguardian.com/business/2009/dec/14/eu-carbon-trading-fraud> accessed 16 December 2020

[2851] See for instance, T Harper, 'Taxman Kept Quiet While £8bn Fraud Helped Fund Osama Bin Laden' (The Times, 30 March 2019) <https://www.thetimes.co.uk/article/taxman-kept-quiet-while-8bn-fraud-helped-fund-bin-laden-gmvj0b7gs> accessed 16th December 2020; M Day, 'Briton "Used Carbon Trading to Fund Terror"' (Independent, 24 September 2014) <https://www.independent.co.uk/news/uk/crime/briton-used-carbon-trading-fund-terror-9754108.html> accessed 16th December 2020.

predicted to increase in the UK in the near future, owing to external influences, such as the COVID-19 Pandemic,[2852] and the expected expansion of gig and sharing economies.[2853]

Several VAT offences are contained in s.72 of the Value Added Tax Act 1994. It is an offence for an individual to be knowingly concerned in, or take steps with a view to, the fraudulent evasion of VAT owed by him or another.[2854] The phrases 'knowingly concerned' and 'taking steps with a view to' enable its application to not only those who evade VAT, but also those who facilitate this offence.[2855] Counterintuitively, the inclusion of the phrase 'taking steps with a view to' significantly expands the scope of the offence so as to encompass omissions preceding any evasion of VAT,[2856] including a failure to register.[2857] Taken together, facilitators may be liable for omissions that result in the evasion of VAT by their clients.[2858] Accordingly, the VAT offence is significantly wider than the similar statutory offence pertaining to the fraudulent evasion of income tax.[2859] The word evasion is given an expansive definition, explicitly including payments of VAT credits, refunds and repayments,[2860] thus extending to deliberate acts as well as omissions.[2861] The individual concerned must have knowledge of the evasion of VAT,[2862] rather than suspicion.[2863] The use of the word fraudulent connotes that the evasion must be both deliberate and dishonest,[2864] with or without an intention to permanently default.[2865]

Notwithstanding the availability of the statutory VAT offence, VAT frauds are commonly prosecuted using the cheating offence. At one stage, this was because Customs contended that carousel and missing trader frauds did not constitute economic activity to enable them to

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[2852] European Commission, 'Study and Reports on the VAT GAP in the EU-28 Member States: 2020 Final Report' (September 2020) <https://ec.europa.eu/taxation_customs/sites/taxation/files/vat-gap-full-report-2020_en.pdf> accessed 16 December 2020, at p.74
[2853] See generally, HM Treasury, 'VAT and the Sharing Economy: Call for Evidence' (December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942573/Call_for_Evidence_-_VAT_and_the_Sharing_Economy.pdf> accessed 16th December 2020
[2854] Value Added Tax Act 1994, s.72(1)
[2855] *R v Binfield* [2019] EWCA Crim 1812
[2856] J Welland, 'Fraud Phantoms' (2019) 184 Taxation 17, 17
[2857] *R v McCarthy* [1981] STC 298
[2858] *R v Binfield* [2019] EWCA Crim 1812
[2859] Taxes Management Act 1970, s.106A; Although the similar offence in Customs and Excise (Management) Act 1979, s.170(2), does not contain this phrase, there is a separate offence of 'taking preparatory steps for evasion of excise duty' in s.170B.
[2860] Value Added Tax Act 1994, s.72(2)
[2861] J O'Donnell, 'VAT Investigation' (2007) 57 VAT Digest 1, 15
[2862] As opposed to the evasion of any other type of tax.
[2863] *R v Forsyth* [1997] 2 Cr App R 299
[2864] *Attorney General's Reference No. 1 of 1981* [1982] QB 848, 856
[2865] *R v Dealy* [1995] 1 WLR 658 (CA)

withhold repayments from those involved in fraud.[2866] A corollary to this proposition was that, as a non-economic activity, the frauds were not subject to VAT and thus, not captured by the offence. This argument was accepted by Customs,[2867] until later developments in the jurisprudence of the Court of Justice of the EU (CJEU).[2868] *Hashash*,[2869] held that, as long as the underlying activity was lawful, economic activity was present and the VAT evasion offence could be used.[2870] While *Hashash* rectified the inability of prosecutors to charge the VAT evasion offence in cases concerning carousel and missing trader frauds, it also illustrates the duplicity and redundancy of the statutory offence, at least while the cheating offence is retained. Presently, the cheating offence is often used owing to its expansive scope and significantly longer maximum penalties.[2871]

It is also an offence for an individual, 'with intent to deceive' to furnish or send for the purposes of the Act, or make 'use for those purposes of any document which is false in a material particular'.[2872] The offence includes causing any of the above, for instance by asking a professional to send a fraudulent document.[2873] The offence is likely to apply to those who create or use false invoices, certificates and registration documents, in furtherance of attempts to evade or fraudulently obtain advantages from the VAT system.[2874] The offence covers attempts to deceive a machine,[2875] alleviating some of the difficulties encountered with the former deception offences.[2876] It is also an offence to make false statements, knowingly or recklessly, in the course of furnishing information, for instance, during the course of an inspection or investigation.[2877] Additionally, there is a catch-all offence, which covers conduct that 'must have involved the commission by him of one or more offences under the preceding provisions' of s.72.[2878] This offence may be useful when the prosecution is unable to identify

[2866] *R v Hashash* [2006] EWCA Crim 2518 (CA) at para 3
[2867] Causing them to prosecute such frauds using the cheating offence, ibid at para 5
[2868] Joined Cases C-254/03 *Optigen Ltd*, C-355/03 *Fulcrum Electronics Ltd*, C-484/03 *Bond House Systems Ltd v Commissioners of Customs & Excise* [2006] ECR 1-500. See also, C-255/02 *Halifax plc and ors v Commissioners for Customs & Excise* [2006] ECR I-1609
[2869] *R v Hashash* [2006] EWCA Crim 2518 (CA)
[2870] Ibid at paras 29-33.
[2871] Value Added Tax Act 1994, s.72(1)(b) (seven years). As a common law offence, the maximum sentence for the cheating offence is life imprisonment.
[2872] Value Added Tax Act 1994, s.72(3)(a)
[2873] Ibid, at s.72(7)
[2874] J O'Donnell, 'VAT Investigation' (2007) 57 VAT Digest 1, 16
[2875] Value Added Tax Act 1994, s.72(6)
[2876] Law Commission, *Fraud* (Law Com No 276, 2002) p.21.
[2877] Value Added Tax Act 1994, s.72(3)(b)
[2878] Value Added Tax Act 1994, s.72(8)

how the offence has been carried out,[2879] or as a holding charge.[2880] However, a cheating charge would always be available in these circumstances, making the offence redundant. Moreover, the offence fails to cohere with fundamental principles of criminal law, specifically, the obligation to specify the particulars of an offence to enable the defendant to ascertain the nature and extent of the allegations.[2881] It is also an offence for an individual to acquire possession of or deal with goods, or accept the supply of services, having reason to believe that VAT has been or will be evaded,[2882] or to supply or accept goods or services, when a security demanded by HMRC has not been paid.[2883]

Evasion of Duty

Offences concerning evasion of duty, or smuggling offences, are contained in the Customs and Excise Management Act 1979. It is an offence to make a false declaration, specifically, to knowingly or recklessly,[2884] make, sign or deliver to HMRC, any false declaration, notice, certificate or other document, or to make a false statement in response to questions from officers of HMRC, which the person is legally compelled to answer.[2885] The document or statement must have been produced for the purposes of an assigned matter, specifically, matters historically assigned to Customs and Excise,[2886] and must be false in a material particular.[2887] The offence contains its own forfeiture provision,[2888] and is often used as a basis for forfeiture claims, as opposed to prosecution.[2889] There is also a strict liability version of the offence.[2890] This offence carries lighter penalties and does not contain a forfeiture provision.[2891] The Act also contains a counterfeiting offence, which is committed when a person counterfeits or falsifies any document relating to an assigned matter,[2892] or counterfeits any seal, signature,

[2879] However, factual particulars should be specified if at all possible, *R v Choudhury* [1996] STC 1163; [1996] 2 Cr App R 484, 489 (CA), as in *R v Asif* [1986] 82 Cr App R 123.
[2880] J O'Donnell, 'VAT Investigation' (2007) 57 VAT Digest 1, 16
[2881] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.59
[2882] Value Added Tax Act 1994, s.72(10)
[2883] Ibid, s.72(11). The security must have been lawfully requested, *Panchagas Mexican Restaurant Ltd v Revenue and Customs Commissioners* [2019] UKFTT 436
[2884] This would appear to be a subjective test following *R v G and another* [2003] UKHL 50 and *Foster v CPS* [2013] EWHC 3885 (Admin).
[2885] Customs and Excise Management Act 1979, s.167(1)
[2886] Ibid, s.1(1). Commissioners for Revenue and Customs Act 2005, Schedule 2, para 6.
[2887] Ibid, s.167(1)
[2888] Ibid
[2889] See for instance, *Stewardson v Director of Border Revenue* [2017] UKFTT 264 (TC) (forfeiture of Rolex watch), *Bakht v Director of Border Revenue* [2014] UKFTT 551 (TC) (gold jewellery) *Amucha Ltd v Director of Border Revenue* [2014] UKFTT 864 (TC) (wine and beer)
[2890] Customs and Excise Management Act 1979, s.167(3).
[2891] ibid
[2892] Customs and Excise Management Act 1979, s.168(1)(a)

initials or other mark used for a purpose relating to an assigned matter.[2893] The offence is also committed by any person who 'knowingly accepts, receives or uses any such document',[2894] or alters such document after issue.[2895] The offence may seem redundant considering its overlap with offences such as forgery.[2896] However, the offence is wider in scope.[2897]

The primary offence pertaining to the evasion of duty is contained in s170 and is committed in two ways. First, it is an offence for an individual to knowingly acquire possession of goods on which duty has been evaded,[2898] or goods that are entirely prohibited or restricted,[2899] such as drugs,[2900] or illegal wildlife.[2901] The offence also captures being knowingly concerned in activities relating to such goods.[2902] Both require intent to 'defraud Her Majesty of any duty payable' or to evade any prohibition or restriction relating to the goods.[2903] Second, it is an offence for an individual to be 'knowingly concerned in any fraudulent evasion or attempt at evasion' of any duty, prohibition or restriction on the goods, or any applicable provision in the Act.[2904] The second offence is a 'catch all provision', as it criminalises conduct by those outside of the initial smuggling operation.[2905] The phrase 'knowingly concerned' also captures actions taken before or after the importation, as long as there is an intent to evade.[2906] Knowledge of the evasion, rather than recklessness, must be shown.[2907] Fraudulent evasion means 'dishonest conduct deliberately intended to evade the prohibition or restriction with respect to, or the duty chargeable on, goods as the case may be',[2908] with dishonesty determined using the *Ivey* test.[2909] There is a separate offence of taking any steps 'with a view to the fraudulent evasion, whether

[2893] Ibid, s.168(1)(d)
[2894] Ibid, s.168(1)(b)
[2895] Ibid, s.168(1)(c)
[2896] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.48
[2897] For the purposes of forgery the defendant must make a false instrument, specifically, an instrument that tells 'a lie about itself', rather than one that simply contains a lie, as in the case of falsification, *R v Warneford* [1994] Crim LR 753; *Attorney General's Reference (No 1 of 2000)* [2001] 1 WLR 331
[2898] Customs and Excise Management Act 1979, s.170(1)(ii)
[2899] Ibid, s.170(1)(i), 'goods which have been unlawfully removed from a warehouse or Queen's warehouse' and s.170(1)(iii), 'goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment'.
[2900] See for instance, *R v Bhegani* [2016] EWCA Crim 2109; *R v Birks* [2017] EWCA Crim 810; *R v Jhurry* [2018] EWCA Crim 2799
[2901] See for instance, *R v Lendrum* [2011] EWCA Crim 228; [2011] 2 Cr App R (S) 69
[2902] Customs and Excise Management Act 1979, s.170(1)(b). Specifically, 'carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods'.
[2903] Ibid
[2904] Ibid, s.170(2)
[2905] *R v Neal* (1983) 77 Cr App R 283, 287
[2906] *R v Ardalan* [1972] 1 WLR 463; *R v Jakeman* [1983] 76 Cr App R 223
[2907] *R v Panayi (No 2)* [1989] 1 WLR 187
[2908] *Attorney General's Reference No. 1 of 1981* [1982] QB 848, 856
[2909] Following the test set out in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, confirmed in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7.

by himself or another, of any duty of excise on any goods'.[2910] This significant expands the scope of the offence so as to encompass acts and even omissions preceding any evasion of duty.[2911] These offences contain forfeiture provisions.[2912] The Act also contains general forfeiture provisions, permitting the forfeiture of items, such as vehicles.[2913] A conviction for being knowingly concerned in the evasion of duty does not ipso facto make that person liable for the duty.[2914] Conversely, an acquittal does not eradicate liability.[2915]

Income Tax

Historically, very few prosecutions were brought against those who evaded income taxes, with the Inland Revenue preferring to conduct civil investigations,[2916] resulting in the imposition of civil penalties.[2917] This was in sharp contrast to the practice pursued by the Department for Work and Pensions in respect of benefit fraud,[2918] as well as Customs and Excise in respect of prohibited goods and indirect taxes.[2919] Prosecutions for benefit fraud still dramatically exceed the number of prosecutions brought for tax evasion.[2920] However, prosecutions for the evasion of income tax increased following the merger of Inland Revenue and Customs and Excise,[2921] as well as the imposition of prosecutorial-referral targets on HMRC as part of the Volume Crime Initiative.[2922] Nonetheless, statutory offences pertaining to the evasion of income taxes

[2910] Customs and Excise Management Act 1979, s.170B(1)
[2911] *R v McCarthy* [1981] STC 298
[2912] Customs and Excise Management Act 1979, s.170(6), s.170B(2)
[2913] Customs and Excise Management Act 1979, s.141. See generally, s.139-144. See for instance, *Sczepaniak v Director of Border Revenue* [2019] UKUT 295 (TCC) (vehicle seized as it contained 2.6 million cigarettes concealed in dried pasta). *Revenue and Customs Commissioners v Smith* [2006] EWHC 3435 (Ch) (goods and car forfeited, as car was found to be carrying significant quantities of alcohol).
[2914] *R v Bell* [2011] EWCA Crim 6
[2915] *Lennon v Revenue and Customs Commissioners* [2020] UKFTT 268 (TC)
[2916] Formerly known as the Hansard Procedure. The Hansard Procedure was replaced with Code of Practice 9, HM Revenue & Customs, 'COP 9 - HM Revenue & Customs Investigations Where We Suspect Tax Fraud'<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494808/COP9_06_14.pdf > accessed 30th June 2016. See chapter seven.
[2917] Civil investigations are regarded as being more 'cost effective'. 'Criminal investigation will be reserved for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate.' HM Revenue & Customs, 'Guidance HMRC's Criminal Investigation Policy' (Updated 13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 13th December 2020
[2918] (and its predecessors) D Cook, *Rich Law, Poor Law: Different Responses to Tax & Supplementary Benefit Fraud.* (OUP 1989); D Cook, *Criminal and Social Justice* (Sage Publications, 2006). See also, J Minkes, L Minkes, 'Income Tax Evasion and Benefit Fraud' in F Brookman, M Maguire, H Pierpoint, T Bennett (Eds), *Handbook on Crime* (Willian Publishing, 2010) p.95
[2919] J Levy, R Cory, 'Back to Basics – Tax Fraud' (2008) 945 Tax J 14, 14
[2920] See chapter seven.
[2921] J Levy, R Cory, 'Back to Basics – Tax Fraud' (2008) 945 Tax J 14, 14
[2922] In 2010, HMRC were tasked with increasing the number of referrals for prosecution for tax evasion offences. Specifically, HMRC were asked to increase the number of prosecutions from 165 individuals per year

have existed since the inception of this form of taxation, with early offences criminalising the making of false statements in respect of a tax return,[2923] the failure of third parties to provide requested information,[2924] and later, knowingly making a false statement or false representation 'for the purpose of obtaining any allowance, reduction, rebate, or repayment in respect of any duty'.[2925]

Owing to the Revenue's longstanding enforcement policy, these offences were rarely used.[2926] For reasons explored above, egregious or high-profile offences deemed worthy of criminal sanction were most often prosecuted using the cheating offence.[2927] The disparity between prosecutions for tax and benefit fraud, as well as the lack of prosecutions for low-value tax crimes were recognised in the Grabiner Report,[2928] which recommended the introduction of a summary offence pertaining to the evasion of income tax.[2929] Accordingly, an offence was introduced of being 'knowingly concerned in the fraudulent evasion of income tax by that or any other person'.[2930] As a conduct offence, no loss or gain actually needs to be incurred by HMRC.[2931] The offence can be committed by act or omission,[2932] and by single events as well as courses of conduct.[2933] The offence captures not only those liable to tax, but also any person 'knowingly concerned' in the evasion, potentially including professional facilitators who incite or collude in the offence.[2934] The individual concerned must have knowledge of the evasion of

in 2010/11 to 1165 individuals in 2014/15, with the aim of sustaining this level thereafter. HM Treasury, *Spending Review 2010* (Cmd 7942, 2010) p71

[2923] Income Tax Act 1842, s.180

[2924] Income Tax Act 1842, s.55

[2925] Finance Act 1910, s.94. The offence was later contained in the Income Tax Act 1918, s.227, Income Tax Act 1952, s.505. See P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.57

[2926] Ibid

[2927] See recently, the conviction of former BHS owner Dominic Chappell, *R v Chappell*, The Times, 6 November 2020, (Southwark Crown Court) and former BBC military historian Howard Tuck, *R v Tuck* [2018] EWCA Crim 2529. Individuals are also prosecuted when they fail to comply with a civil investigation, see for instance, the only conviction resulting from the HSBC scandal, *R v Shanly*, The Times, 5 July 2012 (Wood Green Crown Court)

[2928] Lord Grabiner QC, *The Informal Economy: A Report by Lord Grabiner QC* (HM Treasury, The Stationery Office Ltd, 2000)

[2929] Modelled on similar offences concerning the evasion of VAT and National Insurance Contributions, Value Added Tax Act 1994, s.72(1); Social Security Administration Act 1992, s.114(1). A similar offence is also contained in the Customs and Excise (Management) Act 1979, s.170(2).

[2930] Finance Act 2000, s.144. The offence is now contained in s.106A of the Taxes Management Act 1970, and is triable either way.

[2931] D Salter, 'Some Thoughts on the Fraudulent Evasion of Income Tax' (2002) 6 BTR 489, 503

[2932] *R v Tuck* [2018] EWCA Crim 2529

[2933] *R v Martin and another* [1998] 2 Cr App R 385; Although a decision to allow the jury to convict based on a single incident will be reflected in sentencing, *R v Khan* [2017] EWCA Crim 703

[2934] DC Ormerod, 'Summary Evasion of Income Tax' [2002] Crim LR 3, 14

income tax;[2935] mere suspicion,[2936] or recklessness,[2937] will not suffice, although wilful blindness may be sufficient.[2938] The use of the word fraudulent connotes that the evasion must constitute 'dishonest conduct deliberately intended to evade the prohibition or restriction',[2939] while evasion concerns 'deliberate non-payment',[2940] with or without an intention to permanently deprive.[2941] As with most evasion offences, the breadth of the offence means that failed tax-avoidance schemes are within scope,[2942] and much will depend on the problematic test of dishonesty.[2943]

The introduction of a triable either way offence was based on laudable aims of reducing inconsistency in the prosecution of tax crimes, as well reducing time and expense.[2944] This is partly owing to the choice of a less-expensive forum for trial and the supposed ease of convincing magistrates of a defendant's dishonesty.[2945] However, it is questionable whether many of these offences are heard in the magistrate's courts, owing to either the prosecutor's or defendant's discretion.[2946] The offence has not had a prominent role in increasing prosecutions for income tax evasion. In fact, the year the offence came into force saw one of the lowest rates of prosecutions for this financial crime.[2947] As predicted by Ormerod,[2948] supplements to HMRC's enforcement policy, specifically, the introduction of prosecutorial-referral targets, had a more significant effect on the number of prosecutions.[2949] The introduction of these targets prompted HMRC to focus on prosecuting low-value and straightforward cases.[2950] While the offence may have provided an easier route to taking action against small-time

[2935] As opposed to the evasion of any other type of tax, ibid at p.15
[2936] *R v Forsyth* [1997] 2 Cr App R 299
[2937] *R v Godir* [2018] EWCA Crim 2294; [2019] STC 498
[2938] Ibid at para 16. See also, *Westminster City Council v Croyalgrange and another* [1986] UKHL 9
[2939] *Attorney General's Reference No. 1 of 1981* [1982] QB 848, 856
[2940] DC Ormerod, 'Summary Evasion of Income Tax' [2002] Crim LR 3, 21
[2941] *R v Dealy* [1995] 1 WLR 658 (CA)
[2942] D Salter, 'Some Thoughts on the Fraudulent Evasion of Income Tax' (2002) 6 BTR 489, 501-2
[2943] Following the test set out in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, confirmed in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7.
[2944] Lord Grabiner QC, *The Informal Economy: A Report by Lord Grabiner QC* (HM Treasury, The Stationery Office Ltd, 2000)
[2945] DC Ormerod, 'Summary Evasion of Income Tax' [2002] Crim LR 3, 9-10
[2946] Ibid
[2947] With only 30 prosecutions brought for tax evasion, Inland Revenue, *Report of the Commissioners of Her Majesty's Inland Revenue for the Year Ending 31st March 2002, One-Hundred and Forty-Fourth Report* (Cmd 5706, 2002)
[2948] DC Ormerod, 'Summary Evasion of Income Tax' [2002] Crim LR 3, 5
[2949] HM Revenue & Customs, 'HMRC Fast Facts: Record Revenues for the UK' (May 2014 Bulletin) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/326579/HMRC-fast-facts.pdf> accessed 13th December 2020, p.5
[2950] National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) para 16

offenders, the offence may not be used or may be over-used in an inconsistent and unjust manner.

Moreover, the offence raises concerns surrounding the breadth and overlap of tax evasion offences. It was acknowledged that this offence would do little more than place cheating on a statutory basis for income tax.[2951] While codification of the criminal law is a worthwhile endeavour,[2952] this implies that the common law offence will be abolished or, at least, that its use will be restricted. However, 20 years after the enactment of this offence, cheating the public revenue is still the preferred charge by prosecutors.[2953]

Strict Liability Offence for Offshore Tax Evaders

The strict liability offence for offshore tax evaders,[2954] was designed to assist HMRC to meet its prosecutorial referral targets.[2955] The offence was enacted in the wake of several offshore tax evasion scandals, as well as the accelerating global diffusion of the CRS.[2956] The offence aims to resolve the problems inherent in prosecuting offshore tax evasion by eradicating the requirement for criminal intent, thereby increasing the number of prosecutions and deterring those who would otherwise seek to escape their tax liabilities by hiding income or assets offshore.[2957] The offence is committed when an individual fails to give notice of chargeability to tax,[2958] fails to deliver a return,[2959] or makes an inaccurate return,[2960] in relation to offshore income, assets or activities in excess of the threshold amount,[2961] currently set at a minimum

[2951] HM Revenue & Customs, 'Inland Revenue Tax Bulletin – Issue 49' (October 2000) <https://webarchive.nationalarchives.gov.uk/20110617024627/http://www.hmrc.gov.uk///bulletins/tb49.htm> accessed 14th December 2020
[2952] The Law Commission, *Codification of the Criminal Law: A Report to the Law Commission* (Law Com No. 143, 1985); See more recently, E Steiner, 'Challenging (Again) the Undemocratic Form of the Common Law: Codification as a Method of Making the Law Accessible to Citizens' (2020) 31(1) King's Law Journal 27; J Lavery, 'Codification of the Criminal Law: An Attainable Ideal?' (2010) 74 JCL 557
[2953] J Collins, 'Large Corporates and Disclosure – Beware "Cheating the Revenue"' [2016] Tax Journal 8, 8
[2954] Finance Act 2016, s166 amending Taxes Management Act 1970, s106; Brought into force following The Finance Act 2016, Section 166 (Appointed Day) Regulations 2017, SI 2017/970.
[2955] HMRC, *Tackling Offshore Tax Evasion: A New Corporate Criminal Offence of Failure to Prevent the Facilitation of Evasion* (Consultation Document, July 2015) p.8.
[2956] HMRC, 'No Safe Havens 2014' (14 April 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/303012/No_safe_havens_2014.pdf> accessed 25 October 2020.
[2957] Foreword by David Gauke by Financial Secretary to the Treasury HMRC, *Tackling Offshore Tax Evasion: A New Criminal Offence for Offshore Evaders* (Summary of Responses, December 2015) p.3.
[2958] Taxes Management Act 1970, s.106B.
[2959] Ibid, s.106C.
[2960] Ibid, s.106D.
[2961] Ibid, s.106B(1)(b), s.106C(1)(c), s.106D(1)(b).

of £25,000 of potential lost tax revenue per year.[2962] The offence applies to income tax and capital gains tax and encompasses all offshore income and gains, which are not reportable under the CRS.[2963] Criminal intent is not required,[2964] although defences are available.[2965] The offence is of a summary nature, punishable by a fine and/or a maximum of six months imprisonment.[2966]

Strict liability offences provide several advantages. They are cheaper and easier to prove, for the prosecution does not have to establish *mens rea*.[2967] As such, the offence will facilitate prosecutions for this crime and is likely to deter others from evading their tax liabilities offshore. The strict liability offence is particularly efficient, as the determination of the key *mens rea* element, dishonesty, is riddled with difficulties.[2968] Nevertheless, by removing the need for any criminal intent, the offence avoids any issues inherent in establishing *mens rea,* irrespective of how this requirement is expressed. In turn, the offence will decrease the costs of prosecuting those who evade their tax liabilities offshore, potentially encouraging additional prosecutions.[2969]

If these anticipated effects are realised, it may seem as though the new offence will be effective in addressing tax evasion, particularly considering that individuals with the highest levels of income are more likely to evade tax offshore.[2970] However, strict liability offences are objectionable because they fail to adhere to the fundamental expectation that criminal offences should require proof of fault, and potentially lead to the conviction of those who have not been

[2962] Ibid, s.106F(2); The Sections 106B, 106C and 106D of the Taxes Management Act 1970 (Specified Threshold Amount) Regulations 2017, SI 2017/988, Reg. 3.
[2963] Ibid, Reg. 2C.
[2964] Taxes Management Act 1970, s.106B, s.106C, s.106D.
[2965] Ibid, s.106B(2), s.106C(2), s.106D(2).
[2966] Ibid, s.106G.
[2967] J Stanton-Ife, 'Strict Liability: Stigma and Regret' (2007) 27 OJLS 151, 151; A Ashworth, 'Should Strict Criminal Liability be Removed from all Imprisonable Offences?' in A Ashworth, *Positive Obligations in Criminal Law* (OUP 2013) p.117; AP Simester, 'Is Strict Liability Always Wrong?' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) p.26. In this respect, Lamond notes that 'the rationales for the use of strict liability are generally pragmatic' G Lamond, 'What is a Crime?' (2007) 27 OJLS 609, 629
[2968] See also, S Bourton, 'Revisiting Dishonesty – The New Strict Liability Offence for Offshore Tax Evaders' in C Monaghan, N Monaghan (Eds.), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (The Law of Financial Crime Series, Routledge 2018)
[2969] 'It's HMRC's policy to deal with fraud by use of the *cost effective* civil fraud investigation procedures under Code of Practice 9 wherever appropriate' (emphasis added), HMRC 'Guidance: HMRC's Criminal Investigation Policy' (13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 20th October 2020.
[2970] A Alstadsaeter, N Johannsen, G Zucman, 'Tax Evasion and Inequality' (September 2017, National Bureau of Economic Research, Working Paper 23772) <http://www.nber.org/papers/w23772> p.28

given the opportunity to decide whether they wish to comply, contrary to the rule of law.[2971] The requirement of *mens rea* protects those who have acted without fault, ensuring any punishment imposed following a criminal conviction, as well as any associated stigma and censure, is legitimately imposed on those who are regarded as culpable.[2972] Accordingly, the strict liability offence is likely to result in the conviction of those who may not be considered to be blameworthy in failing to declare their offshore tax liabilities. For instance, the offence may initially apply to those who genuinely lack knowledge of their offshore tax liabilities, those who incorrectly regard themselves to be non-resident, or those who have participated in a failed tax avoidance scheme.[2973] On this basis, the offence has been almost unanimously criticised by professional societies.[2974]

The offence is restricted in application,[2975] and contains several important defences; it is a defence for an individual to show that they have a reasonable excuse for failing to give the required notice,[2976] or for failing to deliver the return,[2977] or to show that they took reasonable care to ensure the accuracy of a submitted return.[2978] These defences are already familiar in tax legislation and guidance follows current practice.[2979] If afforded a wide interpretation, the defences may empower courts to consider the state of mind of the defendant,[2980] effectively providing a 'bulwark to strict liability imposition' ameliorating 'the harshness of liability without fault.'[2981] Nevertheless, the offence essentially places the burden of proof on the

[2971] A Ashworth, 'Should Strict Criminal Liability be Removed from all Imprisonable Offences?' in A Ashworth, *Positive Obligations in Criminal Law* (OUP 2013) p.112-113
[2972] RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) p.243; A Brudner, 'Imprisonment and Strict Liability' (1990) 40 UTLJ 738, 741
[2973] See for instance, ICAEW, 'Tackling Offshore Tax Evasion: A New Criminal Offence' (Consultation Response, 6 November 2014) <http://tinyurl.com/zkj5mwj> accessed 15th December 2016; CIOT, 'HMRC Consultation Document – Tackling Offshore Tax Evasion: A New Criminal Offence for Offshore Tax Evaders – Response by the Chartered Institute of Taxation' (9 October 2015) <http://tinyurl.com/h3gkmqv> accessed 15th December 2016
[2974] Including the Fraud Lawyers' Association, The Law Society, The Bar Council, The Criminal Bar Association of England & Wales, ICAEW, CIOT, ICAS, AAT, and STEP
[2975] Applying only to income, assets or activities in excess of the threshold amount and which are not reportable under the CRS, see Taxes Management Act 1970, s106B(1)(b), s106C(1)(c), s106D(1)(b); Taxes Management Act 1970 (Specified Threshold Amount) Regulations 2017, SI 2017/988, Reg. 2C, Reg. 3.
[2976] Taxes Management Act 1970, s.106B(2).
[2977] Ibid, s.106C(2).
[2978] Ibid, s.106D(2).
[2979] HM Revenue & Customs, Guidance – Offshore Tax Evasion: Offences Relating to Offshore Income' (16 March 2018) <https://www.gov.uk/guidance/offshore-tax-evasion-offences-relating-to-offshore-income> accessed 25 October 2020.
[2980] *R v Unah* [2011] EWCA Crim 1837
[2981] A Reed, 'Strict Liability and the Reasonable Excuse Defence' (2012) 76 J Crim L 293, 297. In fact, these defences may permit a consideration of the individual's personal circumstances and abilities in a way that traditional mens rea elements cannot, perhaps with the exception of dishonesty, J Horder, 'Whose Values Should Determine When Liability is Strict?' in AP Simester (ed), *Appraising Strict Liability* (OUP 2005) p.124

defendant, when he has not been proven to have committed a presumptive wrong,[2982] and in circumstances where such a burden cannot be regarded as justifiable.[2983] Moreover, the defences essentially transform the offence into a negligence offence, which although preferable to a 'pure' strict liability offence, constitutes a lesser standard of *mens rea*. Consequently, the offence fundamentally changes the common understanding of the definition and nature of criminal tax evasion. Absent statutory intervention, it is unlikely that the courts would ever construe a tax evasion offence as being one of strict liability, primarily owing to the universal nature of the obligation to pay taxes, the diffuse nature of the harm caused by this offence, as well as the stigmatic quality of tax evasion convictions.[2984]

It is regrettable that the legislature proceeded to enact an offence of strict liability, without first considering the implications of criminalising negligent offshore tax non-compliance, investigating the role played by the dishonesty test, particularly in the tax evasion context, nor the issues it engenders. This would have enabled the legislature to explore alternative solutions to the problem of establishing dishonesty in tax evasion cases, before enacting a limited and unjust strict liability offence.

Additional Statutory Offences

There are no specific offences pertaining to the evasion of inheritance tax or corporation tax. However, there is an offence of being knowingly concerned in the fraudulent evasion of stamp duty land tax,[2985] which should follow the interpretation given to the similar fraudulent evasion offences discussed above.[2986] Until recently, there also used to be an offence of being knowingly concerned in any fraudulent activity undertaken with a view to obtaining payments of a tax credit.[2987] This offence was repealed owing to the abolition of Child and Working Tax

[2982] RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) p.246
[2983] For instance, this burden may be justifiably placed on those who seek to avoid taxation through the use of offshore arrangements. However, the offence may also capture individuals from the UK who work in other countries, those holding funds offshore for commercial purposes, as well as those who choose to become resident in the UK, without disposing of their offshore income, assets or activities. See , S Bourton, 'Revisiting Dishonesty – The New Strict Liability Offence for Offshore Tax Evaders' in C Monaghan, N Monaghan (Eds.), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (The Law of Financial Crime Series, Routledge 2018)
[2984] Ibid
[2985] Finance Act 2003, s.95
[2986] Taxes Management Act 1970, s.106A; Customs and Excise (Management) Act 1979, s.170(2); Value Added Tax Act 1994, s.72(1)
[2987] Tax Credits Act 2002, s.35

Credits.[2988] There are no specific statutory offences pertaining to council tax fraud or council tax benefit fraud.[2989]

Dishonesty

Almost all tax evasion offences require proof of *mens rea,*[2990] which often encompasses an assessment of whether the defendant acted 'dishonestly'.[2991] Accordingly, dishonesty is of central importance in tax evasion cases and often forms the chief determinant of liability. This is because several tax evasion offences, particularly, the common law offences of cheating the public revenue and conspiracy to defraud, are so extraordinarily broad, (the *actus reus* being satisfied by any form of fraudulent conduct or agreement),[2992] that dishonesty is often the 'only live issue at trial.'[2993] Indeed, the sheer breadth of these offences means that any form of tax non-compliance, including ineffective avoidance schemes, is encompassed, with dishonesty playing a crucial role in ascertaining the culpability of the defendant.[2994] Moreover, even though some of the statutory offences may be narrower in scope, often, the *actus reus* of the offence is usually predetermined or admitted, leaving the trial to focus on dishonesty.[2995] As such, 'the notion of dishonesty is central to considerations of criminality in tax non-compliance

[2988] Which were replaced with Universal Credit, Welfare Reform Act 2012, Sch.14(1), Welfare Reform Act 2012 (Commencement No 32 and Savings and Transitional Provisions) Order 2019

[2989] Benefit fraud offences are contained in the Social Security Administration Act 1992. s.111A(1) makes it an offence to dishonestly make a false statement or representation or to 'produce or furnish, or cause or allow to be produced or furnished, any document or information which is false in a material particular with a view to obtaining any benefit or other payment or advantage under the [relevant] social security legislation (whether for himself or for some other person)'. There is also a summary offence in s.112, which does not require proof of dishonesty.

[2990] Fraud Act 2006, s.1, s.2; Theft Act 1968, s.17; Taxes Management Act 1970, s106A; conspiracy to defraud preserved by section 5(2) of the Criminal Law Act 1977; cheating the public revenue preserved by section 32(1)(a) Theft Act 1968, see *R v Hudson* [1956] 1 All ER 814; indirect tax offences include Value Added Tax Act 1994, s72(1), 72(3), 72(8); Customs and Excise Management Act 1979, s.170, s170B. This is with the exception of Customs and Excise Management Act 1979, s.167(3), s.170A; Taxes Management Act 1970, s106B, s.106C, s.106D.

[2991] Either as an express requirement or as an aspect of the word fraudulently *A-G's Reference No1 of 1981* [1982] QB 848 (CA); Others require an intention to deceive Value Added Tax Act 1994, s72(3)(a); knowledge or recklessness s72(3)(b) see also s72(8); or knowledge and intention Customs and Excise Management Act 1979, s170(1).

[2992] *R v Less, The Times*, March 30, 1993, *Scott v Metropolitan Police Commissioner* [1974] 3 WLR 741; [1975] AC 819 (HL).

[2993] D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 630; See also, Law Commission, *Fraud* (Law Com No 276, 2002) p.86.

[2994] Ibid; see also D Ormerod, 'Summary Evasion of Income Tax' [2002] Crim LR 3, 21.

[2995] P Kiernan, G Scanlon, 'Fraud and the Law Commission: The Future of Dishonesty' (2003) 24 Comp Law 4, 6.

and as a result, has come to be considered as an essential element of both the nature and definition of the offence'.[2996]

The meaning of dishonesty in tax evasion offences does not differ from the meaning attributed to the term for other criminal offences.[2997] In the case of *Feely*,[2998] it was determined that dishonesty is an ordinary word, and, thus, should not be defined judicially,[2999] but rather, should be regarded as a question of fact, to be determined by the jury.[3000] Consequently, in the seminal case of *Ghosh*,[3001] Lord Lane CJ stated that the test to be applied is as follows:

1. Was the defendant's conduct dishonest according to the ordinary standards of reasonable and honest people?
2. If it was so dishonest, did the defendant himself realise that what he was doing was by those standards dishonest?[3002]

In contrast to the traditional approach taken to the interpretation and application of criminal offences in English Law, the dishonesty test does not provide a legal definition of the term for the jury to apply to the defendant's conduct; rather, it asks them to characterise his conduct, in effect, making a moral judgement as to whether it is sufficiently reprehensible to warrant criminalisation.[3003]

The *Ghosh* test was the accepted test for dishonesty for 35 years.[3004] However, the test was subject to intense and widespread criticism from academics,[3005] and senior judges.[3006] This was

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[2996] S Bourton, 'Revisiting Dishonesty – The New Strict Liability Offence for Offshore Tax Evaders' in C Monaghan, N Monaghan (Eds.), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (The Law of Financial Crime Series, Routledge 2018). See also G McBain, 'Modernising the Common Law Offence of Cheating the Public Revenue' (2015) 8 Journal of Politics and Law 40, 76.
[2997] Such as theft and financial frauds. Horder notes that 'around one-half of all indictable charges tried by the courts include a requirement of dishonesty', J Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2019) p.402
[2998] *R v. Feely* [1973] QB 530 (CA).
[2999] Following *Brutus v. Cozens* [1973] AC 854 (HL).
[3000] *R v. Feely* [1973] QB 530 (CA).
[3001] *R v. Ghosh* [1982] 2 All ER 689 (CA).
[3002] Ibid per Lord Lane CJ at p1064; the Ghosh direction was only given in certain circumstances *R v. Roberts* (1987) 84 Cr App R 117 (CA).
[3003] Law Commission, *Legislating the Criminal Code: Fraud and Deception: A Consultation Paper* (Law Com No 155, 1999) 5.11.
[3004] Until *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, confirmed in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7.
[3005] See for instance, E Griew, 'Dishonesty: Objections to Feely and Ghosh' [1985] Crim LR 341; JR Spencer, 'Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would Have Thought' [1982] CLJ 222
[3006] D Ormerod, K Laird, 'Ivey v Genting Casinos – Much Ado about Nothing?' (2018) 9 UK Supreme Court Yearbook 380, 386, citing *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd's Rep. F.C. 102 *R v Cornelius* [2012] EWCA Crim 500

because the *Ghosh* test was predicated on the myth that there is a 'community norm on dishonesty'.[3007] However, dishonesty is unlikely to have the same meaning for all individuals, particularly in a diverse society, and individuals will differ on its application to specified conduct in particular circumstances.[3008] The idea that there is any such thing as 'the ordinary standards of reasonable and honest people' for the jury to apply is farcical.[3009] Consequently, many feared that the *Ghosh* test would lead to inconsistent outcomes, contrary to expectations of fairness and certainty in the application of law.[3010] Further, the generous discretion afforded to the jury is likely to have led to convictions and acquittals based upon superfluous considerations,[3011] with the factual status of this determination leaving few opportunities for review.[3012] Moreover, the *Ghosh* test most likely prompted longer and more difficult trials, as the ambiguity surrounding the meaning of dishonesty often meant that it was logical for a defendant to 'take his chance with the jury', himself being unconstrained by a legal definition of dishonesty, which may otherwise have obliged him to plead guilty to the offence.[3013] The second limb of the *Ghosh* test was also problematic in that it allowed the defendant to advance something akin to a mistake of law as a defence, by claiming that he did not realise his conduct would be regarded as dishonest.[3014] There may be substantial difficulties in convicting a defendant who possesses 'warped' standards of honesty,[3015] posing a threat to widely held standards of propriety.[3016]

In *Ivey*, the Supreme Court held that the second limb 'does not correctly represent the law and that directions based upon it ought no longer to be given'.[3017] Instead, the Court held that the

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[3007] D Ormerod, K Laird, 'Ivey v Genting Casinos – Much Ado about Nothing?' (2018) 9 UK Supreme Court Yearbook 380, 397
[3008] E Griew, 'Dishonesty: Objections to Feely and Ghosh' [1985] Crim LR 341, 344
[3009] Ibid
[3010] Ibid. Creating problems in relation to Article 7 of the European Convention of Human Rights, Law Commission, *Legislating the Criminal Code: Fraud and Deception: A Consultation Paper* (Law Com No 155, 1999) p.60-65.
[3011] D Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] Crim LR 193, 201. Or '"anarchic" verdicts which are not technically perverse', DW Elliott, 'Dishonesty in Theft: A Dispensable Concept' [1982] Crim LR 395, 409
[3012] M Jefferson, 'Conspiracy to Defraud and Dishonesty' (1998) 62 J Crim L 580, 581
[3013] E Griew, 'Dishonesty: Objections to Feely and Ghosh' [1985] Crim LR 341, 343
[3014] JR Spencer, 'Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would Have Thought' [1982] CLJ 222, 224
[3015] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391 at para 57.
[3016] A Samuels, 'Dishonesty' (2003) 67 J Crim L 324, 325; Glanville Williams notes that this extreme type of subjectivism 'gives subjectivism a bad name', G Williams, 'The Standard of Honesty' (1983) 133 New LJ 636, 637; Tur views this possibility as unproblematic and, citing Brett J in *Prince* (1875) LR 2 CCR 154, 157 states that 'mistake of fact is well established in English criminal law' R Tur, 'Dishonesty and the Jury' in AP Griffiths (ed), *Philosophy and Practice* (CUP, 1985) 91
[3017] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391 at para 74

test for dishonesty should involve a subjective assessment of the individual's knowledge or beliefs as to the facts, followed by an application of the objective standards of ordinary decent people in light of this assessment.[3018] The defendant's own perceptions of the honesty of his conduct are no longer relevant.[3019] Despite judicial approval,[3020] the precedential status of this decision was questionable, for the test set out in *Ivey* was strictly obiter, the issue being concerned with cheating. Nonetheless, in *Barton,*[3021] it was held that a unanimous and clear direction from the Supreme Court to abolish and replace a test established by a decision of the Court of Appeal was binding, even if obiter.[3022] Consequently, the court held that the correct test of dishonesty in English Law was that established in *Ivey*:

1. What was the defendant's knowledge or belief as to the facts; and
2. Was his conduct dishonest by the standards of ordinary decent people?[3023]

While the decision has been welcomed by many who support the eradication of the subjective limb,[3024] the decision to replace *Ghosh* with *Ivey* does not resolve the issues inherent in the test of dishonesty. As Ormerod and Laird note, the sustained objections to *Ghosh* were primarily focused on the objective, rather than subjective, limb.[3025] However, this has since become its 'most prominent feature',[3026] exacerbating the issues identified above. *Ivey* has compounded concerns surrounding legal certainty, particularly considering the sheer breadth of many dishonesty offences.[3027] This is because, divergent interpretations of dishonesty will not only prevent the defendant from being able to determine whether any one jury would characterise his conduct as dishonest in advance, but also, *Ivey* ensures that he no longer even has to appreciate his conduct would be so characterised.[3028] In this respect, the subjective limb served

[3018] Ibid.
[3019] Ibid.
[3020] *Patterson v DPP* [2017] EWHC 2820 (Admin); [2018] 1 Cr. App. R. 28; *Pabon* [2018] EWCA Crim 420; [2018] Crim LR 662. The Crown Court Compendium also advised judges to follow *Ivey* D Ormerod, K Laird, 'The Future of Dishonesty - Some Practical Considerations' (2020) 6 Arch Rev 8, 8
[3021] *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7
[3022] Ibid at para 104
[3023] Ibid at para 84
[3024] See for instance, M Galli, 'Oh my Ghosh: Supreme Court Redefines Test for Dishonesty in Ivey v Genting Casinos' (2018) 29(2) Ent LR 55
[3025] D Ormerod, K Laird, 'The Future of Dishonesty - Some Practical Considerations' (2020) 6 Arch Rev 8, 9
[3026] Ibid
[3027] Sullivan and Simester note that 'the Joint Parliamentary Committee on Human Rights considered the retention of the Ghosh test to be important in terms of art.7 compliance' GR Sullivan, AP Simester, 'Judging Dishonesty' (2020) 136 LQR 523, 526 citing Joint Parliamentary Committee on Human Rights, *Fourteenth Report* (2005–06), at para.2.25.
[3028] Ibid. See also, D Ormerod, K Laird, 'Ivey v Genting Casinos – Much Ado about Nothing?' (2018) 9 UK Supreme Court Yearbook 380, 397

an important function in the criminal law, providing increased legal certainty,[3029] and narrowing the scope of application of some of the widest offences.[3030] The *Ghosh* test was defended on this basis by the Law Commission.[3031] Unfortunately, the decision to remove the subjective limb was taken in a civil case without full argument,[3032] arguably in opposition to parliamentary intention,[3033] and was based on the erroneous assumption that the meaning of dishonesty should not diverge in criminal and civil law.[3034] As will be seen below, the failure to define dishonesty, as well as to propound a suitable test for its determination, has had a detrimental impact on prosecutions for tax evasion offences.

Ormerod persuasively argues that the dishonesty test 'raises special difficulty in revenue cases.'[3035] This is because the issues surrounding the failure to define dishonesty are exacerbated in 'specialised cases', where juries, in the absence of relevant experience, fail to understand or appreciate the context in which the conduct is undertaken, preventing them from accurately determining the defendant's honesty.[3036] Tax evasion is an example of such a specialised case, as it often involves complex and contrived tax arrangements, which are unfamiliar to many jurors.[3037] Many will be unable to accurately determine whether a defendant is to be regarded as dishonest using their own standards, let alone the abstract standards of 'ordinary decent people'. Moreover, the jury is prohibited from hearing any evidence pertaining to the meaning of dishonesty in particular contexts,[3038] including evidence of

[3029] The *Ghosh* test was considered to meet the requirements of legal certainty contained in Art 7 of the European Convention on Human Rights, *R v Pattni* [2001] Crim LR 570.
[3030] 'The Court may have inadvertently broadened a number of criminal offences that were already stretching the limits of what can legitimately be criminalised', D Ormerod, K Laird, 'Ivey v Genting Casinos – Much Ado about Nothing?' (2018) 9 UK Supreme Court Yearbook 380, 394
[3031] Law Commission, *Fraud* (Law Com No 276, 2002) p.43
[3032] K Laird, 'Dishonesty: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)' (2018) 5 Crim LR 395, 397
[3033] As the *Ghosh* test was specifically approved during the passage of the Fraud Act 2006, see GR Sullivan, AP Simester, 'Judging Dishonesty' (2020) 136 LQR 523, 526; 'Where Parliament has approved of a test devised by the courts and it has introduced legislation with that test in mind then there is a very strong argument for saying that only Parliament should be able to alter that test' M Dyson, P Jarvis, 'Poison Ivey or Herbal Tea Leaf?' (2018) 134 LQR 198, 201.
[3034] 'Different tests of dishonesty could be justified because civil law dishonesty determines unacceptable conduct in order to impose liability, whereas dishonesty in the criminal law is concerned with identifying culpability, which requires consideration of the defendant's mental state' G Virgo, 'Cheating and Dishonesty' (2018) 77(1) CLJ 18, 20-21
[3035] D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 635
[3036] Ibid. See also, E Griew, 'Dishonesty: Objections to Feely and Ghosh' [1985] Crim LR 341, 345
[3037] J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) Tax J 1, 3
[3038] K Campbell, 'The Test of Dishonesty in R v Ghosh' (1984) 43 CLJ 349, 358

common market practice,[3039] and regulatory attitudes to the conduct in question.[3040] These concerns are further exacerbated when tax has been evaded through the concealment of income, assets or activities offshore; as well as being complicated and unfamiliar to most jurors, the activities involved will often be hidden,[3041] inhibiting the prosecution from producing enough evidence to persuade the jury of dishonesty.[3042] These difficulties are at least implicitly recognised by the introduction of the strict liability offence for offshore tax evasion.[3043]

There is a lack of empirical evidence pertaining to the impact of the dishonesty test.[3044] Thus, it is unclear what effect the ambiguity created by the *Ghosh* and *Ivey* tests has had on prosecutions for tax offences. In some cases, the jury's uncertainty surrounding the honesty of the defendant's conduct might favour the defendant, making it difficult for the prosecution to meet its burden of proof without undeniably clear evidence.[3045] In others, this ambiguity may favour the prosecution, as the jury might take a dim view of any unfamiliar tax saving activities, particularly if they seem 'artificial and unreal to the layperson',[3046] viewing complex tax arrangements as alien and thus dishonest, without taking an informed view of the defendant's conduct or mental state.[3047] Even assuming that this argument places too little faith in the abilities of jurors,[3048] it is unclear whether there is a common understanding of what the standards of 'ordinary decent people' are in respect of tax evasion; an offence once widely regarded as both morally ambiguous and socially acceptable.[3049] This may have made it

[3039] *R v. Lockwood* (1986) 2 B.C.C. 99333 (CA); This was formerly only relevant to the second question of the *Ghosh* test, see *R v Hayes* [2015] EWCA Crim 1944; [2016] 1 Cr App R (S) 63. Common market practice might be taken into account by the jury when ascertaining the defendant's subjective beliefs as part of the *Ivey* test, see *Hussein v FCA* [2018] UKUT 186 (TCC); [2018] Lloyd's Rep. F.C. 574; Z Leggett, 'The New Test for Dishonesty in Criminal Law - Lessons from the Courts of Equity?' (2020) 84(1) J Crim L 37, 47

[3040] Ibid at para 19 'Not by the standards of bankers or brokers in that market(…) nor by the standards of the BBA or the FXMMC' cited in N Dent, A Kervick, 'Ghosh: A Change in Direction?' (2016) 8 Crim LR 553, 555.

[3041] See Chapter 3

[3042] Fisher discusses these issues in relation to the HSBC scandal in, J Fisher, 'HSBC, Tax Evasion and Criminal Prosecution' (2015) 1253 Tax J 6

[3043] Taxes Management Act 1970, s106B, s106C, s106D. See also, Foreword by David Gauke by Financial Secretary to the Treasury HMRC, *Tackling Offshore Tax Evasion: A New Criminal Offence for Offshore Evaders* (Summary of Responses, December 2015) p.3

[3044] See research by Dr Stefan Fafinski and Dr Emily Finch, which showed widely differing views on dishonesty. The website <http://www.honestylab.com> is no longer available; results presented at the British Science Festival at Surrey University in September 2009; see S Chand, 'Women Judge, But Do They Convict?' (BBC News, 7 September 2009) <http://news.bbc.co.uk/1/hi/sci/tech/8242870.stm> accessed 15th December 2016

[3045] J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) Tax J 1, 3

[3046] D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 638

[3047] J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) Tax J 1, 3

[3048] P Kiernan, G Scanlon, 'Fraud and the Law Commission: The Future of Dishonesty' (2003) 24 Comp Law 4, 6

[3049] SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP, 2007) 243; see also SP Green, 'What Is Wrong with Tax Evasion?' (2009) 9 Hous Bus & Tax LJ 220

difficult to persuade a jury to convict in all save the most egregious of cases, particularly, during the reign of the *Ghosh* test, when the defendant was required to appreciate their dishonesty. In contrast, the tax evasion scandals of the past few years engendered wider public condemnation of this financial crime in the UK, as well as a demand for further action to be taken against the perpetrators and facilitators.[3050] However, the terms evasion and avoidance are often conflated,[3051] potentially leaving the public with the impression that both activities are harmful to society and therefore dishonest, enabling the prosecution of activities previously thought to be beyond the reach of tax evasion offences, such as, ineffective tax avoidance.[3052] While those who knowingly and deliberately enter into, or facilitate, tax avoidance schemes that do not legally achieve the required tax saving should be subject to criminal sanction, those who genuinely believe in the legality of the schemes they devise and facilitate should not.[3053] The broad scope of tax evasion offences, as well as the lack of clarity engendered by the dishonesty test, does not produce this clear distinction. Conversely, the uncertainty surrounding the application of the dishonesty test may discourage prosecutors from initiating prosecutions for the culpable facilitation of ineffective tax avoidance schemes, without undeniably clear evidence, which will have grave implications on tax compliance.[3054]

Dishonesty creates a lack of certainty for individuals, who should be able to foresee in advance the legal consequence of a certain course of action, as well as for prosecutors, who must decide whether to charge a defendant according to the prosecution's prospects of success.[3055] In addition, the test of dishonesty is likely to hinder prosecutions for this crime, as an authority with discretion to select appropriate response to criminality,[3056] is likely to be cautious,

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[3050] See Chapter 1

[3051] MP Devereux, J Freedman, J Vella, 'Tax Avoidance' (Paper No 1, Oxford University Centre for Business Taxation, 3 December 2012) <https://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf> accessed 20 October 2017, p.15

[3052] Most famously, *R v Charlton* [1996] STC 1418 (CA). See recently, *Anthony Ashbolt and Simon Arundell v Her Majesty's Revenue & Customs* [2020] EWHC 1588 (Admin) at para 5, where the defence argued, 'the evidence before the judge demonstrated only that the claimants had engaged in lawful tax avoidance, and not evasion, and there were no reasonable grounds for believing they had acted dishonestly.' However, in this case, the use of false documents supported the allegations of evasion.

[3053] All Party Responsible Group on Anti-Corruption and Responsible Tax, 'Ineffective Tax Avoidance: Targeting the Enablers' (2020) <https://static1.squarespace.com/static/5e4a7793b0171c0e2321f308/t/5f90347d3e827c08d710bf2d/1603286142668/targeting-the-enablers-of-tax-avoidance.pdf> accessed 13th November 2020.

[3054] Ibid

[3055] M Wasik, 'Mens Rea, Motive and the Problem of Dishonesty in the Law of Theft [1979] Crim LR 543, 552

[3056] On the uses and limits of HMRC's discretion see J Freedman, J Vella, 'HMRC's Management of the U.K. Tax System: The Boundaries of Legitimate Discretion' in C Evans, J Freedman, R Krever (eds), *The Delicate Balance – Tax, Discretion and the Rule of Law* (IBFD 2011)79

imposing cost-effective civil penalties, rather than a costly and uncertain prosecution, in all save straightforward cases.[3057] This was arguably demonstrated by HMRC's decision to refer low-value cases for prosecution after the imposition of prosecutorial targets.[3058]

However, the dishonesty test fulfils an important role in the delineation of tax offences, by excluding conduct from the scope of the offence, which is either not morally blameworthy, or insufficiently blameworthy for the purposes of criminalisation, as well as activities the defendant genuinely believes he has a right to lawfully undertake.[3059] In this respect, the test implements justice over consistency.[3060] This is particularly important in a tax evasion context where the sheer breadth of the offences means that dishonesty is the only element that distinguishes a failed tax avoidance scheme, or even a simple mistake, from a serious criminal offence. Honest mistakes are highly likely considering the complexity and length of the UK's tax code.[3061] It is of vital importance to the Rule of Law that such distinctions are made, for those who attempt to act within the boundaries of the law should be treated differently from those who do not.[3062] In this respect, it remains to be seen whether the decision in *Ivey* to remove the subjective limb of the *Ghosh* test will have a negative impact on the fairness of prosecutions for this financial crime. While *Ivey* requires the jury to consider the subjective mental state of the accused, including all 'matters that lead an accused to act as he or she did',[3063] it is uncertain whether juries will be directed to consider these matters,[3064] nor how extensively they will be taken into account in ascertaining the defendant's culpability.[3065] Some insight may be gained from the First Tier Tribunal in cases concerning the imposition of civil penalties for the dishonest evasion of customs and excise duty, where, under an objective

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[3057] HMRC 'Guidance: HMRC's Criminal Investigation Policy' (13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 20th October 2020.
[3058] National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) para 16.
[3059] Law Commission, *Legislating the Criminal Code: Fraud and Deception: A Consultation Paper* (Law Com No 155, 1999) 7.40
[3060] R Tur, 'Dishonesty and the Jury' in AP Griffiths (ed), *Philosophy and Practice* (CUP, 1985) p.83
[3061] 'At more than ten million words it is the world's longest' D Frisby, A Oury, 'Budget Revolution' (2020) 185(4736) Taxation 8, 8
[3062] P Alldridge, 'Tax Avoidance, Tax Evasion, Money Laundering and the Problem of 'Offshore'' in S Rose-Ackerman, P Lagunes (eds), *Greed, Corruption and the Modern State* (Essays in Political Economy, Edward Elgar, 2015) p.332
[3063] *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7 at para 108.
[3064] As Ormerod and Laird note, the Ghosh direction was only given when the defendant claimed that he did not appreciate otherwise would consider his conduct to be dishonest. As such, it is now uncertain when a direction or explanation on dishonesty will be given. D Ormerod, K Laird, 'The Future of Dishonesty - Some Practical Considerations' (2020) 6 Arch Rev 8, 10
[3065] M Dyson, P Jarvis, 'Poison Ivey or Herbal Tea Leaf?' (2018) 134 LQR 198, 203.

test,[3066] the court considered the intelligence, experience, knowledge and beliefs of the individual as relevant to the issue of dishonesty.[3067] Specifically, individuals are not dishonest if they simply lack knowledge of, or make a mistake, in relation to the relevant tax law.[3068] Nonetheless, it remains to be seen whether juries in criminal cases will pay sufficient attention to these factors.

The issues engendered by the dishonesty test in tax evasion cases presents compelling reasons for reform. A partial definition of dishonesty in the tax evasion context would be desirable, following the Theft Act model, excluding conduct which is not regarded as being worthy of criminal sanction.[3069] Alternatively, dishonesty could be defined in statute for the purposes of tax evasion offences, or even replaced with an alternative form of *mens rea.*[3070] However, most alternatives would be unsatisfactory, failing to sufficiently capture the essence of the offence.[3071] In this respect, the dishonesty criterion more accurately captures the meaning attributed to tax evasion, as it permits an examination of the accused's motive, or, more accurately, his knowledge, intentions and beliefs, allowing him 'to explain "why" the alleged offence occurred instead of just "how" it occurred.'[3072] This is essential, as it is these aspects

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[3066] Following, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476; Abou-Rahman v Abacha [2006] EWCA Civ 1492; [2007] 1 All E.R. (Comm) 827; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd's Rep. F.C. 102

[3067] See, *Hughes v The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 0718 (TC), paras 65–67; *Evans v The Commissioners for Her Majesty's Revenue & Customs* [2016] UKFTT 0683 (TC), para 78; *Birgani v The Commissioners for Her Majesty's Revenue & Customs* [2016] UKFTT 0213 (TC), para 32, discussed in Z Jiang, 'Unifying and Defining 'Dishonesty' in the Law of Trusts' (2020) 26(5) T&T 429, 436.

[3068] Ibid

[3069] Theft Act 1968, s.2.

[3070] For instance, Alldridge suggests replacing dishonesty with a requirement for a knowing or reckless deception of HMRC, P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.70. While this may reflect the common meaning attributed to tax evasion, it is submitted that requiring the deception of HMRC unduly narrows the scope of tax evasion offences and potentially invites reconsideration of some of the issues which bedevilled the old 'notoriously technical' deception offences, D Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] Crim. LR 193, 194

[3071] Fraud Lawyers Association, 'Tackling Offshore Tax Evasion: A New Criminal Offence – Response to the HMRC Consultation from the Fraud Lawyers' Association' <http://tinyurl.com/zfnrscx> accessed 12th December 2016; A similar point is made by McBain, who examining the history of the offence of cheating the public revenue, noted, 'A prerequisite of the offence has always been dishonesty. None of the caselaw indicates that oversight, unintentional error *etc,* was criminally culpable' G McBain, 'Modernising the Common Law Offence of Cheating the Public Revenue' (2015) 8(1) J Pol & L 40, 76

[3072] Wasik notes that accepting motive as relevant to the consideration of criminal liability underscores much of the criticism of Ghosh, M Wasik, 'Mens Rea, Motive and the Problem of Dishonesty in the Law of Theft [1979] Crim LR 543, 550. However, Jiang states that 'motive is irrelevant qua motive; the relevance of motive is always traceable to intention and belief (…) It is the intention, not its motivating force, that matters in the sight of the law'. Z Jiang, 'Unifying and Defining 'Dishonesty' in the Law of Trusts' (2020) 26(5) T&T 429, 437. Nevertheless, it is clear that these concepts are inextricably connected, with someone's motive, or their reason for doing something, often being based on both their knowledge and intention. The dishonesty test enables juries to consider all of these aspects of a defendant's state of mind.

of the accused's state of mind which are pivotal in transforming a simple failure to notify, or a failure to correctly declare a tax liability, into an act or omission warranting a criminal response. Thus, it is only by using the test of dishonesty that we can accurately capture the conduct that, according to shared concepts of morality, is sufficiently deserving, or harmful, to warrant a criminal sanction[3073] – the dishonest evasion of tax liabilities.

Nonetheless, the next section examines the US approach to determine whether its legislation provides a more appropriate and effective *mens rea* element for tax evasion offences, which the UK could potentially adopt.

Reform

Before turning to the US position, this section concludes by arguing for the consolidation and simplification of the UK's plethora of offences pertaining to tax evasion. As Alldridge notes, several options are available, including, abolishing the tax-specific offences and relying on the general offences, placing cheat on a statutory basis and abolishing or retaining tax-specific offences, or enacting specific statutory offences of dishonesty relating to each type of tax.[3074] Alldridge notes that there is 'no overwhelming case' for any of these options.[3075] However this thesis fundamentally disagrees, suggesting that a preferable option would be to enact tax evasion offences based on the underlying conduct, as opposed to the type of tax evaded. For instance, the cheating offence could be codified, eventually leading to the abolition of the tax-specific offences. This would also resolve the issues presented by the dishonesty test in tax evasion cases.

In the same way that the court in *Ivey* avoided the application of the problematic dishonesty test by holding that dishonesty was not a necessary component of cheating in gambling, instead providing an extended definition of the term cheat, the cheating the public revenue offence could be defined so as to encompass the objective and subjective elements represented by the dishonesty element.[3076] The definition of cheating offered in *Ivey* was as follows,

[3073] R Tur, 'Dishonesty and the Jury' in AP Griffiths (ed), *Philosophy and Practice* (CUP, 1985) p.93. See also, Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 UNSWLJ 712
[3074] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.69
[3075] Ibid
[3076] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391

> No doubt its essentials normally involve a deliberate (and not accidental) act designed to gain an advantage in the play which is objectively improper given the nature, parameters and rules (formal or informal) of the game under examination.[3077]

The offence of cheating the public revenue could be placed on a statutory basis and defined in a similar way, albeit with the inclusion of the subjective elements essential to ascertain culpability for tax evasion. Cheating the public revenue involves a deliberate (and not accidental) act designed to gain an illegal tax advantage (for oneself or for another) in a manner which is objectively improper, given the nature, parameters and rules (formal or informal) of the tax system and the knowledge, intentions and beliefs of the taxpayer. Although applying the *Ivey* test should theoretically result in similar considerations being made by triers of fact in determining dishonesty for the purposes of tax offences, this is far from guaranteed given the wide discretion it affords. Placing cheat on a statutory basis, with a more narrowly circumscribed definition, may negate the need for dishonesty, as culpability would be ascertainable through the application of the other elements of the offence.

Ultimately, this option would promote legal certainty and fairness in the prosecution of tax offences in the UK. This in turn is also likely to increase the effectiveness of prosecutions for tax evasion in the UK, with prosecutors and defendants alike being able to conduct their activities with greater certainty. Indeed, as with the Fraud Act 2006, the consolidation of the UK's patchwork of tax evasion offences could represent the final stage of the crystallisation of public attitudes towards tax evasion as a financial crime, worthy of criminal sanction.[3078] The symbolic effect of this reform could have a deterrent impact on tax evaders.

6.2.3 Corporate Liability

Introduction

Many of the offences discussed in this and the previous chapter, are capable of capturing the facilitation, as well as the perpetration, of tax evasion offences. Additionally, traditional

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[3077] Ibid at para 47

[3078] See for instance the comments of Page, prior to the enactment of the Fraud Act 2006, which remind the author of the evolving position regarding tax evasion offences in the UK. 'The legislature has managed to avoid reform on a fundamental, substantive level since the early 'eighties. This is probably because fraud is still relatively new as a crime, so society maintains a slightly ambivalent attitude towards it. There is a residual tendency to subscribe to the view that if a conman is clever enough to find some greedy fools to rip off, then good luck to him'. F Page, 'Defining Fraud: An Argument in Favour of a General Offence of Fraud' (1997) 4(4) JFC 287, 306.

doctrines of secondary and inchoate liability apply to tax evasion offences, criminalising the aiding and abetting, counselling or procuring,[3079] as well as the encouraging or assisting,[3080] of such an offence. However, the UK has persistently failed to address the facilitation of tax evasion offences, both by professional facilitators and their corporate employers. For instance, despite the UK having one of the highest numbers of intermediaries involved in the Panama Papers,[3081] and identifying nine 'potential professional enablers of economic crime',[3082] there has yet to be a single prosecution arising from the Panama Papers, irrespective of the multitude of civil and criminal investigations carried out into the tax affairs of more than 190 individuals.[3083] Moreover, little action was taken by the UK's financial services regulator, the Financial Conduct Authority (FCA), against any intermediary named in the Panama Papers.[3084] Similarly, following the revelations contained in the HSBC (Suisse) Scandal, no civil or criminal action was taken against the bank, notwithstanding evidence that the bank assisted its UK clients to evade taxation.[3085] The UK's inability to pursue the individuals and corporations that facilitate financial crimes contrasts sharply with other countries, which took enforcement action in response to these scandals.[3086] The UK position contrasts sharply with that of the US,

[3079] Accessories and Abettors Act 1861, s.8, *R v Jogee and Ruddock v Queen* [2016] UKSC 8; [2017] AC 387
[3080] Serious Crime Act 2007, ss.44-46.
[3081] European Parliament, 'Report on the Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (2017/2013(INI))' (8th November 2017) <https://www.europarl.europa.eu/cmsdata/131460/2017-11-08%20PANA%20Final%20Report.pdf> accessed 9th November 2020, p.27. The UK was second on the list of 'top ten countries where intermediaries operate', ICIJ, 'Data: Explore the Panama Papers Key Figures' (31 January 2017) <https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/> accessed 9th November 2020.
[3082] HM Revenue & Customs, 'News Story: Taskforce Launches Criminal and Civil Investigations into Panama Papers' (8 November 2016) <https://www.gov.uk/government/news/taskforce-launches-criminal-and-civil-investigations-into-panama-papers> accessed 9th November 2020.
[3083] These investigations are predicted to generate £190 million, HM Revenue & Customs, *Annual Report and Accounts 2018-19 (For the year ended 31 March 2019* (HC 2018-19, 2394) p.30
[3084] Soon after the revelations were published, the FCA wrote to financial institutions to ask them to identify and explain their involvement in the Panama Papers. Yet, little action has been taken as a result, see D O'Connor, 'Panama Papers – No Banks to Blame, Say Top European Regulators' (KYC 360, 28 June 2018) <https://www.riskscreen.com/kyc360/article/panama-papers-no-one-blame/> accessed 9th November 2020. However, other regulatory authorities took action against their members, see M Walters, 'Panama Papers Solicitor Fined £45,000' (The Law Society Gazette, 15 January 2019) <https://www.lawgazette.co.uk/law/panama-papers-solicitor-fined-45000-/5068873.article> accessed 9th November 2020
[3085] BBC News, 'HSBC Bank "Helped Clients Dodge Millions in Tax"' (10 February 2015) <https://www.bbc.co.uk/news/business-31248913> accessed 9th November 2020. See also, J Treanor, 'HSBC Escape Action by City Regulator following Swiss Tax Scandal' (The Guardian, 4 January 2016) <https://www.theguardian.com/business/2016/jan/04/hsbc-escapes-regulatory-action-swiss-tax-scandal> accessed 9th November 2020.
[3086] See most recently, W Fitzgibbon, 'Germany Seeks Arrest of Panama Papers Lawyers' (ICIJ, 21 October 2020) <https://www.icij.org/investigations/panama-papers/germany-seeks-arrest-of-panama-papers-lawyers/> accessed 9th November 2020. In 2017, HSBC agreed to pay £300million following action by the French authorities, see BBC News, 'HSBC to Pay €300m to Settle Tax Investigation' (15 November 2017) <https://www.bbc.co.uk/news/business-41992985> accessed 9th November 2020.

which not only secured convictions of individual facilitators identified through the Panama Papers,[3087] but also, reached a Deferred Prosecution Agreement (DPA) with HSBC Private Bank (Suisse), including an accompanying penalty of $192.35million, for its facilitation of tax evasion by US citizens.[3088] As will be seen below, the US has persistently taken criminal and civil actions against banks and other organisations that facilitate tax evasion, including many in secrecy jurisdictions.

The Identification Doctrine

Aside from statutory imposition of strict or vicarious liability, the attribution of criminal liability to corporations in the UK, and thus, for the substantive and inchoate offences pertaining to tax evasion identified above, is governed by the common law identification doctrine. The doctrine provides that in order to secure a conviction of a company, the 'directing mind and will' of the company must be shown to have possessed the *mens rea* of the relevant criminal offence.[3089] The 'directing mind and will' of the company consists of the individuals specified as senior officers in the company's incorporation documents, as well as those given 'full discretion to act independently of instructions' when carrying out delegated functions.[3090] However, there is an overwhelming consensus amongst LEAs, academics and other stakeholders that the identification doctrine frustrates the prosecution of corporations for economic crimes.[3091] This is because, while the identification and attribution of criminal intent may be straightforward in cases concerning small companies, prosecutors are often unable to perform this task when dealing with large, complex organisations, which may deliberately or inadvertently obscure the involvement of those identified as the directing mind from

[3087] W Fitzgibbon, 'US Accountant, Guilty in Panama Papers Case, Sentenced to More Than 3 Years' (25 September 2020) <https://www.icij.org/investigations/panama-papers/us-accountant-guilty-in-panama-papers-case-sentenced-to-more-than-3-years/> accessed 9th November 2020.
[3088] United States Department of Justice, 'Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA' (10 December 2019) <https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa> accessed 9th November 2020.
[3089] *Lennard's Carrying Co Ltd v Asiatic Petroleum* [1915] AC 705 (HL); *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL)
[3090] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 171 (HL); *Serious Fraud Office v Barclays Plc and Another* [2018] EWHC 3055; [2020] 1 Cr App R 28 at para 66.
[3091] See for instance, the responses to the Ministry of Justice's Consultation on Corporate Economic Crime, where '(75.9%) agreed that the identification doctrine inhibits holding companies to account for economic crimes committed in or on their behalf', Ministry of Justice, 'Corporate Liability for Economic Crime Call for Evidence: Government Response' (3rd November 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932169/corporate-liability-economic-crime-call-evidence-government-response.pdf> accessed 9th November 2020 at p.10.

participation in criminal activities.[3092] The identification doctrine has hindered the UK's ability to combat the facilitation of tax offences by large corporations, as demonstrated by the UK's tepid response to the organisations at the heart of recent tax evasion scandals.

Failure to Prevent

In recognition of these issues,[3093] two new corporate offences of failing to prevent the facilitation of UK and foreign tax evasion were introduced in the Criminal Finances Act 2017.[3094] Modelled on the corporate offence contained in the Bribery Act 2010,[3095] the new offences extend liability to corporations beyond the commission or facilitation of tax evasion offences, to encompass the failure to prevent the facilitation of this financial crime. As such, the offences increase the scope of responsibility for facilitation offences, as opposed to altering the nature of the substantive offence.[3096] The s.45 offence provides that 'relevant bodies',[3097] will commit an offence if an associated person commits a UK tax evasion facilitation offence,[3098] while acting in an associated capacity.[3099] Similarly, the s.46 offence provides that 'relevant bodies', will commit an offence if an associated person carries out a foreign tax evasion facilitation offence,[3100] while acting in an associated capacity.[3101] For the latter offence

[3092] Ministry of Justice, 'Corporate Liability for Economic Crime Call for Evidence' (13 January 2017) <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf> accessed 9th November 2020 at p.13. This was recently demonstrated by the SFO's attempted prosecution of Barclays bank, which was thwarted on the basis that the senior executives suspected of playing a significant role in the criminality were not to be regarded as the directing mind and will of the company, owing to their lack of complete autonomy in decision-making, *Serious Fraud Office v Barclays Plc and Another* [2018] EWHC 3055; [2020] 1 Cr App R 28

[3093] HM Revenue & Customs, 'Tackling Offshore Tax Evasion: A New Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion' (Consultation Document, 16 July 2015) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf> accessed 12th November 2020, at p.8-9

[3094] Criminal Finances Act 2017, ss.45-46

[3095] Bribery Act 2010, s.7

[3096] T Corfield, J Schaefer, 'The Taxman Cometh: The Criminal Offences of Failure to Prevent Tax Evasion' (2017) 23(10) T&T 1030, 1031. Ashworth notes that this may be regarded as a vertical, rather than horizontal, expansion of the criminal law, 'in effect, adding (…) extra layers of criminal responsibility' A Ashworth, 'The Diffusion of Criminal Responsibility: A Cause for Concern?' [2017] QLY 170, 180

[3097] '"Relevant body" means a body corporate or partnership (wherever incorporated or formed)', Criminal Finances Act 2017, s.44(2).

[3098] As defined in s.45(5), ibid.

[3099] Ibid, s.45(1). Associated persons include 'an employee of B who is acting in the capacity of an employee, (b)
an agent of B (other than an employee) who is acting in the capacity of an agent, or (c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services', ibid s.44(4).

[3100] Ibid, s.46(6)

[3101] Ibid, s.46(1)(a)

to apply, there must be dual criminality,[3102] as well as a sufficient connection between the organisation or the offence and the UK.[3103] For both offences, it is a defence for the organisation to prove that it had reasonable prevention procedures in place, or that it 'was not reasonable in all the circumstances' to require the body to adopt such procedures.[3104] Upon conviction for the offence, a corporation could face an unlimited fine.[3105] Alternatively, the offences are capable of being addressed via a DPA, specifically, an agreement between a prosecutor and a suspected organisation to suspend the prosecution for a certain period of time and ultimately discontinue the prosecution upon the fulfilment of certain conditions.[3106] The UK was inspired to introduce DPAs owing to the US use of this enforcement tool against corporations involved in serious crime.[3107] However, the UK model is intended to provide greater transparency and judicial oversight than its US counterpart,[3108] with the aim of avoiding a common perception of US practice, namely, that DPAs enable prosecutors to enter into 'sweetheart deals' with offending corporations.[3109]

Evaluation

The strict liability nature of the offences renders the identification doctrine inapplicable. Instead, the offences comprise of three stages, namely, the criminal tax evasion by a taxpayer, the facilitation of this crime by an 'associated person' acting in such capacity, as well as a failure to prevent the facilitation.[3110] The offence is likely to improve the law pertaining to tax evasion in the UK by providing a mechanism to address tax-related offending on the part of

[3102] Ibid, s.46(6)
[3103] Ibid, s.46(1)(b) 'The conditions are (a) that B is a body incorporated, or a partnership formed, under the law of any part of the United Kingdom; (b) that B carries on business or part of a business in the United Kingdom; (c) that any conduct constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom', s.46(2).
[3104] Ibid, s.45(2), s.46(3). See also, HM Revenue & Customs, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion' (1st September 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf> accessed 13th November 2020
[3105] Ibid, s.45(8), s.46(7)
[3106] Crime and Courts Act 2013, s.45, Schedule 17. See also, SFO, CPS, 'Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013' <https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf> accessed 13th November 2020
[3107] Ministry of Justice, *Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements* (Cm 8348, 2012) p.19
[3108] Ibid.
[3109] See for instance, P Reilly, 'Sweetheart Deals, Deferred Prosecution and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts' (2019) 50 Ariz St LJ 1113
[3110] HM Revenue & Customs, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion' (1st September 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf> accessed 13th November 2020, p.6

corporations, such as, the facilitation of tax evasion seemingly demonstrated by HSBC (Suisse) amongst others. The offence will also provide a mechanism to address the facilitation of tax offences through the provision of advice and services to avoid the application of anti-tax evasion measures, such as the CRS.[3111] However, thus far, the offence has had a negligible impact; not a single organisation has been charged with the offence.[3112] Further, a HMRC commissioned survey found that only around a quarter of businesses surveyed were aware of the Criminal Finances Act and its offences.[3113] Therefore, the second key aim of the offences is also not presently being realised, specifically, to prompt changes in governance and behaviour by corporations who wish to aver themselves of the reasonable procedures defence.[3114] Nevertheless, investigations into corporate economic crimes committed by large organisations are notoriously complex and take a long time to come to fruition.[3115] There are promising signs that prosecutions or DPAs might soon be forthcoming, with HMRC currently conducting 13 investigations into suspected offences, with another 18 'opportunities' under review.[3116] Additionally, the decision in *Ivey* is likely to make it easier to attribute liability to corporations for the failure to prevent offences, as well as substantive tax evasion facilitation offences, as there is no longer any need to demonstrate a subjective appreciation of dishonesty

[3111] HM Revenue & Customs, 'Tackling Offshore Tax Evasion: A New Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion' (Consultation Document, 16 July 2015) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf> accessed 12th November 2020, at p.10

[3112] HM Revenue & Customs, FOI Release: Number of Live Corporate Criminal Offences Investigations' (Updated 21 October 2020) <https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations> accessed 12 November 2020

[3113] IPSOS Mori Social Research Institute, 'Evaluation of Corporate Behaviour Change in Response to the Corporate Criminal Offences Research Report 529' (December 2018, published March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781334/Evaluation_of_corporate_behaviour_change_in_response_to_the_corporate_criminal_offences__HMRC_research_report_529_.pdf> accessed 13th November 2020, p.4

[3114] HM Revenue & Customs, 'Tackling Offshore Tax Evasion: A New Corporate Offence of Failure to Prevent the Facilitation of Tax Evasion' (Consultation Document, 16 July 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf> accessed 12th November 2020, p.10

[3115] K Laird, 'Deferred Prosecution Agreements and the Interests of Justice: A Consistency of Approach?' (2019) 6 Crim LR 486, 499

[3116] HM Revenue & Customs, FOI Release: Number of Live Corporate Criminal Offences Investigations' (Updated 21 October 2020) <https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations> accessed 12 November 2020

by those associated with the company, or the 'directing mind and will' of the corporation, in the commission of the underlying offence.[3117]

If enforcement of the tax evasion offence replicates the enforcement of the comparable bribery offence, it is likely that the offence will lead to the conclusion of DPAs, as opposed to convictions of offending corporations.[3118] The use of DPAs has been influenced by the desire to avoid the 'unintended detrimental consequences' that can accompany the conviction of a corporation, as demonstrated by the collapse of Arthur Andersen following its prosecution in the US.[3119] The rationale for DPAs has led some to question whether criminal liability should attach to corporations at all, as the preventative and reparative aims of corporate liability can be achieved through the use of the civil regulatory framework.[3120] However, as noted above, the application of the UK's regulatory framework, has resulted in limited action being taken in tax evasion cases.[3121] When action has been taken against offending corporations, the framework has resulted in the imposition of penalties that fail to have a deterrent impact and pale in comparison to those levied by their US counterparts.[3122]

[3117] C Yorke, 'Dishonesty and the Failure to Prevent Tax Evasion' (2017) 1377 Tax J 16; D Ormerod, K Laird, 'The Future of Dishonesty - Some Practical Considerations' (2020) 6 Arch Rev 8, 10; D Ormerod, K Laird, 'Ivey v Genting Casinos – Much Ado about Nothing?' (2018) 9 UK Supreme Court Yearbook 380, 401

[3118] To date, one conviction and seven DPAs have been secured, see SFO, 'Freedom of Information 2020-040 – Bribery Act 2010' (1 March 2020) <https://www.sfo.gov.uk/foi-request/2020-040-bribery-act-2010/> accessed 13th November 2020. SFO, 'SFO enters into Deferred Prosecution Agreement with Airline Services Limited' (30 October 2020) <https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/> accessed 13th November 2020. SFO, 'SFO Receives Approval for DPA with G4S Care & Justice Services (UK) Ltd' (17 July 2020) <https://www.sfo.gov.uk/2020/07/17/sfo-receives-final-approval-for-dpa-with-g4s-care-justice-services-uk-ltd/> accessed 13th November 2020.

[3119] Ministry of Justice, *Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements* (Cm 8348, 2012) p.9. See also, N Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82(3) J Crim L 245, 251

[3120] A Ashworth, 'The Diffusion of Criminal Responsibility: A Cause for Concern?' [2017] QLY 170, 176. 'Strengthening deterrents to misconduct through regulatory reform in sectors where it is less developed must always be regarded as a possible alternative to the extension of the criminal law' Ministry of Justice, 'Corporate Liability for Economic Crime Call for Evidence' (13 January 2017) <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf> accessed 9th November 2020 at p.16.

[3121] Under the UK's regulatory framework, several penalties may be imposed by the FCA on financial institutions that facilitate financial crime, see for instance the Financial Services and Markets Act 2000, s.206, s.402. Under AML legislation, supervisors are required to take 'proportionate and dissuasive disciplinary measures' for breach of AML requirements, see The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, Reg.49, see also Part 9.

[3122] N Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82(3) J Crim L 245, 261

Further, the criminal law has an important function in communicating the impropriety of certain corporate conduct, which cannot be replicated through further regulation.[3123] In addition, despite the limited range of penalties imposed following corporate convictions, other consequences that follow a finding of guilt may act as a powerful deterrent to corporate misconduct.[3124] This is particularly important considering the magnification of harm caused by an offence when it is carried out by a company, rather than an individual.[3125] The 'expressive' or 'communicative' function of criminal liability,[3126] is particularly important in a tax evasion context, where strong enforcement action, particularly criminal prosecutions, can have a positive impact on compliance by other taxpayers.[3127] In this respect, the use of DPAs may strike a balance between the need to communicate the severity of the defendant's conduct and the need to avoid unintended consequences of a criminal conviction.[3128] However, to be effective, the use of DPAs to address the facilitation of tax evasion will need to be based on a more principled, consistent, and coherent approach than that currently taken in respect of corporate bribery offences.[3129] In addition, special consideration should be paid to the enforcement of corporate facilitation offences within the context of tax noncompliance, which may require an alternative approach to that taken in respect of other economic crimes. This issue will be explored in the next chapter. Regardless of the enforcement action taken against

[3123] 'Only a criminal conviction communicates to the public the law's judgment that the corporation's conduct was so bad that the layperson would recognise it as "criminal"' M Dsouza, 'The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification' (2020) 79(1) CLJ 91, 93. Similar arguments have been made by US scholars for many years, see ME Diamantis, 'Corporate Criminal Minds' (2016) 91(5) Notre Dame L Rev 2049, 2062-4

[3124] Including regulatory action taken by supervisory authorities, as well as reputational harm, T Corfield, J Schaefer, 'The Taxman Cometh: The Criminal Offences of Failure to Prevent Tax Evasion' (2017) 23(10) T&T 1030, 1032

[3125] In addition, 'corporate structures place individuals in positions to cause certain harms which they could not cause without them' R Lööf, 'Corporate Agency and White Collar Crime – An Experience-Led Case for Causation-Based Corporate Liability for Criminal Harms' (2020) 4 Crim LR 275, 285-6.

[3126] M Dsouza, 'The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification' (2020) 79(1) CLJ 91, 93; ME Diamantis, 'Corporate Criminal Minds' (2016) 91(5) Notre Dame L Rev 2049, 2062-4

[3127] 'Although it has yet to be proven that prosecution has a greater or lesser impact on these offenders, increased prosecution might be justified for purposes of moral retribution as well as perceived social fairness' M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493, 493

[3128] The need to consider the collateral consequences of a corporate conviction is disputed by Markoff, who argues 'No company publicly traded on a major stock exchange failed because of a conviction that occurred in the years 2001-2010. There is no empirical evidence to support the existence of the Andersen Effect.' G Markoff, 'Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) University of Pennsylvania Journal of Business Law 797, 830. Others make the valid point that the consequences of conviction on individuals and their dependants are only usually considered at the sentencing stage, if at all, C King, N Lord, 'Deferred Prosecution Agreements in England and Wales: Castles Made of Sand?' [2020] PL 307, 315; M Dsouza, 'The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification' (2020) 79(1) CLJ 91, 114

[3129] See C King, N Lord, 'Deferred Prosecution Agreements in England and Wales: Castles Made of Sand?' [2020] PL 307

the corporation, for the law to truly have a deterrent effect, it is important that this action is not taken at the expense of prosecutions of the employees who facilitate tax evasion.[3130]

Nevertheless, if it is accepted that it is suitable to attribute liability to corporations for facilitating tax evasion offences, it is unclear why a 'failure to prevent' model has been introduced. After all, attributing liability to the corporation for the facilitation offence, rather than its omission in preventing it, would provide a clearer message to the public as to the severity of the corporation's conduct. However, as seen above, this would require statutory reform of the identification doctrine. This would be a preferable option to the introduction of further failure to prevent offences,[3131] as well as other methods of attributing liability to corporations, such as, the US model of vicarious liability known as *respondeat superior*, which imposes criminal liability on companies for the criminal actions of employees intended to benefit the corporation.[3132] This is because, unlike these alternatives, the identification doctrine requires the application of criminal liability to be dependent on the blameworthiness of those said to embody the corporation, ensuring adherence to the fundamental principle of individual culpability in the criminal law.[3133] Indeed, the criminal law will struggle to perform its communicative function without this insistence on personal culpability. This has been noted in respect of the US model of vicarious liability; 'once *respondeat superior* is applied to crimes, however, the stigma of conviction becomes weakened as the public begins to recognise that criminal liability may not signify lack of good faith'.[3134] Therefore, although many alternatives have been suggested,[3135] this author supports proposals for reform of the identification doctrine, whereby the range of individuals said to embody the corporation would be expanded and/or more easily identified. In this respect, the UK Government has recently taken positive steps

[3130] C Wells, 'Corporate Criminal Liability: A Ten Year Review' (2014) 12 Crim LR 849, 877
[3131] As suggested in Ministry of Justice, 'Corporate Liability for Economic Crime Call for Evidence' (13 January 2017) <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf> accessed 9th November 2020, p.17-18.
[3132] *New York Central & Hudson River Railroad Co. v. United States* 212 U.S. 481, 493 (1909)
[3133] M Dsouza, 'The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification' (2020) 79(1) CLJ 91, 105; A similar point has been
[3134] Note 'Criminal Liability of Corporations for Acts of their Agents' (1946) 60 Harvard LR 83, 286 cited in R Mays, 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations' (1998) 2(2) Mountbatten Journal of Legal Studies 31, 37
[3135] See for instance, Ministry of Justice, 'Corporate Liability for Economic Crime Call for Evidence' (13 January 2017) <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf> accessed 9th November 2020, p.17-18.

towards implementing reform by commissioning the Law Commission to undertake a review of the identification doctrine.[3136]

Nevertheless, overall, the failure to prevent offence constitutes an improvement to the law pertaining to tax evasion in the UK by providing a method to attribute liability to corporations for their involvement in the facilitation of tax crimes, a formerly near-impossible task.

6.3 The Legal Framework Pertaining to Tax Evasion in the US

6.3.1 Introduction

Similarly to its UK counterpart, the US uses a range of general and specific offences to combat tax evasion. However, US tax evasion offences are primarily of statutory, rather than common law, creation and are set out in key sections of the Internal Revenue Code (IRC).[3137] In some respects, specific US tax evasion offences are broader in scope than those enacted in the UK, applying to the evasion of a wide range of taxes. On the other hand, US offences are narrower in scope for they explicitly proscribe different forms of fraudulent behaviour intrinsically related to tax compliance, rather than encompassing every form of fraudulent conduct per se. Broader general fraud offences are also used to address tax evasion in the US, but their use tends to be restricted to the most egregious cases.[3138] In effect, the US framework provides for a more doctrinally cohesive and coherent set of offences pertaining to tax evasion, than the broad patchwork of offences employed for this purpose in the UK. This section provides an evaluation of the criminal offences pertaining to this financial crime in the US.

6.3.2 Tax Evasion Offences

26 USC § 7201 - Attempt to Evade or Defeat Tax

As in the UK, the US uses a plethora of criminal offences to address tax evasion. However, the 'capstone' of its criminal sanctions regime,[3139] is the offence under §7201 of the IRC of willfully attempting in any manner to evade or defeat any tax imposed by the IRC, or the

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[3136] Ministry of Justice, 'Corporate Liability for Economic Crime Call for Evidence: Government Response'(3 November 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932169/corporate-liability-economic-crime-call-evidence-government-response.pdf> accessed 13th November 2020, at p.22

[3137] 26 USC §§ 7201-7215

[3138] 18 USC § 1001; 18 USC § 287; 18 USC § 2(a)&(b); 18 USC §371; 18 USC §§ 1341 and 1343

[3139] L Brown, A Jamali, 'Tax Violations' (2014) 51 Am Crim L Rev 1751, 1759

payment thereof.[3140] The offence has primarily been used to combat the evasion of income tax, including tax on illicit income,[3141] but is also applicable to the evasion of excise, estate and gift taxes.[3142] The offence can be committed in two ways, namely, an attempt to evade or defeat the assessment of tax, or an attempt to evade or defeat the payment of tax.[3143] The first form of the offence requires proof of a tax deficiency, an affirmative act constituting evasion or attempted evasion of assessment, and willfulness.[3144] The second form of the offence has similar elements, but does not require proof of a tax deficiency, instead requiring proof that a tax has been assessed, is due and owed by the taxpayer.[3145] Prosecutions for the first version of the offence are far more prevalent.[3146] Both iterations of the offence apply to 'any person', expanding the application of the offence to those who are not personally responsible for the payment,[3147] including officers and shareholders of corporations that have evaded taxation,[3148] as well as professional facilitators, such as attorneys and accountants.[3149]

For evasion of assessment cases, although the prosecution must demonstrate a tax deficiency, it is not compelled to demonstrate the exact amount of any deficiency.[3150] Such an endeavour is viewed as unnecessary in the course of imposing criminal penalties, as opposed to recovering evaded taxation.[3151] Accordingly, both direct and indirect methods of proof can be used to demonstrate a tax deficiency.[3152] The direct method of proof refers to the use of specific items to demonstrate a tax deficiency, whereas indirect methods involve the use of circumstantial evidence to demonstrate inaccurate reporting of, or a failure to report, income.[3153] Indirect

[3140] 26 USC § 7201
[3141] *James v United States*, 366 U.S. 213 (1961)
[3142] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.03[7]
[3143] It is regarded as one offence that simply encompasses the different methods of carrying out tax evasion, see *United States v Dunkel*, 900 F.2d 105, 66 AFTR2d 90-5005, (CA-7, 1990) cited in MA Turner, 'Build an Awareness of Unlawful Tax Evasion to Ensure Avoidance' (2008) 81 Prac Tax Strategies 230, 233
[3144] *Sansone v United States*, 380 US 343, 351 (1965)
[3145] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.03[4]
[3146] Ibid at § 7.01[3]
[3147] Ibid at §2.03[5]
[3148] See for instance, *United States v Irwin*, 593 F2d 138 (1st Cir. 1979)
[3149] See for instance, *United States v Helmsley*, 941 F2d 71 (2d Cir. 1991)
[3150] SD Shimick, 'Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero' (2014) 50 Tulsa L Rev 43, 54
[3151] *United States v Johnson*, 319 US 503, 517 (1943)
[3152] SD Shimick, 'Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero' (2014) 50 Tulsa L Rev 43, 59
[3153] L Brown, A Jamali, 'Tax Violations' (2014) 51 Am Crim L Rev 1751, 1761

methods include the net-worth method,[3154] the cash expenditures method,[3155] and the bank deposits method.[3156] Indirect methods are often used in combination to demonstrate unreported income.[3157] Although the amount need not be precisely determined, the majority of circuit courts have held that the amount of the deficiency must be 'substantial'.[3158] This is a 'relative term' that must be interpreted with regard to the context and circumstances of the case.[3159] Amending the return at a later date does not eliminate the deficiency and is unlikely to prove influential in determining willfulness.[3160]

The statutory requirement of 'an attempt in any manner' requires an affirmative act to evade or defeat a tax, as opposed to an omission or 'passive neglect'.[3161] Indeed, it is this element of the offence that differentiates it from the misdeameanor offences contained in §7203.[3162] As such, the simple failure to file a tax return does not fall within the scope of the section, that is, unless it is accompanied by an affirmative act, such as the concealment of income or the making of a false statement to the IRS.[3163] Consequently, the statute is broad in scope, applying to a wide range of affirmative acts, although not as broad as its UK counterparts, such as the primary offence of cheating the public revenue, which expressly applies to omissions.

[3154] Here, the government must establish the opening net worth of the taxpayer and a likely source of the unreported income and/or the impossibility of income arising from non-taxable sources. It must then determine annual increases in the taxpayer's net worth, deducting income from non-taxable sources, and comparing this to reported taxable income, *Holland v United States*, 348 US 121 (1954)

[3155] The cash expenditures method is similar to the net worth method, but focuses on taxpayer spending, as opposed to increases in net worth, to account for tax evaders who spend the sums retained through their activities, *Taglianetti v United* States 398 F2d 558 (1st Cir. 1968), aff'd 394 US 316 (1969); *United States v. Hogan*, 886 F. 2d 1497 (7th Cir. 1989); United *States v Khanu*, 662 F.3d 1226, 1229-1230 (DC Cir 2011)

[3156] The bank deposits method involves the investigation of bank deposits to identify those that represent taxable income during a particular year, which are then aggregated to produce a net sum that is compared to the taxpayer's reported income, *Gleckman v United States*, 80 F. 2d 394 (8th Cir. 1935); *United States v Abodeely* 801 F2d 1020 (8th Cir. 1986); *United States v Mounkes*, 204 F.3d 1024, 1028 (10th Cir. 2000)

[3157] IRS, 'Internal Revenue Manual : 9.5.9.1 Methods of Proof Introduction' (3rd September 2020) <https://www.irs.gov/irm/part9/irm_09-005-009> accessed 7th March 2021

[3158] Shimick notes that the Supreme Court has declined to address the issue, despite the circuit court split, SD Shimick, 'Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero' (2014) 50 Tulsa L Rev 43, 54

[3159] IRS, 'Internal Revenue Manual: 9.1.3.3.2.2.1 26 USC §7201 – Additional Tax Due and Owing' (24 February 2010) <https://www.irs.gov/irm/part9/irm_09-001-003> accessed 7th March 2021

[3160] *Norwitt v United States* 195 F2d 127 (9th Cir), cert denied 344 US 817 (1952) I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.03[1][e]

[3161] *Spies v United States* 317 US 492, 499 (1943), WD Elliott, 'Federal Taxation' (2014) 46 Tex Tech L Rev 809, 813

[3162] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 7.01[3]

[3163] The traditional list of affirmative acts in set out in *Spies v United States* 317 US 492, 495 (1943). As such, this type of evasion is known as a 'Spies evasion', ibid at § 2.03[2]. See also, *United States v Copeland*, 786 F2d 768, 770 (7th Cir. 1985)

The final requirement of the offence is willfulness, defined as a 'voluntary, intentional violation of a known legal duty'.[3164] As the same interpretation is afforded to willfulness for the purposes of all US tax evasion offences, the meaning of this term will be considered in further depth below.

26 USC § 7206(1) – Fraud and False Statements

IRC § 7206 contains five offences, yet the offences contained in the last two sections are rarely used owing to overlap and duplicity.[3165] As such, this chapter concentrates on the most 'potent' tax offences in § 7206 - the tax perjury and aiding and assisting tax fraud offences.[3166] The tax perjury offence is committed when a person 'willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.'[3167] Consequently, the offence requires proof of four elements, specifically; the making and signing of a false federal income tax return, the submission of a written declaration of its accuracy under penalties of perjury, a lack of belief in the accuracy of the return, and willful intent to violate the law.[3168] In contrast to the offence contained in § 7201, the tax perjury offence does not require proof of a tax deficiency,[3169] nor an intent to evade taxes,[3170] and is thus a useful tool when proof of these elements is lacking,[3171] or when false statements are made with minimal adverse tax consequences.[3172] The tax perjury offence

[3164] *United States v Pomponio*, 429 US 10, 12 (1976); *Cheek v United States*, 498 US 192, 200 (1991)
[3165] M Angelo, A Welles Hasen, U Hindberg, R Kesselring, H Perlman, 'Tax Violations' (2020) 57 Am Crim L Rev 1349, 1377
[3166] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.04[1]
[3167] 26 USC § 7206(1)
[3168] *United States v Boyd*, 773 F.3d 637, 644 (5th Cir 2014); *United States v Nicholson*, 961 F.3d 328 (5th Cir 2020)
[3169] *United States v Pree*, 408 F.3d 855, 867 (7th Cir 2005), J Gibbons, 'Proof of Tax-Deficiency – The Silent Element in False Statements Charges?' (2008) 50 Ariz L Rev 337, 338-9. That is, unless the false statement relates to the accuracy of reported income, L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) § 12.02[3][c][v]
[3170] *Siaravo v US*, 311 F2d 469, fn 4 (1st Cir 1967)
[3171] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.04[1]; 'proving a "false statement" case is generally easier and less complex for the government than proving an "evasion" case because in the false statement case the government must simply prove the falsity of one line item on the tax return' PH Bucy, 'Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves' (1997) 29 Ariz St LJ 639, 648
[3172] For instance, when the amount of income has been reported accurately, but the source has not, *United States v DiVarco*, 484 F2d 670, 672-73 (7th Cir 1973), or even when tax has been overpaid *United States v Johnson*, 558 F.2d 744, 745-46 (5th Cir 1977)

overlaps with the general perjury offence,[3173] but the tax perjury offence is wider in scope applying to both individuals and corporations.[3174]

The offence applies to a wide range of documents including tax returns pertaining to a plethora of taxes,[3175] amended tax returns,[3176] schedules and attachments to tax returns,[3177] as well as other related forms signed under penalty of perjury.[3178] The requirement of making and subscribing a return means that it must be prepared, signed and filed with the service,[3179] either by the defendant or someone authorised to act on his behalf.[3180] The presence of a signature on a return creates a rebuttable presumption that it was signed by him,[3181] and that he had knowledge of its contents.[3182] The return, statement, or other document, must be made under penalties of perjury, usually satisfied by a statement on the tax form,[3183] which helps to limit the scope of the offence and avoid duplication of the offence under § 7207.[3184] Although not expressly required by the statute, US courts have restricted the scope of the offence by requiring that the return, statement, or other document must be actually false in a material matter, not just believed to be false.[3185] Although US courts agree that materiality is a matter for the jury,[3186] there is a lack of consensus as to how materiality should be defined and determined.[3187] Some courts consider a material statement to be one that 'must be reported "in order that the

[3173] Contained in 18 USC § 1621
[3174] *United States v Ingredient Tech Corp*, 698 F2d 88 (2nd Cir 1984). The general perjury offence also has a harsher maximum penalty, see L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) § 12.02[3][c]
[3175] Including individual and corporate income tax returns, gift tax returns, estate tax returns, and partnership returns, I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.04[2]
[3176] *Levy v United States,* 271 F. 942 (3rd Cir 1921)
[3177] *United States v Taylor*, 574 F2d 232, 237 (5th Cir 1978)
[3178]I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.04[2]
[3179] *United States v Boitano,* 796 F3d 1160 (9th Cir 2015); *United States v Gilkey*, 362 F Supp 1069, 1071 (ED Pa 1973). If the return is not signed, the offence has not been committed *United States v Robinson*, 974 F2d 575, 577-78 (5th Cir 1992)
[3180] *United States v Badwan*, 624 F2d 1228, 1232 (4th Cir 1980); *United States v Fawaz,* 881 F2d 259, 265 (6th Cir 1989); *United States v Wilson,* 887 F2d 69, 72 (5th Cir 1989)
[3181] 26 USC § 6064, *United States v Gaines*, 690 F2d 849, 853 (11th Cir 1982)
[3182] *United States v Romanow,* 509 F2d 26, 27 (1st Cir 1975); *United States v Olbres,* 61 F3d 967, 971 (1st Cir 1995)
[3183] See for instance, Form 1040 'Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.' Department of Treasury, Internal Revenue Service, 'Form 1040: US Individual Income Tax Return' (2020) <https://www.irs.gov/pub/irs-pdf/f1040.pdf> accessed 13th March 2020
[3184] B Bittker, M McMahon, Zelenak, *Federal Income Taxation of Individuals* (Third edn, Thomson Reuters 2020) at 50.08[4]
[3185] L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) § 12.02[3][c][ii]
[3186] *United States v Gaudin,* 515 US 506 (1995); *Neder v United States*, 527 US 1 (1999)
[3187] J Gibbons, 'Proof of Tax-Deficiency – The Silent Element in False Statements Charges?' (2008) 50 Ariz L Rev 337, 345

taxpayer estimate and compute his tax correctly"',[3188] whereas others regard a statement to be material if it simply has the 'natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.'[3189] The defendant does not have to know that the statement is material,[3190] but must believe it to be false.[3191] The falsity may relate to an omission or an overtly false statement.[3192]

§ 7206(2) Aiding and Assisting Tax Fraud

The false statements offence may apply to facilitators yet it is often more appropriate to charge facilitators, particularly return preparers, with the offence under § 7206(2) of aiding and assisting tax fraud.[3193] Indeed, both crimes could be charged in respect of the same false tax return.[3194] It is similar to the offence of aiding and abetting,[3195] but is designed to have the key advantage of also applying to facilitators who act without the knowledge or complicity of their client.[3196] § 7206(2) may provide a preferable charge to those considered above, as it does not require proof of a tax deficiency,[3197] nor proof that the document was signed under penalties of perjury.[3198] Nonetheless, other charges may be more appropriate for large scale frauds

[3188] *United States v Warden*, 545 F.2d 32,37 (7th Cir 1976) citing *United States v Null*, 415 F.2d 1178, 1181 (4th Cir 1969)
[3189] *United States v Gaudin*, 515 US 506, 509 (1995); see also, *United States v DiVarco*, 484 F2d 670, 673 (7th Cir 1973)
[3190] *United States v Boulerice*, 325 F3d 75, 82 (1st Cir 2003)
[3191] The offence under 26 USC § 7206(1) requires proof that the defendant did not believe the return, document or other statement to be 'true and correct as to every material matter'. This has been interpreted to mean that the statement must not be 'accurate and complete', *Siaravo v US*, 311 F2d 469, 472 (1st Cir 1967)
[3192] Ibid. See also, *United States v Scholl*, 166 F3d 964 (9th Cir 1999)
[3193] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §13.02
[3194] IRS, 'Internal Revenue Manual: 9.1.3.3.7.2 26 USC §7206(2) (Aid or Assistance in Preparation or Presentation of False or Fraudulent Return, Affidavit, Claim or Other) – Elements of the Offence' (15 May 2008) <https://www.irs.gov/irm/part9/irm_09-001-003> accessed 7th March 2021
[3195] Under 18 USC § 2(a). See *United States v Crum*, 529 F.2d 1380, 1382 (9th Cir 1976)
[3196] 'Whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document', 26 USC § 7206(2). 'The purpose was very plainly to reach the advisers of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who may be altogether innocent.' *United States v Kelley*, 105 F2d 912, 917 (2nd Cir 1939). 'The innocence or guilty knowledge of a taxpayer is irrelevant' *United States v Jennings*, 51 Fed Appx 98, 99-100 (4th Cir 2002). Comisky et al note that, consequently, the offence shares greater similarities with the offence in 18 USC § 2(b), I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.05[4]
[3197] *Hull v United States*, 324 F.2d 817, 823 (5th Cir 1963); *United States v Chon*, 713 F3d 812, 820-21 (5th Cir 2013)
[3198] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §13.02.

occasioned by facilitators.[3199] § 7206(2) provides that it is an offence 'to willfully aid or assist in, or procure, counsel, or advise the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter'.[3200] Accordingly, five elements must be proven for the offence of aiding and assisting under § 7206(2), specifically; '(1) the defendant aided, assisted, counselled, or advised another in the preparation of the tax return in question; (2) the tax return contained a statement falsely claiming income, deductions or tax credits; (3) the defendant knew that the statement was false; (4) the false statement was material; and (5) the defendant acted willfully.'[3201]

The use of the phrase 'aids or assists in' means that the offence extends not only to those who prepare false tax returns,[3202] but also, anyone who has an active role in this process.[3203] Accordingly, the offence has been used to address lawyers and accountants who participate in the preparation of false returns,[3204] or the promotion and implementation of fraudulent tax shelters,[3205] as well as those who promote tax protesting activities.[3206] There is no requirement for the defendant to sign the document,[3207] but there is ambiguity surrounding the meaning of the phrase advising in the 'preparation or presentation' of a return.[3208] Some circuits have held that the return or document must be filed with the IRS,[3209] whereas others have held that the language of the statute does not necessitate such a requirement.[3210] In regards to the

[3199] Including 18 USC § 287 (false claims), 18 USC § 1341 or 1343 (mail fraud and wire fraud). The DoJ notes that 'mail or wire fraud charges yield strategic benefits by allowing prosecutors to make the entire scheme an express element of each count, and they support restitution, money-laundering, and asset-forfeiture charges', Ibid.
[3200] 26 USC § 7206(2)
[3201] *United States v Nicholson,* 961 F3d 328, 338 (5th Cir 2020) citing *United States v Morrison*, 833 F3d 491, 500 (5th Cir 2016)
[3202] See for instance, *United States v Jeffries,* 820 Fed Appx 346 (6th Cir 2020)
[3203] M Angelo, A Welles Hasen, U Hindberg, R Kesselring, H Perlman, 'Tax Violations' (2020) 57 Am Crim L Rev 1349, 1383
[3204] *United States v Nicholson,* 961 F3d 328, 338 (5th Cir 2020); *United States v Klausner,* 80 F.3d 55, 58 (2d Cir 1996); *United States v Tierney,* 947 F2d 854, 867 (8th Cir 1991)
[3205] See for instance, *United States v Wasson,* 679 F3d 938, 949 (7th Cir 2012); *United States v Bryan,* 896 F2d 68, (5th Cir 1990)
[3206] See for instance, *United States v Rowlee,* 899 F2d 1275 (2d Cir 1990). The offence has also been used to prosecute "ten-percenters", who are individuals who benefit from cashing others' winnings from gambling, or the individuals who pay them to do so. IRS, 'Internal Revenue Manual: 9.1.3.3.7.2 26 USC §7206(2) (Aid or Assistance in Preparation or Presentation of False or Fraudulent Return, Affidavit, Claim or Other) – Elements of the Offence' (15 May 2008) <https://www.irs.gov/irm/part9/irm_09-001-003> accessed 7th March 2021
[3207] *United States v Coveney,* 995 F2d 578, 588 (5th Cir 1993)
[3208] L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) § 12.02[4][c][iv]
[3209] See for instance, *United States v Palivos,* 486 F3d 250, 258 (7th Cir 2007); *United States v. Dahlstrom,* 713 F2d 1423 (9th Cir. 1983), cert. denied, 466 US 980 (1984).
[3210] See for instance, *United States v McLain,* 646 F3d 599, 604 (8th Cir 2011); *United States v Mudekunye*, 646 F3d 281, 286 (5th Cir 2011)

requirement for the return or other document to be 'fraudulent or false as to any material matter', materiality is interpreted in the same manner as for the § 7206(1) offence.[3211] A false statement is one that is 'untrue and known to be untrue when made',[3212] whereas the term fraudulent requires 'an intent to deceive the Service'.[3213] The meaning of the term 'willfully' will be consider in further detail below. However, for the purposes of the § 7206(2) it is important to recognise that willfulness extends beyond simple knowledge of falsity; rather, a tax fraud objective must be demonstrated.[3214]

§7212(a) – Attempting to Interfere with the Administration of Internal Revenue Laws

§7212(a) provides that it is an offence to 'corruptly or by force or threats of force' to 'endeavor to intimidate or impede any officer or employee of the US acting in an official capacity under this title', or to 'corruptly or by force or threats of force obstruct or impede, or endeavor to obstruct or impede, the due administration of this title.'[3215] As such, §7212(a) contains two clauses, known as the 'Officer Clause' and the 'Omnibus Clause'.[3216] While the first takes its name from the requirement to demonstrate force or threats of force to government agents carrying out responsibilities under the IRC, the Omnibus Clause requires proof of an endeavour to corruptly obstruct or impede,[3217] and takes its name from other more general obstruction offences.[3218] §7212(a) has been labelled a 'catch-all enforcement weapon'.[3219] This is because; unlike §7201, it does not require proof of a tax deficiency; unlike §7206(1), it does not require proof that a return has been signed and filed under penalties of perjury; and, unlike §7206(2), it does not require proof of the presentation or preparation of a false or fraudulent return.[3220] Further, the involvement of more than one individual is not required, as it would be for a *Klein*

[3211] *United States v Gaudin,* 515 US 506 (1995); *United States v Warden*, 545 F.2d 32,37 (7th Cir 1976); *United States v DiVarco,* 484 F2d 670, 673 (7th Cir 1973)
[3212] *United States v Holecek,* 739 F2d 331, 335 (8th Cir 1984)
[3213] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.05[7]
[3214] *United States v Salerno,* 902 F2d 1429, 1433 (9th Cir 1990); *United States v Foy,* 794 F Supp 835, 837 (MD Tenn 1992)
[3215] 26 USC §7212(a)
[3216] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §17.02
[3217] Ibid. 'The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family,' 26 USC §7212(a).
[3218] Such as 18 USC §§ 1503 and 1505. L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §12.02[5][c][i]
[3219] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.06[2]
[3220] Ibid

conspiracy.[3221] As such, the §7212(a) offence has some similarities to the UK offence of cheating the public revenue. However, the scope and application of the US obstruction offence has been more narrowly circumscribed through US case law and enforcement policy.

In order to demonstrate a violation of the Omnibus Clause, it must be proven that the defendant '(1) corruptly, (2) endeavoured, (3) to obstruct or impede the due administration of the Internal Revenue laws',[3222] and that there is a 'nexus between the defendant's conduct and a particular administrative proceeding', which the defendant knows is pending or is reasonably foreseeable.[3223] The use of the term corruptly means that the offence is an 'outlier' in being one of few offences within the IRC to not encompass willfullness as the form of *mens rea*.[3224] The term corruptly means 'acts done with the intent to secure an unlawful benefit either for oneself or for another.'[3225] The term corruptly has been held to extend beyond seeking a financial advantage,[3226] to obstructing an IRS agent in the course of investigation,[3227] although this must amount to more egregious conduct than simply making the 'government's job harder'.[3228] Several courts have interpreted the term corruptly in a similar manner to the term willfully, but have simultaneously recognised Congress' intent in enacting an alternative form of *mens rea*.[3229] Some commentators suggest that the primary difference between these alternatives is the requirement to have knowledge of an illegal affirmative action, as opposed to an unlawful benefit, under the willfulness standard.[3230] This makes willfulness a 'slightly higher bar for the government to establish', with its attendant requirement to demonstrate the defendant's

[3221] *United States v Willner,* WL 2963711 at 6 (SDNY, 2007) 'Just as an agreement by two or more persons to conceal income in this way constitutes a conspiracy to obstruct the administration of the tax code by the IRS, so an effort by a single individual (as here, not joined by any other individual with criminal intent, to conceal income in the same manner constitutes "an endeavor[] to obstruct or impede the due administration of [the IRC]"'.
[3222] *United States v Marek,* 548 F.3d 147, 150 (1st Cir 2008) citing *United States v Wilson,* 118 F.3d 228, 234 (4th Cir 1997)
[3223] *Marinello v United States,* 138 S.Ct. 1101, 1104 (2018)
[3224] K Keneally, MJ Scarduzio, J Day, 'Renewed Government Focus on Section 7212(A)' (2017) 41 Champion 16, 20
[3225] *United States v Reeves,* 752 F2d 995, 1001 (5th Cir 1985)
[3226] *United States v Giambalvo,* 810 F3d 1086 (8th Cir 2016)
[3227] Although merely annoying the agent will not suffice, *United States v Reeves,* 752 F2d 995, 999 (5th Cir 1985)
[3228] *United States v Caldwell,* 989 F2d 1056, 1058 (9th Cir, 1993). L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §12.02[5][c][ii]
[3229] *Marinello v United States,* 138 S.Ct. 1101, 1108 (2018); *United States v Williamson,* 746 F3d 987, 990-992 (10th Cir 2014); *United States v Coplan,* 703 F3d 46, 73 (2nd Cir 2012); *United States v Kelly,* 147 F3d 172, 176-7 (2d Cir 1998).
[3230] B Valcarce, 'Kassouf – The Sixth Circuit's Misguided Attempt to Rein in the IRS' (2018) 108 J Crim L & Criminology 335, 344

violation of a *known* legal duty.[3231] As such, the Omnibus Clause has been a preferred option for prosecuting tax protestors and fraudulent tax shelters.[3232] Nonetheless, recent US case law has noted that corruptly means 'to act knowingly and dishonestly with the specific intent to secure an unlawful benefit either for himself or for another'.[3233] Similarly, in *Kay*,[3234] it was held that corruptly requires 'knowledge of unlawfulness', and refers to 'voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful or end or result, or a lawful end or result by some unlawful method or means'.[3235] Accordingly, there appears to be little distinction between the two forms of *mens rea,* aside from the specificity of the knowledge of illegality required.[3236] As such, in light of the problems presented by dishonesty above, the US should amend §7212 to encompass willfulness, preserving the certainty and clarity that this term provides in the context of federal tax crimes.[3237]

The term endeavor refers to 'any effort… to do or accomplish the evil purpose that section was intended to prevent'.[3238] As such, the Clause applies to attempts, regardless of the success of the intended obstruction.[3239] It is unclear whether an endeavor encompasses an omission, in contrast to other felony offences,[3240] although permission must be sought from the Tax Division

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[3231] K Booth, 'Obstructing by Omission: The Troubling Expansion of the Criminal Offense of Obstructing the IRS and How DOJ Internal Policy Has Played a Role' (2018) 86 U Cin L Rev 1, 39; see also the view of Posner J in *United States v Gage,* 183 F3d 711, 718 (7th Cir 1999) '"willfully" is made to require more proof than "corruptly", though the latter connotes the higher degree of culpability'.

[3232] Ibid at p.24

[3233] Courts have refused to determine whether the offence requires proof 'that the defendant knew that the advantage or benefit he sought was unlawful', but have continually approved this instruction, see for instance, *United States v Gutierrez,* 2018 WL 2451245 at 23 (DNM 2018); *United States v Sorensen,* 801 F3d 1217, 1230 (10th Cir 2015); *United States v Dean,* 487 F3d 840, 853 (11th Cir 2007). Johnson Ware notes, that the trend 'seems to be moving toward including the concept of knowledge of illegality in the jury instructions without borrowing the "willfully" terminology from the other federal tax crimes.' JL Johnson Ware, 'Obstruction and Obscenity: I Know it When I See It' (2017) 19 J Tax Prac & Proc 15, 17

[3234] *United States v Kay,* 513 F3d 432 (5th Cir 2007)

[3235] Ibid at 446. In *United States v Miner,* 774 F3d 336, 347 (6th Cir 2014), the court held that this interpretation of the *mens rea* requirement, alongside the restrictions confirmed in *Marinello,* mean that the statute is not unconstitutionally vague or overbroad.

[3236] JA Townsend, 'Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?' (2009) 9 Houston Business and Tax Law Journal 255, 312. In *Kay,* the Court noted that there are three versions of willfullness. Whereas tax offences require the strictest form of willfullness, proof 'that the defendant knew the terms of the statute and that he was violating the statute', offences that encompass the term corruptly require an intermediate standard of willfullness which 'requires the defendant to have known that his actions were in some way unlawful', but not the terms of the specific statute, ibid at 447-448.

[3237] See also, B Valcarce, 'Kassouf – The Sixth Circuit's Misguided Attempt to Rein in the IRS' (2018) 108 J Crim L & Criminology 335, 365

[3238] *Osborn v United States,* 385 US 323, 333 (1966)

[3239] *United States v Croteau,* 819 F3d 1293, 1308 (11th Cir 2016); *United States v Rosnow,* 977 F2d 399, 410 (8th Cir 1992)

[3240] *Marinello v United States,* 138 S.Ct. 1101 (2018) did not resolve this question; while the Second Circuit explicitly ruled that omissions are included within the scope of the statute, the Supreme Court did not resolve this issue. See, IM Comisky, MD Lee, 'IRS in the Offing? Marinello Limits Tax Obstruction Prosecutions' (2018) 129 J Tax'n 24, 29

of the DoJ to bring a prosecution on this basis.[3241] The sheer breadth of the offence has led to concerns over the Clause being used to prosecute lawful activities that have unlawful results,[3242] as well as conduct that would be more appropriately charged as one of the other offences contained in the IRC, potentially of lower severity.[3243] In this respect, courts and commentators have opined the wide discretion afforded to prosecutors,[3244] as well as the statute's vagueness and duplicity.[3245] In an effort to limit the expansive scope of the offence, in *Marinello,* the Supreme Court interpreted the requirement for an obstruction of the administration of the IRC as necessitating a 'nexus between the defendant's conduct and a particular administrative proceeding', which the defendant knows is pending or is reasonably foreseeable.[3246] The meaning of the phrase administrative proceeding is unclear.[3247] It does not include 'routine, day-to-day work', such as reviewing tax returns, but encompasses audits and investigations.[3248] Although the judgment has been questioned by many, who fear that it adds an unnecessary element to the offence that is not mandated by the statutory language,[3249] the Court's decision helps to constrain an otherwise absurdly wide offence.[3250] This is essential, for although this long-standing offence was previously rarely used by prosecutors,[3251] and

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[3241] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §17.04[3]

[3242] *United States v Mitchell,* 985 F2d 1275 (4th Cir 1993) and *United States v Popkin,* 943 F2d 1535 (11th Cir 1991) are commonly cited examples.

[3243] The Court in *Marinello v United States,* 138 S.Ct. 1101, 1103 (2018) were concerned at the potential of §7212(a) to 'transform the Code's numerous misdemeanour provisions into felonies, making them redundant or perhaps the subject matter of plea bargaining'. Booth notes that without the requirement imposed by *Marinello,* 'other crimes carefully delineated in the federal tax code would become superfluous' K Booth, 'Obstructing by Omission: The Troubling Expansion of the Criminal Offense of Obstructing the IRS and How DOJ Internal Policy Has Played a Role' (2018) 86 U Cin L Rev 1, i

[3244] 'Like pugnacious children with a dangerous new toy, prosecutors have begun to use Section 7212(a) in a way that far exceeds its original purposes as revealed by an examination of the legislative history' RS Fink, C Rule, 'The Growing Epidemic of Section 7212(a) Prosecutions – Is Congress the Only Cure?' (1998) 88 J Tax'n 356, 356.

[3245] K Keneally, 'White-Collar Crime' (1997) 21 Champion 25, 25

[3246] *Marinello v United States,* 138 S.Ct. 1101, 1104 (2018)

[3247] For instance, the DoJ has announced its intention to apply the offence to those who lie when purporting to make a disclosure under IRS voluntary disclosure initiatives in respect of offshore bank accounts, yet it is unclear whether the offence will apply to such conduct post-*Marinello,* K Keneally, MJ Scarduzio, J Day, 'Renewed Government Focus on Section 7212(A)' (2017) 41 Champion 16, 16-17. See also, IM Comisky, MD Lee, 'IRS in the Offing? Marinello Limits Tax Obstruction Prosecutions' (2018) 129 J Tax'n 24, 29

[3248] *Marinello v United States,* 138 S.Ct. 1101, 1109 (2018)

[3249] See for instance, B Valcarce, 'Kassouf – The Sixth Circuit's Misguided Attempt to Rein in the IRS' (2018) 108 J Crim L & Criminology 335, 363; I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.06[2].

[3250] 'The Omnibus Clause would convert even the most minute instances of shoddy record-keeping into obstruction of justice offenses carrying up to three years of incarceration. In other words, the problem(…) is the law's "ungodly br[eadth]"' K Brennan-Marquez, 'Extremely Broad Laws' (2019) 61 Ariz L Rev 641, 645

[3251] The offence originally derives from a section of the Internal Revenue Service Act 1864, ch. 173, 13 Stat. 23B and was enacted in its current form in 1954, RS Fink, C Rule, 'The Growing Epidemic of Section 7212(a) Prosecutions – Is Congress the Only Cure?' (1998) 88 J Tax'n 356, 356. Until the early 1980s, only the Officer

indeed its use was discouraged by policy for many years,[3252] this changed in the late 1990s when the DOJ began to see the offence as an 'evidentiary aid to ease a prosecutor's task in proving tax evasion.'[3253] Since then, prosecutors have brought cases that have continuously expanded the scope and application of the offence,[3254] and have readily added obstruction charges to other tax evasion offences.[3255] Accordingly, unless and until Congress decide to amend the offence, *Marinello* is a welcome decision that helps to preserve the calculated system of sanctions in the US tax code.[3256]

§7212(b) – Forcible Rescue of Property

The §7212(b) offence is designed to prevent the unlawful recovery of property following its lawful seizure by the IRS.[3257] §7212(b) provides that it is an offence for any person to 'forcibly rescue or cause to be rescued any property after it shall have been seized under this title' or to 'attempt or endeavor so to do.'[3258] Accordingly, three elements must be proven, '(1) seizure of property by one authorized to so do under the IRC; (2) knowledge by the defendant that the property has been so seized; and (3) a forcible retaking of the property by the defendant'.[3259] The first requirement means that the seizure must be lawful,[3260] defined in a formal, as opposed

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Clause of the offence was used, requiring force or threats of force against IRS employees. This practices changed following *United States v Williams,* 644 F2d 696 (8th Cir 1981) D Marrazzo, 'Practitioners – Beware the Trojan Horse: The Government Unsheathes an Old Weapon to Target Practitioners for Criminal Tax Offences' (1997) 13 Akron Tax J 85, 89

[3252] Tax Division Direction No.77 was issued in 1989 and stated that the Clause should be 'reserved for conduct occurring after a tax return has been filed' or for 'parties who engage in large-scale obstructive conduct', JL Johnson Ware, 'Obstruction and Obscenity: I Know it When I See It' (2017) 19 J Tax Prac & Proc 15, 20. Yet this restriction was omitted in Directive 129, issued in 2004, ibid. Department of Justice, 'Tax Division Directive No. 129: Charging Obstruction of or Impeding the Due Administration of the Internal Revenue Laws Under Section 7212(a)' (October 2004) <https://www.justice.gov/sites/default/files/tax/legacy/2014/08/05/CTM%20Chapter%203.pdf> accessed 17th March 2021.

[3253] RS Fink, C Rule, 'The Growing Epidemic of Section 7212(a) Prosecutions – Is Congress the Only Cure?' (1998) 88 J Tax'n 356, 363. This was recognised by the Supreme Court in *Marinello v United States,* 138 S.Ct. 1101, 1108 (2018), which noted that since the 1990s, prosecutorial discretion has proved insufficient in restraining the scope of the statute. See, KW Booth, 'Prosecutorial Discretion in Criminal Tax Obstruction Cases: How DOJ Internal Policy Limited the Crime of Corruptly Obstructing the IRS until the Supreme Court Stepped in, and Why Tax Criminals Will Still Get Convicted' (2018) 86 U Cin L Rev 1125, 1146

[3254] JL Johnson Ware, 'Obstruction and Obscenity: I Know it When I See It' (2017) 19 J Tax Prac & Proc 15, 16

[3255] Multiple counts are not bad for duplicity as long as 'each provision requires proof of a fact which the other does not' *United States v Swanson,* 1997 WL225446 at 3-4 (4th Cir 1997). United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §17.04[9]

[3256] US tax evasion offences were 'calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.' *Spies v United States* 317 US 492, 497 (1943).

[3257] W Elliott, *Federal Tax Collections, Liens & Levies* (Thomson Reuters Updated November 2020) §17.06[3]

[3258] 26 USC §7212(b)

[3259] *United States v Hardaway,* 731 F2d 1138, 1140 (5th Cir 1984)

[3260] Ibid, see also *United States v Roccio,* 981 F2d 587, 590 (1st Cir 1992)

to substantive, sense.[3261] There is no need to demonstrate a tax deficiency.[3262] The statute does not include willfullness as its *mens rea* requirement, but rather, it must simply be proven that 'the defendant purposefully, as opposed to mistakenly, retook the property knowing that it had been seized by the IRS'.[3263] Some courts have interpreted the final requirement, a forcible rescue, to require only a minimal amount of force in the retaking of property.[3264] Others have required the rescue to disrupt 'the government's possession in a situation where the government has lawfully asserted dominion and lawfully maintained custody.'[3265]

§7203 – Four Misdemeanor Offences

§7203 provides for four misdemeanor offences of willfully failing to 'pay any estimated tax or tax', to 'make a return', 'keep any records', 'or supply any information'.[3266] The offences apply to any 'person' required to fulfil this obligation and thus extend to corporations,[3267] as well as the corporate officers responsible for carrying out the obligation.[3268] In contrast to the felony tax evasion offence,[3269] an affirmative act is not required and a willful omission will suffice.[3270] Accordingly, the offences should not be used when an affirmative attempt to evade can be demonstrated.[3271] Failing to file a return is the most heavily utilised offence under section §7203.[3272] The offence requires proof that the defendant '(1) was required to file a return, (2) failed to file a return, and (3) acted willfully in failing to file.'[3273] The first element is usually satisfied by demonstrating that the defendant's taxable income exceeded the minimum amount required to file.[3274] There is no need to prove a tax deficiency, although this may be helpful in

[3261] *United States v Main*, 598 F2d 1086, 1090 (7th Cir 1979)
[3262] *United States v Roccio*, 981 F2d 587, 590 (1st Cir 1992)
[3263] *United States v Harris*, 521 F2d 1089, 1092 (7th Cir 1975)
[3264] With the phrase even reaching the removal of IRS seizure stickers on a vehicle, ibid. See also, Research Institute of America, *Federal Tax Coordinator* (2nd edn, Thomson Reuters 2021) V-3205
[3265] *United States v Sanders*, 862 F2d 79, 83 (4th Cir 1988)
[3266] 26 USC §7203
[3267] 26 USC §7701(a)(1)
[3268] 26 USC §7343. *United States v Neal*, 93 F3d 219, 223 (6th Cir 1996)
[3269] 26 USC §7201
[3270] 'Willful but passive neglect of the statutory duty may constitute the lesser offence, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony' *Spies v United States* 317 US 492, 499 (1943). See also *Sansone v United States*, 380 US 343, 351-2 (1965)
[3271] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §10.02
[3272] Ibid at §10.03; I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.09[1]
[3273] *United States v Hassebrock*, 663 F3d 906, 919 (7th Cir 2011)
[3274] See, 26 USC §6012. This is unnecessary for corporations, who must always file 26 USC §6012(2).

determining willfullness.[3275] The second element of the offence is satisfied either by a complete failure to file, or the filing of a document that contains so little information that it is incapable of being labelled a tax return.[3276] The final element, willfullness, has the same meaning as for other tax evasion offences.[3277] However, it is important to note that, although the defendant must still aware of the relevant legal duty,[3278] under this form of the offence, the duty is to file a return.[3279] As such, willfullness does not require an intent to evade taxation, but rather a 'voluntary, purposeful, deliberate, and intentional, as distinguished from accidental, inadvertent, or negligent' failure to act.[3280]

The offence of failing to 'pay any estimated tax or tax' is not commonly used.[3281] It must be demonstrated that the defendant had 'a duty to pay income tax, that he failed to pay the tax, and that the failure to pay was willful.'[3282] The offence is typically used when a return is filed, but the assessed tax goes unpaid.[3283] In this context, willfulness only requires that the defendant knew of the duty to pay and 'voluntarily and intentionally violated that duty';[3284] it is not necessary to prove that the defendant was actually able to pay.[3285] The offences of failing to supply information and failing to keep records are also rarely used.[3286] These offences similarly require proof of the legal duty, a failure to comply and willfullness.

§7207 – Fraudulent returns, statements, or other documents

[3275] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.09[1]
[3276] *United States v Marston*, 517 F3d 996, 1001 (8th Cir 2008)
[3277] *United States v. Bishop*, 412 US 346, 361 (1973)
[3278] See for instance, *United States v Smukler*, 986 F3d 229, 241 (3rd Cir 2021) '*Cheek* held that a *mens rea* of "willfully" in the criminal tax statutes 26 U.S.C. §§ 7201 and 7203 required actual knowledge of the relevant legal duty'.
[3279] 26 USC §7203
[3280] IRS, 'Internal Revenue Manual: 9.1.3.3.4.1.3 26 USC §7203 – Willfulness' (15 May 2008) <https://www.irs.gov/irm/part9/irm_09-001-003> accessed 7th March 2021
[3281] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.09[2]
[3282] *United States v Tucker*, 686 F2d 230, 232 (5th Cir 1982)
[3283] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §10.06[2]
[3284] *United States v Curtis*, 781 F3d 904, 911 (7th Cir 2015) citing *Cheek v United States*, 498 US 192, 201 (1991)
[3285] *United States v Tucker*, 686 F2d 230, 232 (5th Cir 1982); *United States v Easterday*, 564 F3d 1004, 1011 (9th Cir 2009)
[3286] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §10.03

§7207 is another misdemeanor offence of willfully delivering or disclosing 'to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter'.[3287] The offence applies to a wide range of false documents.[3288] Unlike §7206(1), there is no requirement for the document to be signed under penalties of perjury.[3289] Proof that the defendant intended to evade taxation is unnecessary.[3290] Falsity, materiality and willfulness have the same meaning as for other offences discussed in this chapter.[3291] The offence is rarely used, presumably as Policy typically prevents its use in addressing the submission of a false tax return, or other conduct that is captured by the felony offences, absent mitigating considerations.[3292]When the elements of the misdemeanour and felony offences overlap, the 'lesser-included offense doctrine' may apply.[3293]

Willfulness

Most US tax evasion offences require proof that the defendant acted 'willfully'.[3294] Indeed, willfulness has acted as the *mens rea* element of US tax evasion offences since 1919.[3295] The inclusion of this form of *mens rea* is intended to effect Congressional intention of constructing 'penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers'.[3296] In *United States v Murdock*, the Supreme Court held that willfulness not only requires an act 'which is intentional, or knowing, or voluntary, as distinguished from accidental', but also 'an act done with a bad purpose' and an 'evil motive'.[3297] In *United States v Bishop*, the Supreme Court explained that the term wilfully should be afforded an identical interpretation for both the misdemeanour and felony offences, clarifying that the term willfully refers to a 'voluntary, intentional violation of a known legal duty'.[3298] In *United States v Pomponio*, the Court reiterated this definition, but declined to recognise improper motive as a necessary component of willfulness.[3299] After *Pomponio*, circuit courts differed on their

[3287] 26 USC §7207
[3288] *United States v Holroyd*, 732 F2d 1122, 1126 (2nd Cir 1984)
[3289] Or even signed, *United States v. Bishop*, 412 US 346, 357-58 (1973)
[3290] *Sansone v United States*, 380 US 343, 352 (1965)
[3291] In particular see the discussion around 26 USC §7206(1) above at p.
[3292] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §16.03[1], §16.06
[3293] *Sansone v United States*, 380 US 343, 349, 352 -53 (1965)
[3294] With the exception of 26 USC §7212
[3295] J Stein, 'Criminal Liability for Willful Evasion of an Uncertain Tax' (1981) 81(6) Columbia Law Review 1348, 1355
[3296] *United States v. Bishop*, 412 US 346, 361 (1973), ibid.
[3297] *United States v Murdock*, 290 US 389, 394-5 (1933)
[3298] *United States v. Bishop*, 412 US 346, 360-361 (1973)
[3299] *United States v Pomponio*, 429 US 10, 12 (1976)

interpretation of the knowledge component of willfulness, with most applying a subjective standard of evaluation, but with others necessitating that a defendant's claims as to lack of knowledge had to be objectively reasonable.[3300]

This conflict was resolved in the seminal case of *Cheek v United States*, which confirmed the application of the higher subjective standard,[3301] while also holding that constitutional objections to taxation will not negate willfulness.[3302] As a result of *Cheek*, individuals are not considered to have acted willfully if they misunderstand the meaning or application of tax laws in good faith.[3303] This includes misunderstandings based on advice given by a professional, providing that the advice was sought and relied on in good faith, and that all material facts were disclosed.[3304] In addition, the uncertainty of the law in question may prevent a finding of willfulness,[3305] for uncertainty prevents a defendant from possessing the requisite intent to violate the tax laws.[3306] Alternatively, this may be regarded as part of a 'vagueness defense', grounded on a violation of the due process clause of the Fifth Amendment, which requires fair warning of criminalisation.[3307] Some US courts have held that uncertainty is a legal inquiry to be resolved by the court by looking at the relevant authorities,[3308] while others have held that uncertainty is also factual inquiry to be resolved by the jury through the ascertainment of its impact on the defendant's mental state.[3309] Several circuits have held that the law must be unknowable, rather than simply unknown by the defendant.[3310]

[3300] The Seventh Circuit seemed to be an outlier in requiring the defendant's mistake to be objectively reasonable, *United States v Moore* 627 F.2d 830 (7th Cir. 1980), *United States v Cheek* 882 F.2d 1263 (7th Cir. 1989). NA Mirkay III, 'The Supreme Court's Decision in Cheek: Does It Encourage Willful Tax Evasion?' (1991) 56(4) Missouri Law Review 1119, 1131.

[3301] *Cheek v United States*, 498 US 192, 200 (1991)

[3302] Ibid at 206

[3303] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.03[3][a]

[3304] *United States v Evangelista*, 122 F3d 112, 116 (2d Cir 1997); *United States v DeSimone* 488 F3d 561, 571 (1st Cir 2007); *United States v Renner* 648 F3d 680, 687 (8th Cir 2011); *United States v Wright* 798 Fed. Appx. 849, 852 (6th Cir 2019)

[3305] *James v United States*, 366 U.S. 213 (1961)

[3306] *United States v Critzer*, 498 F2d 1160, 1162 (4th Cir 1974)

[3307] J Stein, 'Criminal Liability for Willful Evasion of an Uncertain Tax' (1981) 81(6) Columbia Law Review 1348, 1357. See also, *United States v Dahlstrom*, 713 F2d 1423 (9th Cir 1983)

[3308] *United States v Mallas*, 762 F2d 361, 364 (4th Cir 1985)

[3309] *United States v Garber*, 607 F2d 92 (5th Cir. 1979); In Harris, the Court held that 'the doubtfulness of a tax law can influence a criminal trial in two ways. The law can be objectively ambiguous, as in the present case, where it fails to provide fair notice as a matter of law (…) Alternatively, the defendant or the defendant's tax advisors may have subjectively, but wrongly, seen an ambiguity' *United States v Harris*, 942 F2d 1125, 1132 (7th Cir. 1991).

[3310] *United States v Benson*, 67 F3d 641 (7th Cir 1995); *United States v George* 420 F3d 991 (9th Cir 2005); *United States v Kahre*, 737 F3d 554, 570 (9th Cir 2014)

Although ignorance of the law is not typically recognised as a defence to a criminal charge in the US, the Court explicitly held that criminal tax offences should be afforded special treatment 'due to the complexity of the tax laws'.[3311] The holding in *Cheek* bears similarities to the *Ghosh* interpretation of dishonesty in the UK and has garnered similar criticisms; specifically, that employing a subjective test will allow tax evaders with 'outrageously unreasonable' beliefs to escape liability and will prompt tax evaders to 'cling to frivolous views of the law in the hope of convincing a jury of their sincerity', inhibiting law enforcement.[3312] Nonetheless, as in the UK, the reasonableness of a belief will no doubt be influential in determining its sincerity.[3313] In addition, subjective willfulness can be inferred from circumstantial evidence of the defendant's conduct, including affirmative attempts to evade taxation.[3314] The court will take into account the defendant's previous conduct and compliance history,[3315] as well as their knowledge and abilities.[3316] Further, willfulness extends to willful blindness, encapsulating defendants who claim ignorance owing to their deliberate attempts to ignore the facts,[3317] thus mitigating the impact of a subjective standard on the government's ability to bring prosecutions for this offence.[3318] Moreover, when a defense of legal uncertainty is raised in relation to a tax

[3311] *Cheek v United States*, 498 US 192, 200 (1991) citing *United States v Murdock,* 290 US 389, 396 (1933) 'Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct'.

[3312] *Cheek v United States*, 498 US 192, 210 (1991); NA Mirkay III, 'The Supreme Court's Decision in Cheek: Does It Encourage Willful Tax Evasion?' (1991) 56(4) Missouri Law Review 1119, 1139; MD Yochum, 'Cheek is Chic. Ignorance of the Law is an Excuse for Tax Crimes – A Fashion that Does Not Wear Well' (1993) 31 Duq L Rev 249, 253

[3313] *Cheek v United States*, 498 US 192, 203-4; Field notes that 'the circuits have unanimously interpreted this phrase to explicitly allow a jury to consider the reasonableness of a taxpayer's belief in its willfulness deliberations.' DE Field, 'Sincerity & Credibility: The True Concerns in Assessing Willfulness – An Analysis and Criticism of United States v. Pensyl' (2005) 59(1) Tax Law 283, 294 citing, amongst others, *United States v Pensyl*, 387 F.3d 456, 459-60 (6th Cir. 2004)

[3314] *United States v Guidry*, 199 F.3d 1150, 1157 (10th Cir. 1999); *Spies v United States* 317 US 492, 499 (1943).

[3315] *United States v Lavoie*, 433 F3d 95, 98 (1st Cir 2005); *United States v Daraio*, 445 F3d 253, 264-65 (3rd Cir 2006)

[3316] *United States v Guidry*, 199 F3d 1150, 1157-58 (10th Cir 1999); *United States v Bok*, 156 F3d 157, 166 (2nd Cir 1983) M Angelo, A Welles Hasen, U Hindberg, R Kesselring, H Perlman, 'Tax Violations' (2020) 57 Am Crim L Rev 1349, 1367

[3317] *United States v Jewell*, 532 F2d 697, 700 (9th Cir), cert denied 504 US 908 (1992); *United States v Stadtmauer* 620 F.3d 238 (3d Cir. 2010); *United States v Vallone*, 698 F3d 416 (7th Cir. 2012). 'To allow the most clever, inventive, and sophisticated wrongdoers to hide behind a constant and conscious purpose of avoiding knowledge of criminal misconduct would be an injustice in its own right' *United States v Jinwright*, 683 F.3d 471, 478 (4th Cir, 2012)

[3318] R Zuraw, 'Sniping Down Ignorance Claims: The Third Circuit in United States v Stadtmauer Upholds Willful Blindness Instructions in Criminal Tax Cases' (2012) 56(4) Villanova L Rev 779, 801.

avoidance shelter, it is often rejected when the facilitator's role extended beyond providing advice to fraudulent implementation.[3319]

In fact, rather than unjustifiably inhibiting law enforcement, by placing such emphasis on the subjective intention of the perpetrator or facilitator to comply with their obligations, US case law pays greater deference to the inherent nature of criminal tax evasion than its UK counterpart. This is supported by the fact that willfulness is afforded a narrower interpretation in tax offences than for other offences,[3320] including BSA violations, such as, structuring offences,[3321] and FBAR violations.[3322] In addition, the courts have persistently emphasised that tax offences are a rare exception to the fundamental principle of criminal law that ignorance of the law is not an excuse, owing to the complexity of the tax law and the numerous errors that result from its application, even by honest taxpayers.[3323] The fact that Congress has not interfered with these decisions in the tax context, despite having done so for structuring offences,[3324] and despite approving this interpretation in other statutory contexts,[3325] demonstrates its approval of the judicial interpretation of willfulness, as well as its intention to clearly distinguish tax evasion from other criminal offences, paying greater respect to the labelling function of the criminal law. More importantly, although willfulness is determined by a jury, the term is not left for the judiciary to define.[3326] Rather, as the case law above helps to illustrate, the meaning of the term has been refined through over 100 years of judicial decisions,

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[3319] See for instance, *United States v Solomon*, 825 F2d 1292, 1297-98 (9th Cir 1987); *United States v Smith*, 424 F3d 992 (9th Cir 2005). United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §13.07

[3320] G Szott Moohr, 'Tax Evasion as White Collar Fraud' (2009) 9 Houston Business and Tax Law Journal 208, 212 citing *United States v Kay*, 513 F.3d 432, 447 (5th Cir. 2007) and *United States v Skilling*, 554 F.3d 529, 548-49 (5th Cir 2009)

[3321] Although in *Ratzlaf v United States*, 510 US 135, 144-149 (1994) the Supreme Court held 'we are unpersuaded by the argument that structuring is so obviously "evil" or "inherently bad" that the "willfulness" requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring', Congress later amended 31 USC § 5324 to reverse the effect of this decision. I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 2] (Thomson Reuters, 2020) at § 11.06[2][b]

[3322] For the purposes of civil FBAR violations, US courts have held that constructive knowledge or recklessness of FBAR requirements is sufficient to demonstrate willfulness. See for instance, *United States v Horowitz*, 978 F.3d 80, 88 (4th Cir 2020) 'a "willful violation" of the FBAR reporting requirement includes both knowing and reckless violations, even though more is required to sustain a criminal conviction for a willful violation of the same requirement under § 5322.' For a review of recent case law, see HE Sheppard, 'Constructive Knowledge and FBAR Penalties: Does Merely Filing a Form 1040 Suffice to Establish "Willfulness?"' [2019] International Tax Journal 35

[3323] *Spies v United States*, 317 US 492, 496 (1943); *United States v. Bishop*, 412 US 346, 360 (1973); *Ratzlaf v United States*, 510 US 135, 149 (1994)

[3324] See fn 561 above.

[3325] Davies notes that Congress intended the term willfully in the Child Support Recovery Act, 18 USC § 228 (1994) to be afforded the same interpretation as for tax offences. SL Davies, 'The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance' (1998) 48(3) Duke Law Journal 341, 405

[3326] As it in is in the UK, owing to *R v. Feely* [1973] QB 530 (CA).

providing greater clarity to this area of criminal law than the decisions that abstain from defining dishonesty in the UK.

Related Offences

As in the UK, the US uses a range of general offences to prosecute tax evasion, including the false statements,[3327] and false claims statutes, [3328] the offences of aiding and abetting a federal offense,[3329] willfully causing a federal offense,[3330] and conspiring to commit a federal offence or defraud the US.[3331] In addition, wire fraud and mail fraud offences may be used to address large-scale tax frauds,[3332] providing indirect access to the AML framework discussed in the previous chapter.

18 USC § 1001 False Statements and 18 USC § 287 False Claims

Both the false statements and false claims statutes criminalise 'lying to the government'.[3333] The false claims statute is regularly used to address tax offences.[3334] There is no prohibition on the use of the false statements offence in addressing tax offences where other specific offences also apply,[3335] yet it is most likely to be used where the specific offences are less directly applicable, for instance, where false or fraudulent statements are made to IRS investigators.[3336]

The false statements statute provides that it is an offence to knowingly and willfully 'falsify, conceal, or cover up by any trick, scheme, or device a material fact; make any materially false, fictitious, or fraudulent statement or representation; or make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.'[3337] As such, there are two forms of the offence, specifically, concealment and making

[3327] 18 USC § 1001
[3328] 18 USC § 287
[3329] 18 USC § 2(a)
[3330] 18 USC § 2(b)
[3331] 18 USC §371
[3332] 18 USC §§ 1341 and 1343
[3333] D Duhaime, 'False Statements and False Claims' (2019) 56 American Criminal Law Review 875, 875
[3334] Ibid at p.895 citing *United States v Quevedo,* 654 F3d 819, 821 (8th Cir 2011) and *United States v Clark,* 577 F3d 273, 286 (5th Cir 2009)
[3335] Such as, 26 USC § 7206(1). See, *United States v Woodward,* 469 US 105 (1985)
[3336] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §24.03
[3337] 18 USC § 1001(a)

a false statement.[3338] Only the concealment offence requires proof that the defendant had a legal duty to disclose information.[3339] The false statement offence may be committed orally or in writing,[3340] and may be based on an omission.[3341] The statement is false if it is factually untrue or conceals a material fact,[3342] and is fraudulent if it is made with intent to deceive, not necessarily to defraud.[3343] A material statement is one that has 'a natural tendency to influence or [is] capable of influencing a government agency.'[3344] Materiality should be determined by the jury.[3345] The false statement or concealment must be made in a 'matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the US',[3346] which includes both the IRS and the Tax Court.[3347] The concealment or false statement must be made knowingly and willfully, which may be ascertained from circumstantial evidence.[3348] Following circuit court disagreement over the interpretation of the term willfully, in 2014, the DoJ issued a Memorandum confirming that willfully should be understood to mean that the defendant acted 'with a bad purpose to disobey or disregard the law', rather than simply with knowledge of the falsity of his statements.[3349]

The false claims statute, 18 USC § 287, criminalises the making or presenting 'to any person or officer in the civil, military, or naval service of the US, or to any department or agency thereof, any claim upon or against the US, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent.'[3350] Accordingly, the offence requires proof '(1) [the defendant] presented a claim against the US to an agency or department thereof; (2) such a

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[3338] Some courts regard the section as enacting two offences, *United States v Mayberry*, 913 F2d 719, 722 (9th Cir 1990), while others view the section as providing for two forms of the same offence, *United States v Stewart*, 433 F3d 273, 319 (2nd Cir 2006).
[3339] *United States v Anzalone*, 766 F2d 676, 683 (1st Cir 1985)
[3340] *United States v Beacon Brass Co.*, 344 US 43, 46 (1952)
[3341] *United States v Rowland*, 826 F3d 100, 107 (2nd Cir 2016)
[3342] *United States v House*, 684 F3d 1173, 1203-5 (11th Cir 2012); *United States v Woodward*, 469 US 105, 108 (1985)
[3343] *United States v McGauley*, 279 F3d 62, 69 (1st Cir 2002)
[3344] *United States v Gaudin*, 515 US 506, 509 (1995); *Neder v United States*, 527 US 1, 8 (1999). See also, *United States v Adekanbi*, 675 F3d 178, 182 (2nd Cir 2012) a statement is material if it is 'capable of distracting government investigators' attention away from a critical matter'.
[3345] Ibid
[3346] 18 USC § 1001(a)
[3347] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 3.02[6]
[3348] D Duhaime, 'False Statements and False Claims' (2019) 56 American Criminal Law Review 875, 883, citing *United States v Ledee*, 772 F3d 21, 36 (1st Cir 2014) and *United States v Sebaggala*, 256 F3d 59, 63 (1st Cir 2001)
[3349] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §24.08
[3350] 18 USC § 287

claim was false, fictitious, or fraudulent; and (3) [the defendant] knew claim was false, fictitious, or fraudulent.'[3351] The term claim includes a false tax refund claim,[3352] and the offence has been widely used in addressing fraudulent tax refund schemes by both participants and facilitators.[3353] There is no need to prove that the claim caused loss to the government.[3354] A false statement is 'untrue when made, and then known to be untrue by the person making it', while a fraudulent statement is one that is 'known to be untrue, and made or caused to be made with the intent to deceive the Government agency'.[3355] Proof of materiality is not strictly required by the statute, although some courts consider it to be an element of the offence.[3356] Knowledge, rather than willfulness, is required, but the form of intent differs between circuits.[3357]

18 USC § 2(a)&(b) Aiding and Abetting, and Causing, a Federal Offense

18 USC § 2, the 'accomplice statute',[3358] applies to all federal offences.[3359] It has regularly been used to address the facilitators of tax crimes, particularly those who provide assistance in protesting taxation, establishing tax shelters or seeking fraudulent tax refunds.[3360] §2(a) provides that whoever 'aids, abets, counsels, commands, induces or procures' the commission of an offense 'is punishable as a principal'.[3361] This means that aiding and abetting an offense is punished in the same way as the substantive offense.[3362] The 'aiding and abetting' offence requires proof that '(1) the substantive crime has been committed; and (2) that the defendant charged with aiding and abetting knew of the commission of the substantive offense and acted

[3351] *United States v Croteau*, 819 F3d 1293, 1305 (11th Cir 2016)
[3352] Comisky et al note that it has been used to address refund schemes involving 'tax protestors, former IRS employees, fraudulent return preparers, participants in fraudulent tax shelters, prisoners who file fraudulent refund claims and miscellaneous other instances' I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 3.03[1]
[3353] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §22.02[1]
[3354] *Lamb Eng'g & Const Co v United States*, 58 Fed Cl 106, 111 (2003). *United States v Coachman*, 727 F2d 1293, 1302 (DC Cir 1984)
[3355] *United States v Milton*, 602 F2d 231, 233 (9th Cir 1979)
[3356] The Eighth, Fourth, Fifth, and Third Circuits have suggested that materiality may be relevant. This also may be implied from the Supreme Court's holding in *Neder v United States*, 527 US 1, 20-25 (1999). United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §22.04[2][b]
[3357] Ibid at §22.04[3]
[3358] IRS, 'Internal Revenue Manual: 9.1.3.4.1 18 USC §2 – Principals' (15 May 2008) <https://www.irs.gov/irm/part9/irm_09-001-003> accessed 7th March 2021
[3359] *United States v Hill*, 55 F3d 1197, 1200 (6th Cir 1995)
[3360] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 3.04[2]
[3361] 18 USC § 2(a)
[3362] *United States v Maselli*, 534 F2d 1197, 1200 (6th Cir 1976)

with intent to facilitate it.'[3363] Although the government must prove that an offense has been committed, it does not need to secure a conviction of the principal offender.[3364] Aiding and abetting requires a 'purposive attitude', or proof that the defendant 'associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'.[3365] This has been interpreted to mean that the prosecution must demonstrate that the aider and abettor had knowledge and the *mens rea* required to commit the underlying criminal offense.[3366] However, the standard of *mens rea* required for the aiding and abetting offense is often lower, for in some cases courts have interpreted this statement to mean that knowledge, rather than purposive intent, is sufficient,[3367] and others have permitted jury instructions, which may suggest that only criminal intent on the part of the principal offender is required.[3368] An affirmative act of participation or support must also be demonstrated.[3369] The primary distinction between aiding and abetting an offense and conspiring to commit one, is that 'there need be no agreement, express or tacit between the principal offender and the aider and abettor.'[3370]

§2(b) provides that it is an offence to 'cause an act to be done which if directly performed by him or another would be an offense'.[3371] The primary difference between the two subsections is that §2(b) does not require proof of criminal intent on behalf of the principal offender,[3372] only that the person who caused the crime acted willfully.[3373] The 'causing' offense is used less

[3363] *United States v Huet*, 665 F3d 588, 596 (3rd Cir 2012)
[3364] *United States v Powell*, 806 F2d 1421, 1424 (9th Cir 1986); *Standefer v United States*, 447 US 10, 14 (1980)
[3365] *United States v Peoni*, 100 F2d 401, 402 (2nd Cir 1938). See also, *Nye & Nissen v United States*, 366 US 613 (1949)
[3366] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §21.03[2] citing, amongst others, *United States v Perez*, 922 F2d 782, 785 (11th Cir 1991) and *United States v Bancalari*, 110 F3d 1425, 1430 (9th Cir 1997)
[3367] See for instance, *Bozza v United States*, 330 US 160 (1947), where the defendant was convicted of aiding and abetting a distillery in evading taxation, as he had knowledge of the distillery's criminal intent. See B Weiss, 'What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law' (2002) 70 Fordham L Rev 1341, 1371
[3368] See for instance, *United States v Thompson*, 279 F3d 1043 (DC Cir 2002), AH Kurland, 'To "Aid, Abet, Counsel, Command, Induce or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles' (2005) 57 SCL Rev 85, 123
[3369] *United States v Morrow*, 977 F2d 222, 231 (6th Cir 1992)
[3370] *United States v Krogstad*, 576 F2d 22, 29 (3rd Cir 1978)
[3371] 18 USC § 2(b)
[3372] *United States v Motley*, 940 F2d 1079, 1082 (7th Cir 1991)
[3373] 18 USC § 2(b), *United States v Gabriel*, 125 F3d 89, 101 (2nd Cir 1997). 'If the causer acts intentionally (as opposed to by mistake or accident) and, while acting intentionally, has the same mental state required of the principal, then the causer has acted "willfully"' B Weiss, 'What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law' (2002) 70 Fordham L Rev 1341, 1460

often than the adding and abetting offence,[3374] but has been used to address facilitators who submit fraudulent tax returns or create fraudulent tax shelters on behalf of their clients, with or without their knowledge.[3375] Indeed, the DoJ recommends the use of 26 USC §7206(2) or 18 USC §2(b) in conjunction with other offences in such cases.[3376] However, as the felony tax evasion offences create principal liability for those who aid, abet and cause tax crimes, it is questionable whether these offences should be used in this context.[3377] One district judge has refused to put additional general charges under §2 to a jury in a tax evasion case owing to the risk of confusion this may generate.[3378]

18 USC §371 Conspiracy

Although some statutes contain their own conspiracy provisions,[3379] the IRC does not.[3380] Accordingly, 18 USC §371 if often used to address tax crimes.[3381] In fact, conspiracy charges provide several advantages to prosecutors,[3382] including a lower standard of *mens rea*, enabling the prosecution of those who design and implement tax shelters,[3383] as well as the attribution of greater tax losses, affording benefits in sentencing and restitution.[3384] §371 provides that it is an offence for 'two or more persons' to 'conspire either to commit any offense against the US, or to defraud the US, or any agency thereof in any manner or for any purpose', and to 'do any act to effect the object of the conspiracy'.[3385] Accordingly, §371 contains two clauses; the

[3374] C Doyle, 'Aiding, Abetting, and the Like: An Overview of 18 USC 2' (2016) 18(3) *Current Politics and Economics of the US, Canada and Mexico* 391, 393
[3375] See for instance, *United States v Causey*, 835 F2d 1289, 1290 (9th Cir 1987), *United States v Motley*, 940 F2d 1079, 1082 (7th Cir 1991)
[3376] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §21.05[2]
[3377] JA Townsend, 'Theories of Criminal Liability for Tax Evasion' (Working Paper May 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2060496> accessed 20th March 2021 at p.24
[3378] Ibid, citing p.8106-8107 of the trial transcript of *United States v Daugerdas,* No. S3 09 Cr. 581 (WHP) 2012 WL 5835203 (SDNY 2012)
[3379] See for instance, 18 USC § 1956(g)
[3380] Except 26 USC §7214(a)(4), which only applies to conspiracies involving officers or employees of the US.
[3381] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §23.02
[3382] It has been called the 'darling of the modern prosecutor's nursery', *Harrison v United States,* 7 F2d 259, 263 (2nd Cir 1925)
[3383] PB Hsue, 'Lessons from United States v Stein: Is the Line Between Criminal and Civil Sanctions for Illegal Tax Shelters A Dot?' (2008) 102 Nw U L Rev 903, 934
[3384] JA Townsend, 'Tax Evaded in the Federal Tax Crimes Sentencing Process and Beyond' (2014) 59 Vill L Rev 599, 628
[3385] 18 USC § 371

offence clause, or conspiring to commit a federal offense, and, the defraud clause, or conspiring to defraud the US, the latter also being known as a *Klein* conspiracy.[3386]

Conspiracy requires proof of '(1) an agreement between two or more people to pursue an unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the conspirators in furtherance of the conspiracy's objective'.[3387] The agreement is the 'essence of the conspiracy',[3388] which can be both implied by conduct and established through circumstantial evidence.[3389] The agreement does not need to lead to success.[3390] There must be two persons,[3391] but a corporation can conspire with its employees,[3392] and the conspirator does not need to be indicted or even named.[3393] In addition, a member of the conspiracy must carry out an overt act, which means an action carried out to assist or support the aims of the conspiracy.[3394] The overt act can be a lawful act.[3395] It must also be established that the defendant acted with intent to participate in the conspiracy, with knowledge of its purpose.[3396] As an offense of specific intent, the Offense Clause requires proof of the same *mens rea* as the underlying criminal offense,[3397] in this context willfulness. If conspirator commits an offense, all members of the conspiracy may be held responsible for the offense, providing it could have been reasonably foreseen.[3398]

[3386] After *United States v Klein*, 247 F2d 908, 921 (2nd Cir 1957). See, GCF Shappert, CJ Constantini, 'Klein Conspiracy: Conspiracy to Defraud the United States' (2013) 61(4) US Att'ys Bull 1, 1

[3387] *United States v Fisch*, 851 F3d 402, 406-7 (5th Cir 2017)

[3388] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §23.04. A conspiracy does not exist without one, *Ingram v United States*, 360 US 672, 677-678 (1959).

[3389] *United States v McKee*, 506 F3d 225, 238 (3rd Cir 2007); *United States v Smith*, 249 F3d 473, 478 (3rd Cir 2002)

[3390] *Salinas v United States*, 522 US 52, 65 (1997)

[3391] *United States v Rosenblatt*, 554 F2d 36, 38 (2d Cir 1977); *Morrison v California*, 291 US 82, 92 (1934)

[3392] *United States v Chon*, 713 F3d 812, 820 (5th Cir 2013); *United States v Ams Sintering Co.*, 927 F2d 232, 236-7 (6th Cir 1990); *United States v Stevens*, 909 F2d 431, 432-3 (11th Cir 1990)

[3393] *Rogers v United States*, 340 US 367, 375 (1951)

[3394] 18 USC § 371. *United States v Falcone*, 311 US 205, 210 (1940)

[3395] *United States v Jerkins*, 871 F2d 598, 603 (6th Cir 1989); *United States v Hermes*, 847 F2d 493, 495-6 (8th Cir 1988)

[3396] *United States v Chapman*, 851 F3d 363, 378-9 (5th Cir 2017); *United States v Brown*, 31 F3d 484, 490 (7th Cir 1994); *Ingram v United States*, 360 US 672, 678 (1959). See also, M McBride, 'Federal Criminal Conspiracy' (2020) 57 Am Crim L Rev 759, 766-67

[3397] *United States v Baker*, 63 F3d 1478, 1493 (9th Cir 1995); *United States v Peterson*, 244 F3d 385, 389 (5th Cir 2001); *United States v Pinckney*, 85 F3d 4, 8 (2nd Cir 1996)

[3398] *Pinkerton v United States*, 328 US 640, 645-47 (1946)

In contrast to the Offense Clause, the Defraud Clause does not pertain to other federal offenses, but rather, encompasses otherwise lawful actions that 'conspire to defraud the US'.[3399] The Clause applies to conspiracies to defraud the IRS, known as Klein conspiracies.[3400] An extremely broad interpretation has been given to the term defraud in this context,[3401] with the Supreme Court noting that it 'means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, draft or trickery, or at least by means that are dishonest.'[3402] This means that proof of a planned offence is not required and the government is not required to prove any of the tax evasion offences considered above, merely an attempt to 'interfere with or obstruct one of its lawful governmental functions'.[3403] Accordingly, although the conduct must amount to more than simply making the 'government's job harder',[3404] there is no need to demonstrate willfulness.[3405] As a result, the conspiracy offence has been frequently used to prosecute professionals, such as lawyers and accountants, who have devised fraudulent tax shelters for their clients, as well as their high-profile employers, including KPMG and EY.[3406] More recently, the offence has been used to prosecute professionals involved in attempts to evade taxation revealed in the Panama Papers.[3407] This is because unlike willfulness, an attempt to defraud simply requires proof of an attempt to obstruct the IRS using dishonest or deceitful

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[3399] 18 USC § 371, *United States v Tuohey*, 867 F2d 534, 536 (9th Cir 1989); *United States v Jerkins*, 871 F2d 598, 603 (6th Cir 1989).

[3400] After *United States v Klein*, 247 F2d 908, 921 (2nd Cir 1957). See, GCF Shappert, CJ Constantini, 'Klein Conspiracy: Conspiracy to Defraud the United States' (2013) 61(4) US Att'ys Bull 1, 1

[3401] 'In combination, "conspiracy" and "defraud" have assumed such broad and imprecise proportions as to trench not only on the act requirement but also on the standards of fair trial and on constitutional prohibitions against vagueness and double jeopardy' AS Goldstein, 'Conspiracy to Defraud the United States' (1959) 68 Yale LJ 405, 408

[3402] *Hammerschmidt v United States*, 265 US 182, 187-8 (1924)

[3403] United States Department of Justice, 'Criminal Tax Manual' (16th November 2020) <https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0> accessed 14th March 2020, at §23.07[1][b]

[3404] *United States v Caldwell*, 989 F2d 1056, 1058 (9th Cir, 1993). L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §12.03[1][c][iii][B]

[3405] *United States v Cyprian*, 23 F3d 1189, 1201-2 (7th Cir 1994); PH Bucy, 'Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves' (1997) 29 Ariz St LJ 639, 656

[3406] See for instance, the indictment of KPMG and professionals associated with its design and implementation of fraudulent tax shelters, *United States v Stein*, 541 F3d 130 (2nd Cir 2008), *United States v Pfaff*, 619 F3d 172 (2nd Cir 2010), as well as the NPA reached with Ernst and Young LLP and the prosecution of professionals associated with the promotion of fraudulent tax shelters, *United States v Coplan*, 703 F3d 46 (2nd Cir 2012). See also, the indictment of professionals connected to fraudulent tax shelters promoted by Jenkins & Gilchrist (a law firm) and BDO Seidman (an accounting firm), and the related NPA with Deutsche Bank, *United States v Daugerdas*, 837 F3d 212 (2nd Cir 2016); *United States v Parse*, 789 F3d 83 (2d Cir 2015). I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 1.08

[3407] *United States v. Ramses Owens, Dirk Brauer, Richard Gaffey, Harald Joachim Von Der Goltz*, Southern District of New York, 2018, 18 Crim 693.
<https://www.justice.gov/usao-sdny/press-release/file/1117201/download> accessed 12 August 2020.

means;[3408] it does not additionally require an intent to escape taxation,[3409] nor an appreciation of the criminality of such an attempt.[3410] Owing to these advantages, conspiracy charges are often also added to other tax evasion charges.[3411]

The use of the conspiracy offence has been criticised when the underlying tax evasion offence cannot be proven.[3412] Indeed, as discussed above, willfulness helps to ensure that only the culpable are convicted of stigmatic tax offences. However, it is important to note that in practice the US seems to have somewhat restricted the use of conspiracy offences to prosecuting, or reaching DPAs/NPAs in respect of, egregious conduct by professionals and corporations.[3413] In these cases, the professionals involved have taken great steps to conceal their activities, at the very least demonstrating some awareness of the issues involved in their claimed legal interpretation and the view that would be held by the IRS.[3414] In addition, these prosecutions have an important deterrent effect and lead to the recovery of significant sums of taxation.[3415] In this respect, the conspiracy offence seems to achieve more effective results than its equally broad UK counterpart in the tax evasion context. At the same time, it should not be added to every tax evasion charge.[3416]

18 USC §§ 1341 and 1343 Mail and Wire Fraud

[3408] *United States v Caldwell,* 989 F2d 1056, 1059-61 (9th Cir, 1993).
[3409] IRS, 'Internal Revenue Manual: 9.1.3.4.8.2 18 USC §371 – Klein Conspiracy' (15 May 2008) <https://www.irs.gov/irm/part9/irm_09-001-003> accessed 7th March 2021
[3410] PB Hsue, 'Lessons from United States v Stein: Is the Line Between Criminal and Civil Sanctions for Illegal Tax Shelters A Dot?' (2008) 102 Nw U L Rev 903, 934-5; JA Townsend, 'Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough? (2009) 9 Hous Bus & Tax LJ 255, 264; PH Bucy, 'Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves' (1997) 29 Ariz St LJ 639, 656
[3411] Conspiracy prosecutions 'avoid engaging the jury in the complex tax issues', B Zagaris, 'US Indictments Bought Against US Tax Professionals for Tax Shelters' (2009) 25(8) Int'l Enforcement L Rep 311, 311. 'The conspiracy count allegations are framed as a cascade of allegations telling a damning story. This contrasts with counts for the tax offenses, which are dry, sparse, boring, and usually not even flowered up for dramatic effect.' L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §12.03[1][c][i][A]
[3412] PB Hsue, 'Lessons from United States v Stein: Is the Line Between Criminal and Civil Sanctions for Illegal Tax Shelters A Dot?' (2008) 102 Nw U L Rev 903, 936-7
[3413] SA Schumacher, 'Magnifying Deterrence by Prosecuting Professionals' (2014) 89 Ind LJ 511, 513-4
[3414] Townsend notes that the requirement for dishonesty or deceit helps to limit the scope of the offence, JA Townsend, 'Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough? (2009) 9 Hous Bus & Tax LJ 255, 346
[3415] SA Schumacher, 'Magnifying Deterrence by Prosecuting Professionals' (2014) 89 Ind LJ 511, 545-7
[3416] 'Conspiracy charged are frequent charges accompanying traditional tax crimes to permit the government to increase its chances of obtaining a conviction.' L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §12.03[1][c][i][A]

The Mail and Wire fraud statutes are popular and forceful tools used to tackle a variety of white-collar crimes,[3417] including tax evasion. This is due to the wide scope of mail and wire fraud offences,[3418] the lower standard of *mens rea* required,[3419] as well as the significant sentences that can be imposed; a maximum of twenty years, or even thirty years if the offence involves a financial institution,[3420] compared to five years for tax evasion.[3421] Moreover, mail and wire fraud are both predicate offences for the purposes of the money laundering and RICO statutes, providing access to forfeiture provisions.[3422] The wire and mail fraud offences require proof 'that the defendant perpetrated a scheme (A) to defraud by means of a material deception; (B) with the intent to defraud; (C) while using the mails, private commercial carriers, and/or wires in furtherance of that scheme; (D) that did result or would have resulted in the loss of money or property or in the deprivation of honest services.'[3423] Wire fraud additionally requires proof of an 'interstate nexus'.[3424] A scheme to defraud refers to 'any plan or course of action by which someone intends to deprive another(…) of money or property by means of false or fraudulent pretenses, representations, or promises.'[3425] An act or omission can be regarded as fraud,[3426] but the fraudulent aspects of the scheme must be material.[3427] There is no need to demonstrate that the scheme was successful,[3428] but it must be proven that the defendant acted with intent to defraud, or 'the intent to deceive or cheat, usually for the purpose of obtaining financial gain or causing financial loss.[3429] US courts disagree on whether intent to cause harm is required, in addition to an intent to deceive.[3430] However, it is clear that proof of wilfulness

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[3417] 'To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart – and our true love.' J Rakoff, 'The Federal Mail Fraud Statute (Part 1)' (1980) 18 Duq L Rev 771, 771. The offences have been referred to as the 'prosecutor's secret weapon', CJ Stuart, 'Mail and Wire Fraud' (2009) 46 AM Crim L Rev 813, 814

[3418] G Szott Moohr, 'Tax Evasion as White Collar Fraud' (2009) 9 Houston Business and Tax Law Journal 208, 213; L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §12.03[3][c][i]

[3419] ES Pogdor, 'Mail Fraud: Opening Letters' (1992) 43 SC L Rev 223, 266

[3420] 18 USC §§ 1341 and 1343

[3421] 26 USC § 7201

[3422] 18 USC § 982(a)(1); 18 USC § 1963, See ch 5, pp.

[3423] M Angelo, J Loscalzo, R Turner, 'Mail and Wire Fraud' (2020) 57 Am Crim L Rev 1023, 1024-5. 18 USC §§ 1341 and 1343

[3424] Ibid at p.1025, 18 USC § 1343

[3425] *United States v Daniel,* 329 F3d 480, 485 (6th Cir 2003). See also, *McNally v United States,* 483 US 350, 358 (1987) a scheme to defraud means to 'wrong someone in his property rights by dishonest methods or schemes (…) by trick, deceit, chicane or overreaching.'

[3426] *United States v Shields,* 844 F3d 819, 822 (9th Cir 2016); *Sonneberg v United States,* WL 1798982 (3rd Cir 2003)

[3427] A material statement is one that has 'a natural tendency to influence or [is] capable of influencing, the decisionmaking body to which it was addressed'.' *Neder v United States,* 527 US 1, 16 (1999) citing *United States v Gaudin,* 515 US 506, 509 (1995)

[3428] *United States v Pimental,* 380 F3d 575, 585 (1st Cir 2004)

[3429] *United States v Owens,* 301 F3d 521, 528 (7th Cir 2002)

[3430] JR O'Sullivan, 'Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers' (2010) 63 Vand L Rev En Banc 23, 35

is not required.[3431] The defendant must use the mail,[3432] or 'wire, radio or television communication',[3433] in furtherance of the scheme to defraud.[3434] The latter requirement means that legally compelled information cannot be the basis of a mail fraud charge.[3435] While this excludes tax returns that are not in themselves fraudulent,[3436] the overwhelming majority of district courts have held that a scheme can be effected through the filing of false tax return.[3437] Finally, it must be shown that the scheme was intended to result in the deprivation of money, tangible or intangible property, or honest services.[3438] Taxes owed to both domestic,[3439] and foreign,[3440] governments, constitute money or property interests for the purposes of mail and wire fraud offences.[3441]

US commentators have lambasted the offences as being absurdly uncertain 'catch-all crimes',[3442] which undermine the clear and comprehensive crimes in the IRC.[3443] Indeed, use of mail and wire fraud offences could render specific tax evasion offences practically redundant.[3444] However, it is important to remember that the US does not have a general fraud offence, with offences like mail and wire fraud fulfilling this role.[3445] Indeed, mail and wire fraud offences are no wider than the offences contained in the UK's Fraud Act 2006. In

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[3431] ES Pogdor, 'Tax Fraud – Mail Fraud: Synonymous, Cumulative or Diverse?' (1989) 57 U Cin L Rev 903, 925

[3432] 18 USC § 1341

[3433] 18 USC § 1343

[3434] This means that the mailing or wiring must be 'part of the execution of the scheme as conceived by the perpetrator', *Schmuck v United States,* 489 US 705, 715 (1989)

[3435] *Parr v United States,* 363 US 370, 388-92 (1944)

[3436] Ibid

[3437] *United States v Miller,* 545 F2d 1204, 1216 (9th Cir 1976); *United States v Marabile,* 503 F2d 1065, 1066 (8th Cir 1974). Compare *United States v Henderson,* 386 F Supp 1048, 1054 (SDNY 1974). In *United States v Regan,* 713 F Supp 629, 635 (SDNY 1989) the Court stated '*Henderson* has been rejected or distinguished in virtually all of the reported cases that cite the opinion.'

[3438] M Angelo, J Loscalzo, R Turner, 'Mail and Wire Fraud' (2020) 57 Am Crim L Rev 1023, 1034

[3439] *Fountain v United States,* 357 F3d 250, 256 (2nd Cir 2004); *United States v Dale,* 991 F2d 819, 849 (DC Cir 1993); *United States v Bucey,* 876 F2d 1297, 1310 (7th Cir 1989); *United States v Porcelli,* 865 F2d 1352, 1360 (2nd Cir 1989)

[3440] *Pasquantino v. United States*, 544 US 349, 125 S.Ct. 1766 (2005)

[3441] JS Friedman, 'Whiskey and the Wires: The Inadvisable Application of the Wire Fraud Statute to Alcohol Smuggling and Foreign Tax Evasion' (2006) 96 J Crim L & Criminology 911, 936-7; ES Pogdor, 'Tax Fraud – Mail Fraud: Synonymous, Cumulative or Diverse?' (1989) 57 U Cin L Rev 903, 918

[3442] DC Richman, WJ Stuntz, 'Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution' (2005) 105 Colum L Rev 583, 634; ES Pogdor, 'Mail Fraud: Opening Letters' (1992) 43 SC L Rev 223, 269

[3443] G Szott Moohr, 'Tax Evasion as White Collar Fraud' (2009) 9 Houston Business and Tax Law Journal 208, 213

[3444] Ibid. See also, L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §12.03[3][c][i]

[3445] D Healy, J McGrath, '"Comparing Apples with Oranges Disguised as Apples" (But Still Producing Fruit): The Methodological Difficulties in Conducting Comparative White-Collar Crime Research and a Way Forward' (2020) 63 Irish Jurist 61, 69

addition, the use of mail and wire fraud offences in tax evasion cases is restricted by enforcement policy, which provides that such charges will only be brought when there is a 'large fraud loss or a substantial pattern of conduct and there is a significant benefit to bringing the charges instead of or in addition to Title 26 violations.'[3446] For instance, the CEO of a software company was recently indicted for wire fraud after concealing $2billion from the IRS in offshore bank accounts.[3447] Accordingly, while the offences are incredibly wide in scope, in practice, they are largely used in the most egregious tax evasion cases.

6.3.3 Corporate Liability

Introduction

As discussed above, a corporation is considered a 'person' within the meaning of US tax evasion offences.[3448] Accordingly, a corporation may also be held criminally liable for evading its own taxes,[3449] or for facilitating the evasion of taxes by another, under the relevant provisions of the IRC.[3450] A corporation may also conspire with its employees to violate the IRC or otherwise defraud the IRS.[3451] The US recognises that 'vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime.'[3452] The US has demonstrated its commitment to this principle by bringing criminal charges against many corporations who have perpetrated or facilitated white collar crimes, including tax evasion offenses. This is in sharp contrast to the UK, which provides for corporate liability for tax crimes in theory, but rarely utilises these powers in practice. At first, this was attributable to issues inherent in the identification doctrine, but, following the introduction of the failure to

[3446] See Ch. 5, pp. Department of Justice, 'Tax Division Directive No. 128 (supersedes Directive No. 99) Charging Mail Fraud, Wire Fraud or Bank Fraud Alone or as Predicate Offenses in Cases Involving Tax Administration' (29 October 2004) <https://www.justice.gov/archives/usam/tax-resource-manual-14-tax-division-directive-no-128> accessed 12 August 2020
[3447] Department of Justice, 'CEO of Multibillion-dollar Software Company Indicted for Decades-Long Tax Evasion and Wire Fraud Schemes' (15 October 2020) <https://www.justice.gov/opa/pr/ceo-multibillion-dollar-software-company-indicted-decades-long-tax-evasion-and-wire-fraud> accessed 23rd March 2021
[3448] 26 USC §7701(a)(1); 26 USC §7343 'The term "person" as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.'
[3449] *United States v Beacon Brass Co Inc et al*, 344 US 43 (1952)
[3450] *United States v Shortt Accountancy Corporation*, 785 F2d 1448 (9th Cir 1986)
[3451] *United States v Chon*, 713 F3d 812, 820 (5th Cir 2013); *United States v Hartley*, 679 F2d 961, 972 (11th Cir 1982)
[3452] Department of Justice, 'United States Justice Manual 9-28.000 – Principles of Federal Prosecution of Business Organizations' (29 July 2020) <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300> accessed 29th March 2021 at § 9-28.200

prevent offence, must also stem from a lack of resources or commitment to bring corporate prosecutions for tax crimes. In comparison, the US respondeat superior doctrine essentially provides for a form of vicarious liability,[3453] holding a corporation criminally responsible for the criminal acts of its agents, including low-level employees, carried out with intent to benefit the corporation.[3454] In addition, the US has demonstrated a strong commitment to tackling corporate tax offences. Accordingly, this section argues that the US law and enforcement policies pertaining to corporate liability for tax crimes are more effective, both in theory and in practice, than their UK counterparts.

Specific Offences

The US has enacted a specific felony offence that criminalises an employer's wilfull failure to 'collect, account for, and pay over any tax imposed by this title' or failure to 'collect or truthfully account for and pay over such tax'.[3455] The offence criminalises employers' non-compliance with legal obligations to withhold certain taxes from the wages of employees.[3456] The offence extends not only to corporations, but also, to individuals who are responsible for carrying out this obligation.[3457] There is also a misdemeanor strict liability offense of failing to deposit withheld taxes in a bank account on trust for the US when requested.[3458] The UK has enacted a similar strict liability offence, which can result in an unlimited fine,[3459] but has not enacted a directly comparable offence that requires proof of *mens rea*. The US offence contains exceptions that mitigate the potentially unfair consequences resulting from the application of a strict liability offence.[3460] The UK offence does not contain any similar provisions, with

[3453] Ed, 'Criminal Liability of Corporations for Acts of Their Agents' (1946) 60(2) Harvard Law Review 283, 283
[3454] HL Brown, 'Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents' (1995) 41 Loyola Law Review 279, 285-88
[3455] 26 USC §7202
[3456] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 2.08
[3457] *United States v Hamdan*, WL 2615916 (ED La 2020)
[3458] 26 USC §7215, following notice from the IRS under 26 USC §7512. There is also a misdemeanour offense of willfully failing to furnish a withholding statement to an employee under 26 USC §7204.
[3459] Income Tax (Earnings and Pensions) Act 2003, s. 684(4A) following notice under the Income Tax (Pay As You Earn) Regulations 2003, SI2003/2682, Regs 97N, 97Q
[3460] 26 USC §7215(b). The exceptions are; 'reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax' and 'that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.'

reliance instead placed on prosecutorial discretion and judicial oversight to perform this function.[3461]

Respondeat Superior Doctrine

Historically, common law prevented the attribution of criminal liability to corporations, particularly for offenses that required criminal intent.[3462] However, this position was overturned in the seminal case of *New York Central & Hudson River Railroad Company v US,*[3463] which confirmed the application of criminal offences to corporations.[3464] Under US federal law, corporate criminal liability is imposed under the respondeat superior doctrine, which attributes criminal liability to a corporation based on the acts of its employees.[3465] The doctrine merely requires proof that criminal activities were carried out by those acting for the corporation, within the remit of their employment and for the purposes of benefitting the corporation.[3466] The criminal activity must have been committed within the employee's 'general line of work',[3467] but does not need to have been sanctioned by senior management.[3468] In fact, the key distinction between common law corporate liability in the UK and US,[3469] is that 'a corporation may be held criminally responsible for conduct that it specifcally prohibited and that its employee went to great lengths to conceal'.[3470] Moreover, it is unnecessary to show that a single employee acted with the requisite knowledge, for the collective knowledge of employees will be recognised as that of the corporation.[3471]As such, the respondeat superior doctrine provides for a much wider basis of corporate criminal liability than the identification

[3461] P Vaines, 'Security for PAYE' (2016) 1320 Tax J <https://www.taxjournal.com/articles/security-paye-03082016> Accessed 29th March 2021
[3462] Eds, 'Criminal Responsibility of Corporations' (1923) 27(4) Dickinson Law Review 89, 89-95
[3463] 212 US 481, 495-6 (1909)
[3464] DC Ball, DE Bolia, 'Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision' (2009) 9(1) Wyoming Law Review 230, 233
[3465] N Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82(3) J Crim L 245, 249
[3466] Congressional Research Service, 'Corporate Criminal Liability: An Overview of Federal Law' (30 October 2013) <https://crsreports.congress.gov/product/pdf/R/R43293/4> accessed 19th March 2021 p.3
[3467] *United States v. Agosto-Vega*, 617 F.3d 541, 25 (1st Cir. 2010)
[3468] *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1004 (9th Cir. 1972)
[3469] Although both doctrines have identical common law origins, 'By the end of the nineteenth century, however, the doctrine of respondeat superior expanded to include affirmative agent actions committed against the express orders of the principal, effectively doing away with the English distinction between acts of misfeasance and nonfeasance.' R Luskin, 'Caring about Corporate "Due Care": Why Criminal *Respondeat Superior* Liability Outreaches its Justification' (2020) 57(2) American Criminal Law Review 303, 307
[3470] Ibid at p.303. See also, *United States v. Potter*, 463 F.3d 9, 26 (1st Cir. 2006), *United States v. Twentieth Century Fox Film Corporation*, 882 F.2d 656, 660 (2d Cir. 1989)
[3471] *United States v Shortt Accountancy Corporation*, 785 F2d 1448 (9th Cir 1986); *United States v. Bank of New England*, 821 F2d 844, 856 (1st Cir. 1987) *cf United States v. Philip Morris USA, Inc*., 566 F3d 1095, 1122 (D.C.Cir. 2009)

doctrine in the UK.[3472] In fact, the effect is similar to the imposition of the failure to prevent offence in the UK, without the concomitant defences.[3473]

The US began to frequently prosecute corporations towards the latter half of the 20th Century.[3474] However, its approach dramatically changed following the prosecution of Arthur Andersen, and the appreciation, following the collapse of the firm, of the dramatic collateral consequences that could accompany a corporate conviction.[3475] Since 2001, prosecutors, particularly in the Criminal Division of the Justice Department, have made frequent use of DPAs and Non-Prosecution Agreements (NPAs).[3476] These agreements were originally intended for use in cases involving individuals,[3477] and there is little statutory authority for their use by prosecutors.[3478] Instead, the use of prosecutions, DPAs and NPAs, has only been vaguely outlined by enforcement policies; the Holder, Thompson, McNulty and Fillip Memos, and presently, the Yates Memo,[3479] codified in the USJM.[3480] The Principles of Federal Prosecution of Business Organisations provides that, in deciding whether to prosecute or attempt to reach a NPA/DPA, prosecutors must consider eleven factors, including, the nature and seriousness of the offense, the systemic and persistent nature of criminal activity within

[3472] R Luskin, 'Caring about Corporate "Due Care": Why Criminal *Respondeat Superior* Liability Outreaches its Justification' (2020) 57(2) American Criminal Law Review 303, 313; N Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82(3) J Crim L 245, 262

[3473] In *Dollar SS Co,* the court held that regardless of the company's prevention policies and procedures, liability would be imposed for the company 'failed to prevent the commission of the forbidden act' *Dollar SS Co v United States,* 101 F2d 638 (9th Cir 1939), A Weissmann, D Newman, 'Rethinking Corporate Criminal Liability' (2007) 82 Ind LJ 411, 421

[3474] M Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49 UC Davis Law Review 497, 500

[3475] Between 1992-2001, thirteen DPAs/NPAs were entered into, compared to 39 in the five years following 2001, DM Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 MD L Rev 1295, 1307-8. From 2006-2015, 384 DPAs and NPAs were agreed, B Banyamin, 'Get Your Hand Off My DPA! The Proper Scope of the Judicial Supervisory Power in Deferred Prosecution Agreements' (2017) 54(2) Am Crim L Rev 571, 571 both citing BL Garrett, J Ashley, 'Corporate Prosecution Registry' (University of Virginia School of Law and Duke University School of Law) <https://corporate-prosecution-registry.com/browse/> accessed 29th March 2021.

[3476] Ibid (Uhlmann) at p.1303.

[3477] A Amulic, 'Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States' (2017) 116(1) Mich L Rev 123, 128

[3478] 26 USC §3161(h). DM Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 MD L Rev 1295, 1329

[3479] V Root Martinez, 'The Government's Prioritization of Information Over Sanction: Implications for Compliance' (2020) 83(85) Law and Contemporary Problems 85, 99-101

[3480] Department of Justice, 'United States Justice Manual 9-28.000 – Principles of Federal Prosecution of Business Organizations' (29 July 2020) <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300> accessed 29th March 2021

the corporation, the level of cooperation provided, and the collateral consequences of a criminal conviction.[3481]

Evaluation

In sharp contrast to the UK, the expansive scope of corporate criminal liability in the US has led to impressive results in combatting the evasion of taxation, as well as the facilitation of tax crimes. The US has prosecuted several corporations for evading corporate taxes.[3482] The US has also reached DPAs/NPAs with high-profile law and accounting firms, as well as insurance companies, for their facilitation of the use of fraudulent tax shelters.[3483] The US has also used corporate liability to combat offshore tax evasion in a manner incomparable to other countries. A significant number of DPAs/ NPAs have been concluded with foreign banks for their facilitation of tax evasion by US citizens through offshore accounts.[3484] For instance, the US reached a DPA with UBS in 2009 for conspiring to defraud the IRS, which resulted in the imposition of a $780million penalty, as well as unprecedented levels of information exchange between Switzerland and the US.[3485] The US also indicted Switzerland's oldest bank, Wegelin, which admitted guilt and paid a penalty of $74million leading to the collapse of the bank.[3486]

[3481] Ibid at § 9-28.300

[3482] Department of Justice, 'Manhattan US Attorney Announces $95 Million Recovery from Deutsche Bank in Fraudulent Conveyance Case Related to Federal Income Tax Avoidance' (4 January 2017) <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-95-million-recovery-deutsche-bank-fraudulent-conveyance> accessed 29 March 2021

[3483] See for instance, US Department of Justice, 'KPMG to Pay $456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case' (29 August 2005) <https://www.justice.gov/archive/opa/pr/2005/August/05_ag_433.html> accessed 28 January 2021; Department of Justice, 'Manhattan U.S. Attorney Announces Agreement With Ernst & Young LLP To Pay $123 Million To Resolve Federal Tax Shelter Fraud Investigation' (1 March 2013) <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-agreement-ernst-young-llp-pay-123-million-resolve> accessed 29th March 2021; Department of Justice, 'Zurich Life Insurance Company Ltd and Zurich International Life Limited Enter Agreement with US Regarding Insurance Products' (25 April 2019) <https://www.justice.gov/opa/pr/zurich-life-insurance-company-ltd-and-zurich-international-life-limited-enter-agreement-us> accessed 29th March 2021

[3484] See the DPA recently concluded with one of Israel's largest banks Department of Justice, 'Mizrahi-Tefahot Bank Ltd Admits its Employees Helped US Taxpayers Conceal Income and Assets' (12 March 2019) <https://www.justice.gov/opa/pr/mizrahi-tefahot-bank-ltd-admits-its-employees-helped-ustaxpayers-conceal-income-and-assets> accessed 29th March 2021

[3485] See ch 4 p. United States District Court Southern District of Florida, 'Case No.09-60033-CR-COHN United States of America vs. UBS AG: Deferred Prosecution Agreement' (19 February 2009) <https://www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Deferred_Prosecution_Agreement.pdf> accessed 19 July 2019

[3486] Department of Justice, 'Swiss Bank Pleads Guilty in Manhattan Federal Court to Conspiracy to Evade Taxes' (3 January 2013) <https://www.justice.gov/usao-sdny/pr/swiss-bank-pleads-guilty-manhattan-federal-court-conspiracy-evade-taxes> accessed 19th March 2021. Emmenegger notes that this indictment was of 'high symbolic importance' and was likely to result in comparatively minimal collateral consequences (at least for the US), P Emmenegger, 'The Long Arm of Justice: US Structural Power and International Banking' (2015) 17(3) Bus Polit 473, 486

The US also charged six large and eight small banks with tax evasion offenses before establishing the Swiss Bank Program in 2013.[3487] The Program required Swiss Banks to disclose criminal activities, provide information on US taxpayers, close US taxpayer accounts, and pay significant penalties, in exchange for a NPA.[3488] By the end of the Program, the US had reached NPAs with 80 banks and imposed over $1.36billion in penalties.[3489] In this respect, not only has the US been able to obtain significant financial benefits in taking criminal action against corporations that facilitate tax evasion, but through its action against Swiss banks, the US dramatically enhanced international cooperation in tax matters and ultimately accelerated the fall of Swiss bank secrecy for foreign account holders.[3490] In contrast to the UK, the US has reached a significant number of agreements with corporations in respect of tax crimes, with 38 DPAs/NPAs relating to tax fraud agreed in the final 20 months of the Obama Administration alone.[3491] Two DPAs and two NPAs relating to tax fraud were reached in 2019, accounting for over 10% of all DPAs/NPAs reached by the DoJ in that year, with penalties exceeding $400millon.[3492] This includes a DPA with HSBC Private Bank (Suisse) in 2019, including an accompanying penalty of $192.35million, for its facilitation of tax evasion by US citizens.[3493] Accordingly, it is clear that the US approach to attributing criminal liability to corporations, as well as its approach to enforcement, is far more effective at recovering taxation than its UK counterpart.

Nonetheless, US commentators have expressed concerns at the expansive scope of criminal liability in the US, suggesting that it lacks proportionality,[3494] and may be counterproductive

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[3487] Y Lengwiler, A Saljihaj, 'The US Tax Program for Swiss Banks: What Determined the Penalties?' (2018) 154(23) Swiss Journal of Economics and Statistics 1, 1

[3488] Department of Justice, 'Swiss Bank Program' (Announced 29 August 2013) <https://www.justice.gov/tax/swiss-bank-program> accessed 29th March 2021

[3489] Department of Justice, 'Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungs AG' (27 January 2016) < https://www.justice.gov/opa/pr/justice-department-announces-final-swiss-bank-program-category-2-resolution-hszh-verwaltungs> accessed 29th March 2021

[3490] P Emmenegger, 'Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters: A Nut Too Hard to Crack?' (2017) 11 Regulation & Governance 24, 26; Y Lengwiler, A Saljihaj, 'The US Tax Program for Swiss Banks: What Determined the Penalties?' (2018) 154(23) Swiss Journal of Economics and Statistics 1, 2

[3491] BL Garrett, 'Declining Corporate Prosecutions' (2020) 57 American Criminal Law Review 109, 145

[3492] Gibson Dunn, '2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (8 January 2020) <https://www.gibsondunn.com/2019-year-end-npa-dpa-update/> accessed 29 March 2021, Appendix; BL Garrett, J Ashley, 'Corporate Prosecution Registry' (University of Virginia School of Law and Duke University School of Law) <https://corporate-prosecution-registry.com/browse/> accessed 29th March 2021

[3493] United States Department of Justice, 'Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA' (10 December 2019) <https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa> accessed 9th November 2020

[3494] SN Vu, 'Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent' (2004) 104 Columbia Law Review 459, 466

from a deterrence perspective.[3495] In addition, the US has frequently been criticised for its persistent use of DPAs/NPAs with many suggesting that they afford too much discretion to prosecutors,[3496] lack judicial oversight,[3497] and do not have the same condemnatory effect as prosecution.[3498] Further, many question the proposed rationale for DPAs, arguing that individuals are not afforded parity of treatment in the consideration of collateral consequences,[3499] and that most prosecutions would not result in a 'corporate death penalty', refuting the need to consider such impacts in enforcement decisions.[3500] Several corporations also seem to be persistent offenders, suggesting that the deterrence and reformative objectives of DPAs/NPAs are not being achieved.[3501] Moreover, while US corporate indictments pertaining to tax evasion were formerly accompanied by the indictment of individuals, enhancing deterrence and retribution,[3502] contemporarily, few actions against corporations are accompanied by individual indictments.[3503] In this respect, the US's persistent use of DPAs

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[3495] R Luskin, 'Caring about Corporate "Due Care": Why Criminal *Respondeat Superior* Liability Outreaches its Justification' (2020) 57(2) American Criminal Law Review 303, 317

[3496] J Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8 J Legal Analysis 191, 231 (2016)

[3497] The standard of review US Courts are able to provide for DPAs is uncertain. However, federal appellate courts have suggested that the courts only have a limited role in ensuring the compliance of DPAs with the authorising legislation and has limited ability to conduct a substantive review of the terms of the DPA. *United States of America v Fokker Services BV,* 818 F3d 733 (DC Cir 2016), *United States of America v HSBC Bank USA, NA,* 863 F3d 125 (2nd Cir 2017) P Reilly, 'Sweetheart Deals, Deferred Prosecution and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts' (2019) 50 Ariz St LJ 1113, 1121

[3498] Note 'Criminal Liability of Corporations for Acts of their Agents' (1946) 60 Harvard LR 83, 286 cited in R Mays, 'Towards Corporate Fault as the Basis of Criminal Liability of Corporations' (1998) 2(2) Mountbatten Journal of Legal Studies 31, 37

[3499] A Amulic, 'Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States' (2017) 116(1) Mich L Rev 123, 135

[3500] 'No public company convicted in the years 2001–2010 went out of business because of a federal criminal conviction. This result calls the conventional wisdom about the Andersen Effect into serious doubt.' G Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) U Pa J Bus L 797, 827

[3501] Such as HSBC, see N Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82(3) J Crim L 245, 253. Pfizer received 'no fewer than four deferred prosecutions over the course of little more than a decade' JS Rakoff, 'The Problematic American Experience with Deferred Corporate Prosecutions' (2019) 13(1) Law and Financial Markets Review 1, 1

[3502] See for instance, the indictment of professionals associated with the design and implementation of fraudulent tax shelters at KMPG, *United States v Stein,* 541 F3d 130 (2nd Cir 2008), *United States v Pfaff,* 619 F3d 172 (2nd Cir 2010) and Ernst and Young LLP, *United States v Coplan,* 703 F3d 46 (2nd Cir 2012). I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at § 1.08

See also, the prosecution of Bradley Birkenfeld, the whistle-blower in the UBS scandal, Department of Justice, 'Former UBS Banker Sentenced to 40 Months for Aiding Billionaire American Evade Taxes' (21 August 2009) <https://www.justice.gov/opa/pr/former-ubs-banker-sentenced-40-months-aiding-billionaire-american-evade-taxes> accessed 29th March 2021

[3503] 'For the time period from 2001 to 2018, individuals were prosecuted alongside corporations entering deferred or non-prosecution agreements in 134 of the 497 total agreements with organizations (or 27%)' BL

may be a case of pursuing 'quantity over quality', or the presentation of a 'façade of enforcement'.[3504] However, the UK demonstrates that low quality enforcement actions are better than no action at all, particularly considering the magnification of the harm caused by criminal corporate entities and the importance of taking visible enforcement actions in the tax compliance context. In this respect, the US use of DPAs/NPAs has led to speedier, cost effective, resolutions to tax crimes that often would not otherwise be possible, potentially owing to evidential or financial constraints.[3505] Further, DPAs/NPAs can lead to improvements in corporate compliance procedures, including innovative solutions in addressing tax crimes, such as an agreement to curtail and review the provision of tax products and services.[3506]

It is clear that the US model should not be adopted without modification, yet the US approach convincingly illustrates why the identification doctrine should be modified or replaced with a more expansive form of corporate criminal liability in the UK. Nevertheless, there are dangers inherent in applying such a wide basis of liability as the respondeat superior model, which may inhibit the aims of deterring and preventing tax crimes.[3507] A balance must be struck between facilitating law enforcement and criminalising non-culpable violations of criminal law. In this respect, several US commentators have suggested retaining the respondeat superior model, but incorporating a defence of taking reasonable care to prevent the offense.[3508] This would seem to have a similar effect to the failure to prevent offence in the UK, yet the label attaching to such criminal activity would more accurately reflect the harm caused by the corporation – the commission of a substantive offence, rather than simply a failure to prevent one. In addition, the US has made significant use of DPAs/NPAs in addressing tax evasion facilitation offences, suggesting that the UK was correct to introduce these powers into its own legal framework, despite the issues inherent in this law enforcement tool. Importantly, the UK recognised some

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Garrett, 'Declining Corporate Prosecutions' (2020) 57 American Criminal Law Review 109, 112. After UBS, few individuals employed by Swiss banks were charged with offences, ibid at p.132.

[3504] M Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49 UC Davis Law Review 497, 527; JS Rakoff, 'The Problematic American Experience with Deferred Corporate Prosecutions' (2019) 13(1) Law and Financial Markets Review 1

[3505] M Yangming Xiao, 'Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime' (2013) 23(1) Cornell Journal of Law and Public Policy 233, 242-3

[3506] See for instance, the DPA reached with German Bank HVB, United States Attorney Southern District of New York, 'German Bank HVB Admits Criminal Wrongdoing and Agrees to pay $29million as Part of Deferred Prosecution Agreement in Relation to Largest-Ever Tax Shelter Fraud' (14 February 2006) <https://www.justice.gov/archive/usao/nys/pressreleases/February06/hvbdeferredprosecutionagreementpr.pdf> accessed 29th March 2021; JA Nasar, 'In Defense of Deferred Prosecution Agreements' (2017) 11(2) NYU JL & Liberty 838, 853

[3507] R Luskin, 'Caring about Corporate "Due Care": Why Criminal *Respondeat Superior* Liability Outreaches its Justification' (2020) 57(2) American Criminal Law Review 303, 317

[3508] Ibid at p. 330. See also, A Weissmann, D Newman, 'Rethinking Corporate Criminal Liability' (2007) 82 Ind LJ 411, 440

of the concerns surrounding the US approach to concluding DPAs, providing clear authority for DPAs in legislation, and providing for a much greater degree of judicial oversight.[3509] Nonetheless, it is clear that both the UK and US need to adopt more consistent and principled approaches to the use of such agreements. These issues should be addressed by considering the enforcement of corporate liability for tax crimes within the wider enforcement policy and approach pertaining to tax evasion offences.

6.4 Comparison of the Legal Frameworks in the UK and US

Both the UK and the US have comprehensive legal frameworks providing for the criminalisation of tax evasion and fraud, as well as the facilitation of these crimes by both individuals and corporations. Indeed, there appear to be few omissions in the scope of liability imposed in each jurisdiction. However, while the UK has enacted several offences pertaining to the evasion of different types of taxes, US tax evasion offences centre on the underlying conduct giving rise to the offence. In this respect, the US has been able to enact a 'complete criminal code', obviating the need to rely on other general white-collar offences, and enabling different labels and sanctions to be attached to different categories of offending.[3510] Importantly, the US clearly differentiates between culpable actions and omissions in respect of tax crimes. In contrast, the UK rarely uses its statutory offences in preference of charging the common law offence of cheating the public revenue, a catch-all crime with an accompanying severe sentence of imprisonment. Therefore, the UK would benefit from reconsidering its approach to the criminalisation of tax evasion, enacting offences based on the underlying conduct, rather than retaining a patchwork of duplicitous offences for each type of tax evaded. This would also help to more narrowly circumscribe the overly broad scope of UK tax evasion offences. `

The UK and US also use one form of *mens rea* consistently for almost all tax evasion offences. However, whereas the judicial failure to define dishonesty in the UK has left the application of this term fraught with uncertainty, US case law provides a higher level of clarity in the

[3509] Ministry of Justice, *Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements* (Cm 8348, 2012) p.19; P Reilly, 'Sweetheart Deals, Deferred Prosecution and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts' (2019) 50 Ariz St LJ 1113, 1144

[3510] G Szott Moohr, 'Tax Evasion as White Collar Fraud' (2009) 9 Houston Business and Tax Law Journal 208, 209; US tax evasion offences were 'calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.' *Spies v United States* 317 US 492, 497 (1943).

interpretation of the term wilfulness, through decades of judicial decisions clarifying the scope and application of this term. On the other hand, the US's use of general offences that do not require proof of willfullness in high-profile tax evasion cases undermines the consistency and fairness provided by this form of *mens rea.* Nevertheless, the US demonstrates that, while the UK does not necessarily have to alter the form of *mens rea* chosen for tax evasion offences, significant benefits could be gained in providing a statutory or judicial definition of this term, including a higher level of certainty for both prosecutors and defendants.

Both the UK and US also impose criminal liability on the facilitators of tax crimes, including corporations. However, the US legal framework seems to be more effective in practice, owing to its more expansive approach to attributing liability to corporations, as well as a greater commitment to pursuing the corporations at the centre of tax evasion scandals. The UK has already taken steps, inspired by the US, to improve its ability to address companies that fail to prevent tax evasion, including the introduction of a more expansive statutory offence and the provision of authority to prosecutors for the use DPAs to address this type of corporate criminal conduct. While the reformed UK approach has some advantages over its US counterpart, the introduction of a limited statutory offence does not rectify the problems inherent in the wider identification doctrine and does not send a clear signal to the public regarding the severity of the offending conduct.

6.5 Conclusion

The discussion above illustrates that the UK could gain many insights from the US, which would improve the effectiveness of its criminal offences pertaining to tax evasion. However, the preceding discussion also highlights that the effectiveness of tax evasion offences depend not only on their doctrinal coherence, but also, on how they are enforced. As such, the next chapter considers the enforcement policies and procedures for combatting tax evasion in the UK and US.

Chapter 7 – The Enforcement of Tax Evasion Legislation in the UK and US

7.1 Introduction

Most countries treat tax evasion as a distinct crime, adopting a more selective criminal investigation and prosecution policy than for other criminal offences.[3511] This is primarily attributable to the expense of prosecutions over other options of redress, as well as the insufficient resources and capacity of LEAs to carry out criminal investigations, considering the high prevalence of this financial crime.[3512] For some countries, this also represents a conscious choice to consider tax evasion as a crime of lower severity, worthy of lighter sanction.[3513] This chapter identifies and evaluates the policies and approaches adopted in the UK and US towards the enforcement of tax evasion offences. The chapter will consider the rationale behind the adoption of selective enforcement policies in each jurisdiction, as well as the factors that influence tax authorities in the UK and US to conduct criminal, rather than civil, investigations. The practical impact of such policies will also be identified by considering the number of convictions for tax offences in each jurisdiction, highlighting the issues that can be caused by affording significant discretion to tax authorities and prosecutors. This chapter will also explore the use of civil alternatives to prosecution in each jurisdiction, analysing the scope and application of civil investigations and penalties, including the use of tax amnesties. The final section aims to compare and evaluate the enforcement policies adopted in each jurisdiction, using the standards of evaluation put forward by tax compliance literature in a variety of disciplines.

7.2 The UK

7.2.1 Introduction

In the UK, HMRC is responsible for conducting all investigations, whether civil or criminal, into noncompliance with both direct and indirect taxes.[3514] Other LEAs, such as the FCA and the SFO could prosecute tax offences, but very rarely do so.[3515] Before the merger of Inland

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[3511] See generally, OECD, 'Offshore Voluntary Disclosure: Comparative Analysis, Guidance and Policy Advice' (September 2010) <https://www.oecd.org/tax/administration/45967994.pdf> accessed 14th April 2021
[3512] AK Jain, 'Income Tax Penalty and Prosecution Provisions: A Comparison of the United Kingdom and Indian Experiences' (1987) 10 BTR 353, 357.
[3513] K Weidenfeld, A Spire, 'Punishing Tax Offenders in France and Great Britain: Two Criminal Policies' (2017) 24(4) JFC 574, 575.
[3514] The Commissioners for Revenue and Customs Act 2005, ss.5-9.
[3515] *R v Rollins* [2010] UKSC 39; [2010] 1 WLR 1922; Criminal Justice Act 1987, s.1. The SFO has responsibility for enforcing the failure to prevent the facilitation of foreign tax evasion offence under Criminal Finances Act 2017, s.46, s.49.

Revenue and Customs and Excise, each authority was responsible for bringing prosecutions.[3516] However, owing to the larger move towards the separation of investigative and prosecutorial functions in the criminal justice system,[3517] as well as high-profile prosecutorial failures by Customs & Excise,[3518] the creation of HMRC was accompanied by the creation of the Revenue and Customs Prosecution Office (RCPO).[3519] In 2010, the RCPO was incorporated into the CPS,[3520] which is now responsible for bringing all tax evasion prosecutions in England and Wales. However, it is important to note that HMRC still have a fundamental role in this process, deciding which cases to refer to the CPS for prosecution.[3521] This section examines HMRC's approach to the enforcement of tax evasion offences, before providing a contemporary evaluation of the impact of HMRC's Criminal Investigation Policy.

7.2.2 The Prosecution of Tax Evaders

Historically, the Inland Revenue, and later HMRC, rarely sought prosecutions for tax evasion offences, instead opting to address tax evasion by way of civil penalties.[3522] Indeed, since the enactment of the income tax, 'the principal response of the Revenue to fraud by the taxpayer has been to avoid the use of criminal prosecutions'.[3523] Civil penalties for VAT offences were introduced later, owing to their perceived success in addressing the evasion of direct taxes.[3524] The Inland Revenue's prosecution policy used to be based on the presence of 'badges of

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[3516] Customs and Excise Management Act 1979, s.145, s.155. The Inland Revenue had 'no express power to prosecute' but had 'such a power at common law in aid of their overall functions' *R v Werner* [1988] STC 550, 554.

[3517] Including the creation of the CPS, following the Phillips Commission, *Royal Commission on Criminal Procedure* (Cmnd 8092, 1981) and the enactment of the Prosecution of Offences Act 1985, s.1.

[3518] Including two prosecutions that led to inquiries in 1999 and 2000, the consequent Butler and Gower Hammond Reports, and the collapse of the 'London City Bond cases' in the early 2000s, which led to the Butterfield review, see HM Crown Prosecution Service Inspectorate, 'The Inspectorate's Report on the London Casework Units of the Customs and Excise Prosecutions Office' (Report 22/04, December 2004) <https://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/CEPO2204Rep.pdf> accessed 6th April 2021, p.1-2. See also P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) p.72-78.

[3519] The Commissioners for Revenue and Customs Act 2005, ss.34-42.

[3520] This was formally achieved in 2014 via the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014, SI 2014/834.

[3521] HM Revenue & Customs, 'Guidance HMRC's Criminal Investigation Policy' (Updated 13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 13th December 2020.

[3522] Customs and Excise had a 'much more vigorous approach to investigating offences' than the Inland Revenue, see J O'Donnell, 'Vat Investigation' (2007) 57 VAT Dig 1, 2; see also D Ormerod, 'Cheating the Public Revenue' [1998] Crim LR 627, 645.

[3523] P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) p.135 citing Income Tax Act 1842, s.55.

[3524] Following the recommendation of Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983) para 1.4.3. RM White, '"Civil Penalties": Oxymoron, Chimera and Stealth Sanction' (2010) 126 LQR 593, 604.

heinousness', which would tend towards bringing a criminal prosecution.[3525] The 'badges' included the profession of the taxpayer, the complexity of the fraud, the use of forged documents, collusion and incomplete, or repeated non-disclosure, of information.[3526] In 1983, a report by the Keith Committee found that the enforcement powers of the revenue collection authorities had not been subjected to a comprehensive evaluation and seemed to 'have grown up as an historical hotpotch without any comprehensive scheme or logical framework.'[3527] Nonetheless, the selective use of the criminal justice system in combatting tax crimes was approved by the Committee.[3528] This position still persists to this day, with no comprehensive review being undertaken into the principles underlying the enforcement of tax offences in the UK.[3529] In addition, although judicial review is theoretically available in respect of prosecution decisions,[3530] courts have routinely supported the Inland Revenue's selective prosecution policy, noting 'it is not only rational but probably the only workable policy'.[3531] In *Mead*, the court recognised that the Revenue's primary aim is to collect revenue and significant resources are needed to pursue criminal prosecution, yet a small number of prosecutions are still necessary to achieve deterrence.[3532] Accordingly, the application of the policy has been subjected to minimal review by the courts, which have generally supported the use of selective prosecution.[3533]

HMRC is no longer responsible for criminal prosecutions, yet the selective prosecution policy continues, for HMRC is responsible for referring cases to the CPS for prosecution.[3534] As such, HMRC acts as a gatekeeper to the criminal justice system. HMRC's Criminal Investigation Policy currently provides:

[3525] R Rhodes QC, 'The Inland Revenue and the Criminal Law' (1989) 53(4) Journal of Criminal Law 477, 477
[3526] Ibid. See also KD Deane, 'Tax Evasion, Criminality and Sentencing the Tax Offender' (1981) 21(1) The British Journal of Criminology 47, 49-50.
[3527] Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983) para 1.3.1.
[3528] Ibid at para 18.4.5-6, para 22.1.10, paras 27.2.6 and 7.
[3529] RM White, '"Civil Penalties": Oxymoron, Chimera and Stealth Sanction' (2010) 126 LQR 593, 605; H Travers, 'Current Issues in HMRC Criminal Investigations & Prosecutions' (IBC Tax Investigations Conference, May 2010) <http://www.bcl.com/downloads/HarrysTaxTalk25May2010.pdf> accessed 2nd April 2021, p.1.
[3530] *R v Inland Revenue Commissioners Ex p. Allen* [1997] STC 1141; *R v Inland Revenue Commissioners Ex p. Mead* [1993] 1 All ER 772; [1992] STC 482; *R v Werner* [1988] STC 550.
[3531] *R v Inland Revenue Commissioners Ex p. Mead* [1993] 1 All ER 772; [1992] STC 482.
[3532] Ibid at 783C.
[3533] In *Hackett v HMRC* [2020] UKUT 0212 (TCC) A taxpayer unsuccessfully argued that HMRC should have conducted a criminal, rather than a civil, investigation.
[3534] HM Revenue & Customs, 'Guidance HMRC's Criminal Investigation Policy' (Updated 13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 13th December 2020.

> It's HMRC's policy to deal with fraud by use of the cost effective civil fraud investigation procedures under Code of Practice 9 wherever appropriate. Criminal investigation will be reserved for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate.[3535]

In making this determination, HMRC consider several factors including the presence of organised crime or conspiracy, the extent of losses, previous conduct, the role of the individual (particularly if a professional), the presence of false statements and documents, and/or other forms of concealment or deception.[3536] The broad range of factors considered in the policy provides little opportunity for judicial review of prosecution decisions.[3537]

7.2.3 Number and Type of Prosecutions

HMRC's criminal investigation policy has led to very low numbers of prosecutions for tax evasion offences in the UK. From 1950-1974, a grand total of 2619 prosecutions were brought, ranging from 50-195 prosecutions for tax offences each year.[3538] This figure increased slightly from 1991-96, when the Inland Revenue brought 240 prosecutions each year for tax offences.[3539] Nevertheless, a lack of public and governmental enthusiasm to increase these numbers led to further decline in the number of tax evaders subject to prosecution.[3540] From 1998-2002, only 263 defendants were prosecuted by the Inland Revenue for serious tax fraud in the entire four year period,[3541] including, in 2001/2, only 30 prosecutions for this offence.[3542] Prosecutions by Customs and Excise were slightly higher during this period with, for instance, 127 prosecutions brought in 1998-99.[3543] However, by 2007, only two in a thousand cases of detected tax evasion were prosecuted in the UK.[3544] After 2007, the number of prosecutions

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[3535] Ibid.
[3536] Ibid.
[3537] H Travers, 'Current Issues in HMRC Criminal Investigations & Prosecutions' (IBC Tax Investigations Conference, May 2010) <http://www.bcl.com/downloads/HarrysTaxTalk25May2010.pdf> accessed 2nd April 2021, p.4.
[3538] KD Deane, 'Tax Evasion, Criminality and Sentencing the Tax Offender' (1981) 21(1) The British Journal of Criminology 47, 50.
[3539] D Cook, *Poverty, Crime and Punishment* (Child Poverty Action Group, 1997) 102.
[3540] D Cook, *Criminal and Social Justice* (Sage Publications, 2006) 49.
[3541] National Audit Office, *Tackling Fraud Against the Inland Revenue* (HC 2002-03, 429-I) p.39.
[3542] Inland Revenue, *Report of the Commissioners of Her Majesty's Inland Revenue for the Year Ending 31st March 2002, One-Hundred and Forty-Fourth Report* (Cmd 5706, 2002).
[3543] Lord Grabiner QC, 'The Informal Economy' (HM Treasury March 2000) <https://webarchive.nationalarchives.gov.uk/20081023142344/http://www.hm-treasury.gov.uk/d/74.pdf> accessed 2nd April 2021, p.34.
[3544] Public Accounts Committee, *HMRC: Tackling the Hidden Economy* (HC 2007-08, 712-I) p.6.

declined even further, by precisely 41%.[3545] In 2010, following the financial crisis and several high-profile tax evasion scandals,[3546] HMRC were tasked with increasing the number of prosecutions for tax evasion offences from 165 individuals in 2010/11, to 1165 individuals in 2014/15 by making sufficient referrals to the CPS.[3547] Consequently, the number of prosecutions for tax evasion offences has dramatically increased, from 420 in 2010/11, 545 in 2011/12, 770 in 2012/13, 915 in 2013/14 and 1288 in 2014/15.[3548] The significant increase in prosecutions for tax evasion appears to be based on public sentiment and political concerns, as opposed to being based upon a logical and principled justification. In this respect, while many commentators have advocated for increased utilisation of prosecutions in combatting tax evasion in the UK, highlighting the possible benefits in terms of deterrence,[3549] an inadequate explanation was offered by HMRC for setting a target of 1000 prosecutions annually.[3550]

Throughout this time, not only the quantity, but also the quality, of tax evasion prosecutions has been questioned. For instance, Deane examined a selection of cases from 1950-74 and concluded 'there was only a handful of cases in which the fraud could be said to show any degree of sophistication.'[3551] Later, an attempt to focus on high-profile celebrity cases to increase the deterrent impact of prosecutions achieved little success, as did focusing on certain professions and geographical sectors.[3552] By the early 2000s, there was concern that the Revenue were focusing on only large value cases, leading to the introduction of a summary

[3545] House of Commons Treasury Committee, *Closing the Tax Gap: HMRC's Record at Ensuring Compliance* (HC 2010-12, 1371-I) p.11.
[3546] Including, 'Offshore leaks', 'Lux leaks', 'Swiss leaks', 'Panama Papers' and 'Bahamas Leaks' A Scherrer, 'Money Laundering, Tax Avoidance and Tax Evasion: Research Papers' (European Parliamentary Research Service Blog, 27 April 2017) <https://epthinktank.eu/2017/04/27/money-laundering-tax-avoidance-and-tax-evasion-research-papers-and-a-video/> accessed 18th September 2017.
[3547] HM Treasury, *Summer Budget 2015,* (HC 2015-16, 264) p.43.
[3548] National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) p.33; HM Revenue and Customs, *Annual Report and Accounts 2014-15 (For the year ended 31 March 2015)* (HC 2014-15, 18-I) p.16.
[3549] See for instance, R de la Feria, 'Tax Fraud and Selective Law Enforcement' (2020) 47(2) Journal of Law and Society 240; M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493; J Roording, 'The Punishment of Tax Fraud' (1996) Apr Crim LR 240.
[3550] 'HMRC was set a target(…), based on what HMRC thought it and the wider criminal justice system could cope with at the time. HMRC achieved this target by focussing on lower complexity cases. (…) HMRC does not know what impact prosecuting an extra 1,000 people has had or what the optimum number would be to provide an effective deterrent.' Public Accounts Committee, *Tackling Tax Fraud* (HC 2015–16, 674-I) p.6.
[3551] KD Deane, 'Tax Evasion, Criminality and Sentencing the Tax Offender' (1981) 21(1) The British Journal of Criminology 47, 53.
[3552] Including the successful prosecution of Lester Piggott and the failed prosecutions of Ken Dodd and Harry Redknapp, P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) 121.

offence pertaining to income tax evasion.[3553] However, in practice, the introduction of prosecutorial targets in 2010 led HMRC to 'focus on less complex cases' particularly 'lower-value cases', with prosecutions being undertaken for losses as small as £250.[3554] The average prison sentence also fell by 57% from 2011-2014, suggesting that HMRC were focusing on low hanging fruit to fulfil their objectives.[3555] Of particular concern, considering the context in which such targets were introduced, is that only thirteen individuals were prosecuted for offshore tax evasion from 2009-2016.[3556] Following these revelations, HMRC were also tasked with increasing the number of prosecutions for 'serious and complex tax crime' by 'wealthy individuals and corporates' to over 100 a year by the end of the Parliament.[3557]

However, since 2016, the number of prosecutions has dramatically declined. Indeed, 2014-15 was the only year that HMRC met the target of achieving 1000 prosecutions.[3558] 880 individuals were prosecuted in 2015-16,[3559] followed by 886 prosecutions in 2016-17,[3560] 917 prosecutions in 2017-18,[3561] and only 548 prosecutions in 2019-20.[3562] Of these, only 42

[3553] Lord Grabiner QC, 'The Informal Economy' (HM Treasury March 2000) <https://webarchive.nationalarchives.gov.uk/20081023142344/http://www.hm-treasury.gov.uk/d/74.pdf> accessed 2nd April 2021, p.34.

[3554] 'The value of cases in our sample ranged from £250 through to an organised crime case worth £160 million. HMRC does not yet know what the right balance of case size should be.' National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) p.33.

[3555] V Houlder, 'More UK Tax Evaders Going to Jail but Prison Terms are Falling' (1 June 2015) <https://www.ft.com/content/5d58f0e2-0788-11e5-a58f-00144feabdc0> accessed 6th April 2021

[3556] HM Revenue & Customs, 'Press Release: Tough New Sanctions Announced for Offshore Tax Evaders' (24 August 2016) <https://www.gov.uk/government/news/tough-new-sanctions-announced-for-offshore-tax-evaders> accessed 6th April 2021.

[3557] HM Treasury, *Summer Budget 2015*, (HC 2015-16, 264) p.43. See also, HM Revenue & Customs, 'No Safe Havens: Our Offshore Evasion Strategy 2013 and Beyond' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/193112/offshore-strategy_1_.pdf> accessed 6th April 2021 at p.17 - 'HMRC has already significantly increased the number of criminal investigations and prosecutions of tax cheats, and will increase the number of investigations specifically into offshore evasion.'

[3558] HM Revenue and Customs, *Annual Report and Accounts 2014-15 (For the year ended 31 March 2015)* (HC 2014-15, 18-I) p.16.

[3559] HM Revenue and Customs, *Annual Report and Accounts 2015-16 (For the year ended 31 March 2016)* (HC 2015-16, 338-I) p.22.

[3560] HM Revenue and Customs, *Annual Report and Accounts 2016-17 (For the year ended 31 March 2017)* (HC 2016-17, 18-I) p.24.

[3561] HM Revenue and Customs, *Annual Report and Accounts 2017-18 (For the year ended 31 March 2018)* (HC 2017-18, 1222-I) p.25.

[3562] Kingsley Napley, 'HMRC Fails to Deliver on Pledge to Increase Criminal Prosecutions by End of 2020, FOI Request Reveals' (21 December 2020) <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/hmrc-fails-to-deliver-on-pledge-to-increase-criminal-prosecutions-by-end-of-2020-foi-request-reveals> accessed 6th April 2021. HMRC state that 691 prosecutions were brought in 2019-20. The reason for the discrepancy may be that HMRC statistics include offences other than tax evasion, see HM Revenue & Customs, 'HMRC Quarterly Performance Report: October to December 2020' (4 February 2021) <https://www.gov.uk/government/publications/hmrc-quarterly-performance-report-october-to-december-2020> accessed 12th April 2021.

prosecutions concerned wealthy individuals or businesses in 2018-19 and only 32 in 2019-20,[3563] meaning that HMRC has woefully failed to meet its targets. Further, from 2012-19, only 34 individuals have been prosecuted for offshore tax evasion,[3564] and only twenty individuals have been convicted for facilitating fraudulent purported tax avoidance schemes.[3565] Overall, from 2015-2020, 4,123 people were prosecuted following a charging decision by HMRC,[3566] yet zero prosecutions were brought against corporations for failing to prevent tax evasion.[3567] Even more dramatically, in the first three quarters of 2020-21, HMRC only referred 119 cases for prosecution returning the number of prosecutions for tax evasion to pre-2010 levels.[3568] Although, as HMRC notes, the prosecution rate has undoubtedly been affected by the Covid-19 Pandemic,[3569] it is clear that the use of the criminal justice system in combatting tax offences was already in decline.

Accordingly, while HMRC has increased, and then decreased, the number of prosecutions for tax evasion offences, little consideration has been paid to the reasons for these radical changes in approach, nor the practical impact when combined with the UK's problematical legal framework. In this respect, the imposition of targets has led to inconsistency between official policy, which emphasises a focus on the most serious cases, and practice, which focuses on low-value cases to fulfil well-intentioned but under-theorised enforcement targets. An enforcement policy that leads to the prosecution of those who have evaded small sums onshore, yet reaches civil agreements with those who have hidden significant sums offshore to escape

[3563] Ibid; HM Revenue & Customs, *Annual Report and Accounts 2018-19 (For the year ended 31 March 2019)* (HC 2018-19, 2394-I) p.36.
[3564] HM Revenue & Customs, *Annual Report and Accounts 2018-19 (For the year ended 31 March 2019)* (HC 2018-19, 2394-I) p.30.
[3565] Ibid at p.32.
[3566] HM Revenue and Customs, *Annual Report and Accounts 2019 to 2020 (for the year ended 31 March 2020)* (HC 2019-2020, 891-I) p.14.
[3567] HMRC have conducted at least 13 investigations into suspected offences, with another 18 'opportunities' under review, HM Revenue & Customs, 'FOI Release: Number of Live Corporate Criminal Offences Investigations' (Updated 21 October 2020) <https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations> accessed 12 November 2020.
[3568] HM Revenue & Customs, 'HMRC Quarterly Performance Report: October to December 2020' (4 February 2021) <https://www.gov.uk/government/publications/hmrc-quarterly-performance-report-october-to-december-2020> accessed 12th April 2021.
[3569] HM Revenue and Customs, *Annual Report and Accounts 2019 to 2020 (for the year ended 31 March 2020)* (HC 2019-2020, 891-I) R10

taxation, does not appear to be fair;[3570] appearances matter when it comes to tax compliance.[3571] Further, it is questionable whether the number of prosecutions for tax evasion should exceed those for benefit fraud, given that the former causes two to nine times greater losses than the latter to the Treasury, depending on the estimates used.[3572] This disparity has been frequently highlighted by commentators and does not appear to be subsisting in the present decade.[3573] For instance, 10,000 individuals were prosecuted for benefit fraud in 2013-14,[3574] compared to 915 for tax-related crimes.[3575] In 2019-2020, over 2000 individuals were referred for prosecution for benefit fraud, compared to 548 for tax crimes.[3576] In total, from 2008-2018, 23 times as many individuals were prosecuted for benefit fraud than tax crimes.[3577] Indeed, from 2011-2016, of the 72 high net worth individuals were suspected of tax fraud, only two were

[3570] See for instance the response to the HSBC (Suisse) scandal, where despite investigations into over 1000 account holders, HMRC only submitted three cases to the CPS, of which only one was prosecuted. HM Revenue & Customs, 'Statement by HMRC on Tax Evasion and the HSBC Suisse Data Leak' (14 February 2015) <https://www.gov.uk/government/news/statement-by-hmrc-on-tax-evasion-and-the-hsbc-suisse-data-leak> accessed 6th April 2021.

[3571] M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493, 508; P Leighton, 'Fairness Matters—More than Deterrence' (2010) 9 Criminology & Public Policy 525.

[3572] Tax Watch contentiously state that evasion, criminal attacks, hidden economy and *avoidance* 'are very clearly analogous to fraud' putting the proportion of the tax gap attributable to fraud to 43% or £20bn. Tax Watch argue that this amounts to nine times the losses caused by benefit fraud, which cost £2.2bn in 2018-19. Tax Watch, 'Equality before the Law? HMRC's Use of Criminal Prosecutions for Tax Fraud and other Revenue Crimes. A Comparison with Benefits Fraud' (February 2021) <https://www.taxwatchuk.org/tax_crime_vs_benefits_crime/> accessed 6th April 2021. HMRC's estimate of the proportion of the tax gap attributable to evasion only is £4.6bn, or twice the loss caused by benefit fraud, HM Revenue & Customs, 'Measuring Tax Gaps 2020 Edition: Tax Gap Estimates from 2018 to 2019' (9 July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907122/Measuring_tax_gaps_2020_edition.pdf> accessed 1st April 2021.

[3573] D Cook, *Rich Law, Poor Law: Different Responses to Tax & Supplementary Benefit Fraud.* (OUP 1989); D Cook, *Criminal and Social Justice* (Sage Publications, 2006).

[3574] HM Government, 'Tackling Fraud, Error and Debt in the Benefits and Tax Credits System' (March 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417718/tackling-fraud-error-debt-benefit-tax-system.pdf> accessed 13th December 2020, p.9. The Government has been reluctant to provide more up to date estimates, see UK Parliament, 'Written Questions, Answers and Statements – Question for Attorney General UIN 18925, tabled on 21 February 2020' <https://questions-statements.parliament.uk/written-questions/detail/2020-02-21/18925> accessed 13th December 2020.

[3575] HM Revenue & Customs, 'HMRC Fast Facts: Record Revenues for the UK' (May 2014 Bulletin) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/326579/HMRC-fast-facts.pdf> accessed 13th December 2020, p.5.

[3576] Department for Work and Pensions, *Annual Report and Accounts 2019-20 for the year ended 31 March 2020* (HC 2019-20, 401-I) p.72; Kingsley Napley, 'HMRC Fails to Deliver on Pledge to Increase Criminal Prosecutions by End of 2020, FOI Request Reveals' (21 December 2020) <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/hmrc-fails-to-deliver-on-pledge-to-increase-criminal-prosecutions-by-end-of-2020-foi-request-reveals> accessed 6th April 2021.

[3577] Tax Watch, 'Equality before the Law? HMRC's Use of Criminal Prosecutions for Tax Fraud and other Revenue Crimes. A Comparison with Benefits Fraud' (February 2021) <https://www.taxwatchuk.org/tax_crime_vs_benefits_crime/> accessed 6th April 2021.

criminally investigated, and only one prosecuted, with the rest being subject to a civil investigation.[3578]

The practical impact of HMRC's enforcement policy renders it questionable whether individuals are being treated equally, or whether only the egregious behaviour of those with lower incomes is being addressed by the criminal justice system, contrary to the rule of law. The recent targets challenge the premise of the historic approach to tax evasion enforcement, which focused on revenue collection rather than deterrence, and have led to inequitable outcomes. Accordingly a fundamental review of HMRC's Criminal Investigation Policy and approach is long overdue. In this respect, it should be determined whether the increased use of criminal penalties is an appropriate and effective response to combatting tax evasion; a task considered below. However, while it may be beneficial to increase the number of prosecutions for tax evasion, the use of prosecutorial targets has resulted in inequitable outcomes. Targets that focus on the quantity, rather than the quality, of tax evasion prosecutions are misguided and should not be imposed.

7.2.4 Criminal Investigation

Before the merger of HM Customs and Excise and the Inland Revenue, criminal investigation powers were bestowed upon the two agencies through a plethora of statutory instruments, depending on the type of tax evaded.[3579] The powers available to Customs and Excise were more extensive than those available to the Inland Revenue, which had to rely on the police to arrest suspected tax evaders.[3580] From 2005-2012, the powers of HMRC were subject to detailed review, with the aim of 'aligning powers, deterrents and safeguards across the taxes and duties administered by HMRC'.[3581] In the early stages of the review, HMRC's criminal investigation powers were aligned with the police investigation powers contained in the Police and Criminal Evidence Act (PACE) 1984, by virtue of the Finance Act 2007.[3582] As a result, HMRC's powers are now aligned with those in use in the wider criminal justice system; a precursor to the increased use of prosecutions to address tax crimes. Some experts opposed this

[3578] National Audit Office, *HM Revenue & Customs: HMRC's Approach to Collecting Tax from High Net Worth Individuals* (HC 2016-17, 790-I) p.9
[3579] N Swift, 'FB 2007 – HMRC Investigation Powers' (2007) 16(881) Tax J 6, 6
[3580] See J Collins, M Piggin, 'Finance Act Notes: Criminal Investigations and HMRC Powers – Sections 82-87 and Schedule 22' (2007) 5 BTR 562, 562
[3581] Ibid. Including, Taxes Management Act 1970, ss.20BA, 20C; Finance Act 2003, Schedule 13; Tax Credits Act 2002, s.36; Value Added Taxes Act 1994, Schedule 11. N Swift, 'FB 2007 – HMRC Investigation Powers' (2007) 16(881) Tax J 6
[3582] Finance Act 2007, s.82-87

move on the basis of principle, suggesting criminal investigation powers should be exercised by other LEAs,[3583] whereas others questioned its practical effect, lamenting the lack of inclusion of appropriate safeguards.[3584] However, in some respects, PACE provides for a higher threshold for the exercise of criminal investigation powers,[3585] and stronger safeguards than those it replaced,[3586] including increased executive review of investigation powers.[3587] In addition, while it may be objectionable to address all instances of tax evasion using the criminal law, it is imperative to ensure that adequate powers are available to the most appropriate agencies when this course of action is considered appropriate. In this respect, the decision to base criminal investigation powers on the type of power sought, as opposed to the tax evaded, is a more integrated and logical approach. This is in contrast to the piecemeal and duplicitous approach taken to the enactment of criminal offences.

HMRC have the power to request document production orders either under PACE, where the material requested is 'special procedure material',[3588] or otherwise under its preserved production powers relating to the type of tax at issue.[3589] These powers enable HMRC to request documents from third parties when there are reasonable grounds to suspect tax fraud.[3590] The powers are designed to prevent searches of property owned by innocent third parties.[3591] HMRC similarly has the power to issue disclosure notices, also aimed at third parties, under the Serious Organised Crime and Police Act 2005.[3592] Failing to comply or

[3583] House of Lords Select Committee on Economic Affairs, *The Finance Bill 2007* (HL 2006-07 121-I) para 205
[3584] See for instance, J Schwarz, 'Rights and Powers: Protecting the Legitimate Interests of Taxpayers' (2009) 3 BTR 306
[3585] Employing a threshold of belief, rather than suspicion, for the purposes of obtaining search warrants, production orders, and powers of arrest, J Collins, M Piggin, 'Finance Act Notes: Criminal Investigations and HMRC Powers – Sections 82-87 and Schedule 22' (2007) 5 BTR 562, 562
[3586] For instance, HMRC officers must abide by PACE Codes of Practice when exercising PACE powers, Police and Criminal Evidence Act 1984, s.67
[3587] Including through the oversight forum, which was in place from 2009-2013. HM Revenue & Customs, 'Forum to Oversee the Implementation of New HMRC Powers, Deterrents and Safeguards: Annual Reports' (13 February 2014) <https://www.gov.uk/government/publications/forum-to-oversee-the-implementation-of-new-hmrc-powers-deterrents-and-safeguards-annual-reports> accessed 9th April 2021. The latest evaluation of HMRC's powers was undertaken from 2020-21, HM Revenue & Customs, 'Evaluation of HMRC's Implementation of Powers, Obligations and Safeguards Introduced since 2012' (January 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958474/Evaluation_of_HMRC_s_implementation_of_powers__obligations_and_safeguards_introduced_since_2012.pdf> accessed 9th April 2021
[3588] Police and Criminal Evidence Act 1984, Schedule 1, s.14(2)
[3589] Taxes Management Act 1970, s.20BA; Value Added Tax Act 1994, Schedule 11, para 11; Finance Act 1994, Schedule 7, para 4A; Finance Act 1996, Schedule 5, para 7; Finance Act 2000, Schedule 6, para 131; Finance Act 2001, Schedule 7, para 8; Finance Act 2003, Schedule 13, Part 6.
[3590] Ibid
[3591] A Craggs, 'Beware of the Knock' (2017) 180(4617) Taxation 11, 13
[3592] Serious Organised Crime and Police Act 2005, ss.60-70

providing false or misleading information in response to the disclosure notice is a criminal offence.[3593] HMRC has the power to apply for search warrants and execute seizures under PACE,[3594] and the POCA,[3595] where there are reasonable grounds for believing that an indictable offence has been committed and the material sought is likely to be of substantial value to the investigation.[3596] Relevant HMRC officers can arrest suspects for indictable tax offences and search property following arrest,[3597] but may not charge or bail suspects, or take their fingerprints.[3598] At all times, HMRC has access to information that is ordinarily available, including government records and social networking sites.[3599] In certain cases, HMRC has the power to employ intrusive surveillance powers.[3600]

7.2.5 Conviction and Sentencing

The conviction rate for tax evasion offences is relatively high, with over 90% of cases referred for prosecution resulting in a conviction.[3601] When compared to an average conviction ratio for other criminal offences of 87%,[3602] this may reflect the fact that difficult cases are not being referred for prosecution. In 2015, the most commonly charged offence was fraudulent evasion of income tax,[3603] followed by fraudulent evasion of VAT,[3604] and cheating the public revenue.[3605] In 2019-20, the VAT offence was most commonly used, followed closely by the cheating offence, whereas in 2018-19, cheating, and conspiring to cheat, were the most common charges.[3606] It is disappointing to see that an overly broad, common law offence, is

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[3593] Ibid, s.67
[3594] Police and Criminal Evidence Act 1984, s.8, s.114.
[3595] Finance Act 2013, s.224, Schedule 48
[3596] Police and Criminal Evidence Act 1984, s.8, s.114.
[3597] Police and Criminal Evidence Act 1984, s.24, s.32
[3598] Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015, SI 2015/1783, Art 4.
[3599] HM Revenue & Customs, 'Guidance: HMRC's Criminal Investigation Powers and Safeguards' (13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/criminal-investigation> accessed 9th April 2021
[3600] Contained in the Investigatory Powers Act 2016, the Regulation of Investigatory Powers Act 2000 and the Police Act 1997, ibid. A Craggs, 'Caught in the Act' (2021) 187(4786) 24, 25
[3601] HM Revenue and Customs, *Annual Report and Accounts 2017-18 (For the year ended 31 March 2018)* (HC 2017-18, 1222-I) p.16.
[3602] Ministry of Justice, 'National Statistics: Criminal Justice Statistics Quarterly: December 2019' (Updated 26 November 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888301/criminal-justice-statistics-quarterly-december-2019.pdf> accessed 22nd April 2021
[3603] Taxes Management Act 1970, s.106A
[3604] Value Added Tax Act 1994, s.72(1)
[3605] Tax Watch, 'Equality before the Law? HMRC's Use of Criminal Prosecutions for Tax Fraud and other Revenue Crimes. A Comparison with Benefits Fraud' (February 2021) <https://www.taxwatchuk.org/tax_crime_vs_benefits_crime/> accessed 6th April 2021.
[3606] Ibid

still the prosecutor's choice in addressing tax crimes. In sentencing tax offenders, courts take into account the gain to the offender, or the loss to HMRC, as well as their culpability in committing the offence.[3607] Fraud offences have a maximum sentence of 10 years imprisonment, specific tax offences typically have a maximum sentence of 7 years imprisonment, and the cheating offence has a maximum sentence of life imprisonment.[3608] Approximately 43% of convicted tax evaders face a custodial or suspended sentence.[3609]

7.2.6 Civil Investigation

When HMRC suspects that tax has not been paid, it is able to use a variety of civil methods of redress, including making a formal enquiry into a tax return,[3610] or issuing a determination[3611] or discovery assessment.[3612] In support of these actions, HMRC is able to obtain information voluntarily from a taxpayer,[3613] or may utilise its powers under Schedule 36 of the Finance Act 2008. These powers can be exercised for the purposes of investigating the non-payment of most types of taxation,[3614] as well as relevant foreign taxes, specifically, taxes imposed by the countries that have agreed exchange of information agreements with the UK.[3615] Schedule 36 provides for the power to issue a taxpayer notice or a third party notice, which require the provision of information or documents that are 'in the person's possession or power',[3616] and are reasonably required for the purpose of checking a person's tax position.[3617] Issuing a third party notice typically requires HMRC to obtain the agreement of the taxpayer, or the approval of the First-tier Tribunal (FTT).[3618] However, a new power is

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[3607] Sentencing Council, 'Revenue Fraud: Common Law, Common law, Customs and Excise Management Act 1979 (sections 50, 170 and 170B), Fraud Act 2006, s.1, Taxes Management Act 1970 (section 106A), Theft Act 1968, s.17, Value Added Tax Act 1994 (section 72)' (1 October 2014) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/revenue-fraud/> accessed 22nd April 2021

[3608] Ibid

[3609] Tax Watch, 'Equality before the Law? HMRC's Use of Criminal Prosecutions for Tax Fraud and other Revenue Crimes. A Comparison with Benefits Fraud' (February 2021) <https://www.taxwatchuk.org/tax_crime_vs_benefits_crime/> accessed 6th April 2021.

[3610] Taxes Management Act 1970, s.9A(1), s.12AC(1), Schedule 1A para 5. Finance Act 1998, Sch 18, Pt IV, para 24(1)

[3611] Taxes Management Act 1970, s.28C, Finance Act 1998, Schedule 18, para 36.

[3612] Taxes Management Act 1970, s.29. Finance Act 1998, Schedule 18, para 41. M McLaughlin (Ed), *HMRC Investigations Handbook 2015/16* (Bloomsbury Professional, 2017) p.1-3

[3613] *JJ Management LLP and others v Revenue Customs Commissioners and another* [2020] EWCA Civ 784; *Hunter v Revenue and Customs Commissioners* [2019] UKFTT 312 (TC)

[3614] Finance Act 2008, Schedule 36, paras 63, 64(2), 84.

[3615] Finance Act 2008, Schedule 36, para 63(4)

[3616] Finance Act 2008, Schedule 36, para 18

[3617] Finance Act 2008, Schedule 36, para 1, para 2. Information notices can be issued to non-resident taxpayers and third parties, see *R (on the application of Jimenez) v First Tier Tribunal (Tax Chamber)* [2019] EWCA Civ 51; *Revenue and Customs Commissioners v PQ* [2019] UKFTT 371 (TC)

[3618] Finance Act 2008, Schedule 36, para 3

about to be introduced, which will enable HMRC to obtain information or documents from financial institutions without prior approval of the taxpayer or FTT.[3619] The power has been introduced to improve the UK's ability to reciprocate under its international cooperation agreements, as it currently takes the UK twice as long as expected under the international standard to respond to information requests from other countries.[3620] Nevertheless, concerns have been expressed regarding the removal of this safeguard, which will apply to both domestic and international attempts to obtain information.[3621] HMRC also have the power to obtain information and documents using an identity unknown notice,[3622] which is used when HMRC is unable to identify the relevant taxpayer(s), including in cases concerning offshore accounts.[3623] HMRC can also utilise an identification notice, which requires the recipient to provide someone's name, address and/or date of birth.[3624] In 2011, HMRC were provided with the power to obtain data in bulk from certain data-holders, including employers and banks.[3625] In 2016, these powers were extended to electronic payment providers and businesses that facilitate online transactions.[3626] HMRC also has the power to inspect business premises, including assets and documents held on the premises, if reasonably required for checking a tax position.[3627] Penalties are imposed for noncompliance with HMRC powers.[3628] HMRC's civil powers cannot be used primarily for the purposes of a criminal investigation.[3629]

A full examination of the impact of technology on the legal framework pertaining to tax evasion is beyond the scope of this thesis. However, it is important to discuss the impact of the Connect

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[3619] Finance (No.2) HC Bill (2019-21) [270], s.122 adding para 4A to Finance Act 2008, Schedule 36.
[3620] HM Revenue & Customs, 'Policy Paper: Amending HMRC's Civil Information Powers' (3 March 2021) <https://www.gov.uk/government/publications/amending-hmrcs-civil-information-powers/amending-hmrcs-civil-information-powers> accessed 10th April 2021
[3621] HM Revenue & Customs, 'Amending HMRC's Civil Information Powers: Summary of Responses' (21 July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902294/Amending_HMRC_s_Civil_Information_Powers_-_summary_of_responses.pdf> accessed 10th April 2021 at p.11-13
[3622] Finance Act 2008, Schedule 36, para 5
[3623] For instance, from 2005-7, HMRC obtained notices requiring thirteen financial institutions to provide information relating to offshore accounts held by their UK customers. It then obtained consent to serve a similar notice on a remaining 308 financial institutions, see *Re Revenue and Customs Commissioners' Application (Approval to Serve 308 Notices on Financial Institutions)* [2009] UKFTT 224 (TC)
[3624] Finance Act 2008, Schedule 36, para 5A
[3625] Finance Act 2011, Schedule 23, Part 2. Data-gathering Powers (Relevant Data) Regulations 2012, SI 2012/847.
[3626] Finance Act 2016, s.176
[3627] Finance Act 2008, Schedule 36, Part 2
[3628] Finance Act 2008, Schedule 36, Part 7; Finance Act 2011, Schedule 23, Part 4
[3629] *Gold Nuts Ltd v Revenue & Customs Commissioners* [2016] UKFTT 82 (TC); [2016] Lloyd's Rep. F.C. 249

system, which is responsible for initiating around 90% of HMRC's investigations.[3630] Connect is a 'data-matching and risking tool that allows HMRC to cross match one billion HMRC and third-party data items'.[3631] These items include tax returns, bank accounts, records held by government authorities, social networking websites and online marketplaces.[3632] Connect cost approximately £80million to create, but was estimated to have led to the recovery of £4billion by 2019.[3633] As seen in Chapter 5, HMRC's use of SAR data in civil and criminal investigations dramatically increased after it was fed into the Connect system.[3634] The information obtained from the CRS, discussed in Chapter 4, is also fed into the Connect system.[3635] HMRC is currently examining how it can use AI with Connect,[3636] and is seeking a similar tool for the purposes of identifying, assembling and linking crypto transactions with service providers.[3637] Consequently, although the full impact of technological advancement on tax evasion remains to be considered, it is clear that HMRC's ability to detect tax evasion has been dramatically improved by technological tools, such as Connect.

7.2.7 Code of Practice 9

In cases where HMRC suspect fraud, yet decide against conducting a criminal investigation, it is likely that Code of Practice 9 (CoP9) will be used to investigate the suspected fraud. CoP9 is a procedure whereby HMRC offer the suspected tax evader the opportunity to disclose their fraudulent conduct via a Contractual Disclosure Facility, in exchange for a guarantee that the taxpayer will not face criminal investigation or prosecution.[3638] HMRC uses Code of Practice

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[3630] J Sanghrajka, 'Degrees of Connection' (2020) 186(4752) Taxation 8, 10. Specifically, 500,000 cases, HM Revenue & Customs, HM Treasury, 'No Safe Havens 2019: HMRC's Strategy for Offshore Tax Compliance' (May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802253/No_safe_havens_report_2019.pdf> accessed 10 August 2019, p.17

[3631] Ibid

[3632] Ibid

[3633] P Rigney, 'The All Seeing Eye – An HMRC Success Story?' (IFA, December 2016) <https://www.ifa.org.uk/media/653935/Tax-HMRC-Connect-system.pdf> accessed 14th October 2020; HMRC, 'Making Connections' <https://www.tax.org.uk/system/files_force/file_uploads/151218%20Connect%20Briefing_Public%20v1.0.pdf?do> accessed 14th October 2020.

[3634] See chapter 5, pp

[3635] HM Revenue & Customs, HM Treasury, 'No Safe Havens 2019: HMRC's Strategy for Offshore Tax Compliance' (May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802253/No_safe_havens_report_2019.pdf> accessed 10 August 2019, p.18

[3636] J Sanghrajka, 'Degrees of Connection' (2020) 186(4752) Taxation 8, 10.

[3637] HM Revenue & Customs, 'Cryptoasset Blockchain Analysis Tools' (17 January 2020) <https://www.contractsfinder.service.gov.uk/Notice/ec88ae4b-4f4c-4926-982a-723636cf2f82?p=1> accessed 14th October 2020.

[3638] HM Revenue & Customs, 'Code of Practice 9: HM Revenue & Customs Investigations Where We Suspect Fraud' (June 2014)

8 (CoP8) to resolve 'cases where the CoP9 is not used'.[3639] Although CoP8 used to be restricted to cases not concerning fraud, including failed tax avoidance schemes, it now extends to cases that involve potential criminal conduct.[3640] The progenitor of CoP9 was the Hansard Procedure, which derives its name from a statement made by the Chancellor of the Exchequer to the House of Commons in 1923.[3641] Initially, it was unclear whether the use of the Hansard Procedure precluded prosecution when the suspect refused to cooperate or made a false disclosure. In *R v Barker,*[3642] the court held that disclosures made as a result of Hansard should be treated as an involuntary confession, and were thus, inadmissible.[3643] After this decision was overturned by statute,[3644] concerns were expressed over the possibility of the Revenue instigating a prosecution, despite the tax evader having made a full disclosure.[3645] Following the case of *Allen,*[3646] which confirmed the Revenue's ability to conduct a criminal investigation following the provision of false information,[3647] the Hansard procedure was revised to confirm that a prosecution will not be pursued should a full and complete disclosure be made.[3648] In *R v Gill and another,*[3649] it was held that, as the Revenue reserved the right to prosecute when a full disclosure had not been made, Hansard interviews should be conducted in accordance with the Police and Criminal Evidence Act 1984 (PACE).[3650] However, *Gill* also confirmed that

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494808/COP9_06_14.pdf> accessed 10th April 2021

[3639] HM Revenue & Customs, 'HM Revenue and Customs Fraud Investigation Service – Code of Practice 8' (February 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684324/COP8_02_18.pdf> accessed 10th April 2021

[3640] A Wells, 'No, No, No!' (2010) 166(4272) Taxation 6,7; R Brockwell, L McKeown, 'No More Mr Nice Guy?' (2003) 151(3913) Taxation 350

[3641] Firstly in HC Deb 19 July 1923, vol 166, cols2514-16W

[3642] *R v Barker* [1941] 2 KB 381 (CA)

[3643] Ibid, following *R v Cason* (1935) 14 Annot Tax Cases 471.

[3644] Finance Act 1942, s34; Currently Taxes Management Act 1970, s105

[3645] Or by the CPS without consulting the Revenue, as in *R. v Werner (Laurence Ian)* [1998] STC 550; Times, March 24, 1998 (CA (Crim Div)) I Ferrier, 'Double Jeopardy' (1998) 17 CTP 121; S Elwes, RG Clutterbuck, 'Tax and Criminal Prosecutions' [1999] Crim LR 139; N Eastaway, 'Prosecution Polemics' [1998] Tax P 26; JT Newth, 'Issue Unresolved' (1998) 141 Tax 148; J Gwyer, 'Hansard Exposed' (1998) 141 Tax 55; C Wilmot, 'Modernising Hansard' (1999) 143 Tax 469; R Rhodes, 'The Indivisibility of the Crown' (1998) 148 NLJ 747; see Inland Revenue's Response, 'Prosecutions and the "Hansard" Procedure' (1998) 35 IRTB 544

[3646] *R v Allen* [2001] UKHL 45; [2002] 1 AC 509

[3647] Ibid. see also, J Hilliard, 'The Hansard Procedure and the Right against Self-Incrimination: Recent Developments' (2003) 1 BTR 6, 8

[3648] HC Deb, 7 November 2002, Vol 392, Col784W; C Oates, 'The New Hansard Procedure: Business As Usual?' (2002) 670 Tax J 5; C Jowitt, J Kellett, 'New Look Hansard' (2003) 150 Tax 317

[3649] [2003] EWCA Crim 2256; [2003] All ER 559

[3650] Ibid at paras 38-40

evidence obtained without complying with PACE safeguards may be admissible providing that this does not harm the fairness of the proceedings.[3651]

The Hansard Procedure was replaced by CoP9,[3652] which, in an attempt to avoid the impact of *Gill,* initially provided for a blanket exclusion from prosecution once CoP9 had been offered, unless false statements were made.[3653] However, this meant that suspected evaders who refused to cooperate, or only provided partial cooperation, were still able to obtain immunity from prosecution.[3654] Following criticism from the National Audit Office,[3655] CoP9 was revised to clarify that HMRC reserves the right to conduct a criminal investigation when the 'recipient has failed to make a full disclosure of all irregularities'.[3656] The current version of CoP9 also requires the recipient to admit fraud to benefit from immunity, enabling the application of higher penalties.[3657] In practice, a taxpayer that refuses to cooperate may be subject to intrusive criminal or civil investigation by HMRC.[3658] However, even a civil investigation is likely to result in higher penalties being imposed than that available under CoP9 in such circumstances.[3659] If the taxpayer makes materially false or misleading statements or produces false or misleading documents, this can be treated as a separate criminal offence.[3660] Indeed,

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[3651] Ibid at para 44. See also, *R v K* [2010] EWCA Crim 1640 at para 43; *Gold Nuts Ltd v Revenue & Customs Commissioners* [2016] UKFTT 82 (TC); [2016] Lloyd's Rep. F.C. 249 at para 204

[3652] HM Revenue & Customs, 'Code of Practice 9: HM Revenue & Customs Investigations Where We Suspect Fraud' (June 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494808/COP9_06_14.pdf> accessed 10th April 2021

[3653] C Oates, E Dwan, 'Hansard RIP' (2005) 155 Tax 686

[3654] Ibid. See also National Audit Office, *HM Revenue & Customs: Managing Civil Tax Investigations* (HC 2010-11, 677-I) p.26

[3655] Ibid.

[3656] HM Revenue & Customs, 'Code of Practice 9: HM Revenue & Customs Investigations Where We Suspect Fraud' (June 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494808/COP9_06_14.pdf> accessed 10th April 2021, p.2. See also, M Truman, 'New Contractual Disclosure Facility for Dishonest Taxpayers' (2011) 168(4314) Taxation 2, 2

[3657] S Stenton, L Vanderheide, 'Practice Guide – How to Handle COP 9: Our Top Nine Steps' (2020) 31(1473) Tax J 12, 12; H Adams, J Jones, 'Tricky Business' (2015) 175 Tax 18, 18

[3658] HM Revenue & Customs, 'HMRC Internal Manual: Fraud Civil Investigation Manual: FCIM204060-Where CDF Offer is Made 30 June 2014 Onwards: Action Following Issue of Code of Practice 9: Customer Rejects the Offer' (Updated 7 April 2021) <https://www.gov.uk/hmrc-internal-manuals/fraud-civil-investigation/fcim204060> accessed 10th April 2021

[3659] A Barry, 'All That Glisters is Not Gold' (2007) 883 Tax J 17, 18; S Stenton, L Vanderheide, 'Practice Guide – How to Handle COP 9: Our Top Nine Steps' (2020) 31(1473) Tax J 12, 14

[3660] HM Revenue & Customs, 'Code of Practice 9: HM Revenue & Customs Investigations Where We Suspect Fraud' (June 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494808/COP9_06_14.pdf> accessed 10th April 2021, p.2; 'This means that, if there is a false statement, it is a much simpler prosecution to do. If you like, there is a double jeopardy here. If people have lied to us during this process, it opens a much simpler route to prosecution.' Public Accounts Committee, *Oral Evidence: Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 974-I) Answer to Q104

the only prosecution following the HSBC (Suisse) scandal, that of property developer Michael Shanly, was based on the provision of false information during the CoP9 investigation.[3661]

Determining whether CoP9 is effective in practice requires resolution of the underlying issue concerning the appropriate response to tax evasion, particularly, the optimal use of the civil and criminal justice systems. The question of external effectiveness will be considered below. However, it is clear that efforts have been made to improve the internal effectiveness of the civil investigation of fraud procedure, which is now set out with greater clarity and offers better protection to taxpayers who make a full disclosure.

7.2.8 Civil Penalties Regime

When a taxpayer has not complied with their obligations under the taxing statutes, they will be required to pay any tax due, as well as potentially interest and penalties. The imposition of penalties depends upon whether the taxpayer can be said to have taken reasonable care, or has a reasonable excuse, for failing to comply with their obligations.[3662] As discussed above, even cases of tax evasion that are inherently criminal in nature will often be dealt with using the civil penalties regime.[3663] Civil penalties have been used to address tax evasion since the inception of the income tax.[3664] The original penalty provisions were heavily punitive in nature and were consequently reformed in the 1960s, before forming part of the Taxes Management Act 1970.[3665] Civil penalties for VAT were only introduced after the recommendations of the Keith Committee and were enacted in the Finance Act 1985, before being replaced by the Value Added Tax Act 1994.[3666] Owing to this evolution, the civil penalties regime was 'a mess' with different powers and rules enacted for each type of taxation.[3667] The regime was improved following the merger leading to the creation of HMRC,[3668] the review of HMRC's powers and

[3661] *R v Shanly* The Times, 5 July 2012 (Wood Green Crown Court); Public Accounts Committee, *Oral Evidence: Tax Avoidance and Evasion: HSBC* (HC 2014-15 1095-I) p.22.
[3662] Finance Act 2007, Schedule 24, Para 1(3); Finance Act 2008, Schedule 41, Para 20; Finance Act 2009, Schedule 55, Para 23, Schedule 56, Para 16
[3663] HM Revenue & Customs, 'Guidance: HMRC's Criminal Investigation Powers and Safeguards' (13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/criminal-investigation> accessed 9th April 2021
[3664] P Alldridge, *Criminal Justice and Taxation* (Oxford Monographs on Criminal Law and Justice, OUP 2017) p.135 citing Income Tax Act 1842, s.55.
[3665] Ibid. Taxes Management Act 1970, Part 10
[3666] Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983) para 1.3.1.
[3667] P Berwick, R Shiers, 'HMRC Powers and Approach: Part 1: The New Penalty Regime' (2010) 3 PCB 205, 205
[3668] The Commissioners for Revenue and Customs Act 2005

safeguards,[3669] as well the consequent enactment of the Finance Act 2007.[3670] The aim of the 2007 Act was to introduce a coherent penalty system for incorrect returns pertaining to all taxes, with penalty determinations based on the type of behaviour involved.[3671] The scope of the current civil penalties regime has been further expanded and consolidated by later Finance Acts, yet the underpinning legal framework is still complex in scope and application.[3672]

In order to impose a penalty, HMRC must raise an assessment and must provide notice of this assessment to the taxpayer.[3673] A penalty cannot be imposed if the taxpayer has been convicted of an offence.[3674] There are several types of penalties that HMRC may impose. Penalties are imposed for giving HMRC documents that contain an inaccuracy, which amounts to, or creates, an understated tax liability, a false or overstated tax loss or repayment claim.[3675] The penalty applies to most direct and indirect taxes, including income tax and VAT.[3676] Penalties are also imposed for failing to notify HMRC of an under-assessment to tax,[3677] and failing to notify HMRC of liability to income tax, corporation tax or capital gains tax.[3678] The penalties imposed are calculated based on the potential lost revenue (PLR), as well as the nature of the behaviour, specifically, whether it was careless or deliberate, and whether it was disclosed or concealed.[3679] For a deliberate and concealed act or omission, the penalty can amount to 100% of the PLR, or 200% of the PLR if the lack of compliance is connected to another jurisdiction.[3680] There are also penalties for failing to submit a return, or pay tax, on time.[3681] These penalties are unfortunately contained in a plethora of statutes. A consolidated regime was introduced in the Finance Act 2009,[3682] which applies for the purposes of income tax and

[3669] Which ran from 2005-2012, HM Revenue & Customs, 'Review of HMRC's Powers, Deterrents and Safeguards' <https://webarchive.nationalarchives.gov.uk/+/http://www.hmrc.gov.uk//about/powers-appeal.htm> accessed 13th April 2021
[3670] P Berwick, R Shiers, 'HMRC Powers and Approach: Part 1: The New Penalty Regime' (2010) 3 PCB 205, 205
[3671] P Berwick, 'Powers, Penalties and Investigations Analysis – Tax Penalties in Practice' (2010) 31(1031) Tax J 10, 10; C Herald, 'VAT Penalties' (2013) 100 Vat Digest 4, 4
[3672] N Wells, 'Let's Clarify' (2021) 187(4786) Taxation 16, 16
[3673] Finance Act 2007, Schedule 24, Para 13; Finance Act 2008, Schedule 41, Para 16; Finance Act 2009, Schedule 55, Para 18, Schedule 56, Para 11.
[3674] Finance Act 2007, Schedule 24, Para 21; Finance Act 2008, Schedule 41, Para 23; Finance Act 2009, Schedule 55, Para 26, Schedule 56, Para 17
[3675] Finance Act 2007, Schedule 24, Part 1, para 1
[3676] Ibid
[3677] Ibid at paras 2 and 4C
[3678] Finance Act 2008, Schedule 41, Para 1
[3679] Finance Act 2008, Schedule 41, Para 6; Finance Act 2007, Schedule 24, Part 2, Para 4, Para 4C
[3680] Finance Act 2007, Schedule 24, Part 2; Finance Act 2008, Schedule 41, Para 6; Finance Act 2009, Schedule 55, Para 6
[3681] Finance Act 2009, s.106, s.107, Schedules 55 and 56; Finance Act 1988, Schedule 18, paras 17 and 18; Value Added Tax Act 1994, s.59.
[3682] Finance Act 2009, s.106, s.107, Schedules 55 and 56

capital gains tax, but has not been extended to corporation tax or VAT.[3683] The Finance Bill 2021 reforms the penalty regime for late submissions and late payments, with the new penalties applying to both income tax and VAT, but not corporation tax.[3684] The new model is intended to 'avoid mechanistically charging large number of penalties for those who are trying hard to comply', with the aim of increasing fairness and taxpayer cooperation.[3685] These reforms were long overdue, following evidence that the late penalty regime was having a disproportionately adverse impact on vulnerable and elderly taxpayers.[3686] Some of the older penalty provisions have also been retained, including penalties relating to the failure to keep records,[3687] and for false claims to reduce payments on account.[3688] Several additional penalties apply in respect of failures relating to VAT,[3689] including VAT fraud and evasion.[3690] A separate penalty regime exists for noncompliance with customs duties and obligations.[3691] Assessments to penalties may be appealed,[3692] but the burden of proof rests with the taxpayer.[3693]

In 2011 additional penalties were introduced in respect of inaccuracies, failing to notify chargeability and failing to file a tax return in respect of income tax or capital gains tax involving an offshore matter.[3694] The extension increased the penalties imposed for these acts or omissions to up to 200% of the PLR, depending on the level of cooperation provided by the

[3683] Finance (No.3) Act 2010, ss.26 & 27, Schedules 10 and 11 (relevant provisions not in force)
[3684] Finance (No.2) HC Bill (2019-21) [270], Clauses 112 & 113, Schedules 23, 24 and 25
[3685] HM Revenue & Customs, 'Making Tax Digital – Sanctions for Late Submission and Late Payment: Consultation Document' (20 March 2017) <https://www.gov.uk/government/consultations/making-tax-digital-sanctions-for-late-submission-and-late-payment> accessed 13th April 2021 at p.6.
[3686] Office of Tax Simplification, 'Tax Penalties: Final Report' (November 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/374509/OTS_tax_penalties_final_report_121114.pdf> accessed 13th April 2021 at p.9.
[3687] Taxes Management Act 1970, s.12B(5); Finance Act 1998, Schedule 18, Part 3; Value Added Tax Act 1994, s.69(1)
[3688] Taxes Management Act 1970, s.59A(6)
[3689] Value Added Tax Act 1994, s.69(1) (breach of Regulations), s.59 (failure to file or pay VAT on time), s.62 (issuing a false certificate)
[3690] Ibid, ss. 60-61, Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order SI 2008/568, Art 4 (conduct involving dishonesty), Value Added Tax Act 1994, ss.69C-E (transactions connected with VAT fraud)
[3691] Finance Act 2003, ss.24-41; The Customs (Contravention of a Relevant Rule) Regulations 2003, SI 2003/3113; The Export (Penalty) Regulations 2003, SI 2003/3102. See HM Revenue & Customs, 'Notice 301: Civil Penalties for Contraventions of Customs Law' (23 September 2020) <https://www.gov.uk/government/publications/excise-notice-301-civil-penalties-for-contraventions-of-customs-law> accessed 13th April 2021
[3692] Finance Act 2007, Schedule 24, Part 3, Para 15; Finance Act 2008, Schedule 41, Para 17; Finance Act 2009, Schedule 55, Para 20, Schedule 56, Para 13
[3693] This is because 'it is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position) to provide the right answer.' *Nicholson v Morris* [1976] STC 269, 280.
[3694] Finance Act 2010, Schedule 10; Finance Act 2010, Schedule 10 (Appointed Days and Transitional Provisions) Order 2011, SI 2011/975; Finance Act 2007, Schedule 24, Part 2; Finance Act 2008, Schedule 41, Para 6; Finance Act 2009, Schedule 55, Para 6

offshore jurisdiction involved.[3695] In 2016, these penalties were extended to acts or omissions relating to offshore transfers, and the enhanced inaccuracy penalty for offshore matters was extended to inheritance tax.[3696] There is also an asset-based penalty for deliberate non-compliance offshore causing PLR over £25,000,[3697] as well as an aggravated penalty for moving offshore assets to avoid the application of the CRS.[3698] Before the CRS came into force, a requirement to correct offshore non-compliance was introduced, with additional penalties imposed for non-compliance.[3699] HMRC have the power to publish the details of those who deliberately evade more than £25,000,[3700] as well as those who dishonestly enable the evasion of over £5,000.[3701] A range of penalties apply to the facilitators or enablers of tax evasion and other forms of deliberate non-compliance. For instance, penalties are imposed on tax agents that participate in dishonest conduct,[3702] enable offshore tax evasion,[3703] or enable tax avoidance schemes that are defeated.[3704]

The number of civil penalties imposed by HMRC has increased over time, from 7,859 in 2010-11 to 15,135 in 2013-14.[3705] This includes an increased number of penalties for deliberate, rather than careless behaviour.[3706] Correspondingly, the amount attributed to compliance activities, including actions taken against avoidance and evasion, has continued to rise. £34.1bn was generated from compliance activities in 2018-19, equating to an additional £7.5bn since 2015-16.[3707] In addition, £36.9bn was generated from this work in 2019-20.[3708] The amount of tax collected through agreements reached under Code of Practice 9 increased from £95.8m in 2018-19 to £119.4m in 2019-20 in line with the reduced number of criminal investigations

[3695] Penalties, Offshore Income etc (Designation of Territories) Order 2011, SI 2011/976; Penalties, Offshore Income etc (Designation of Territories) (Amendment) Order 2013, SI 2013/1618. See also Finance Act 2015, s.120, Schedule 20.
[3696] Finance Act 2015, Schedule 20; Finance Act 2015, Schedule 20 (Appointed Days) Order 2016, SI 2016/456
[3697] Finance Act 2016, Schedule 22
[3698] Finance Act 2015, Schedule 21; Offshore Asset Moves Penalty (Specified Territories) Regulations 2015, SI 2015/866; Offshore Asset Moves Penalty (Specified Territories) (Amendment) Regulations, SI 2017/989
[3699] Finance (No.2) Act 2017, Schedule 18
[3700] Ibid para 30; Finance Act 2009, s.94
[3701] Finance Act 2012, Schedule 38, Part 4, Para 28
[3702] Finance Act 2012, Schedule 38, Part 4
[3703] Finance Act 2016, s.162, Schedule 20
[3704] Finance (No.2) Act 2017, s.65, Schedule 16
[3705] These statistics concern penalties imposed under the Finance Act 2007, Schedule 24 and Finance Act 2008, Schedule 41. Office of Tax Simplification, 'Tax Penalties: Final Report' (November 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/374509/OTS_tax_penalties_final_report_121114.pdf> accessed 13th April 2021 at p.27
[3706] Ibid. See also, R Cave, 'Tax Penalties' (2015) 61 STB 2
[3707] National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.4
[3708] HM Revenue and Customs, *Annual Report and Accounts 2019 to 2020 (for the year ended 31 March 2020)* (HC 2019-2020, 891-I) p.20

conducted during this period.[3709] Since 2010, over £3billion has been recovered from combatting offshore tax evasion alone.[3710] Nonetheless, the total number of civil enquiries and audits has started to decline, with more than a 33% reduction in the number of compliance checks carried out from 2016-17 to 2018-19.[3711] The number of compliance checks closed by HMRC further declined from 338,000 in 2019-20 to only 162,000 in the first three quarters of 2020-21.[3712] The Covid-19 Pandemic appears to have had a devastating effect on HMRC's compliance activities, with one third to one half of the usual number of compliance checks carried out during 2020 and only half of the typical compliance yield recovered.[3713] This is in part understandable, yet it is also disappointing, for in times of national crisis it is more important than ever to ensure that tax is collected and non-compliance is addressed appropriately. Moreover, it is clear to see that the number of compliance activities carried out was decreasing prior to the onset of the pandemic.

Overall, the civil penalty regime seems to be more logical than the system of criminal penalties, providing different levels of sanction for different levels of culpability. However, as with the relevant aspects of the criminal justice system, the legislation underpinning the civil penalty regime is out of date and overlaps, rendering some penalty provisions redundant.[3714] Moreover, although attempts have been made to consolidate aspects of the civil penalty regime, there is still an unnecessary amount of legislation in this area with different statutes governing the application of similar penalties to different types of taxes.[3715] In addition, penalties are not

[3709] R Curtis, 'Plea Bargain Deals Raise Extra Tax of £120m' (2020) 186(4758) Taxation 5, 5
[3710] HM Revenue and Customs, *Annual Report and Accounts 2019 to 2020 (for the year ended 31 March 2020)* (HC 2019-2020, 891-I) p.33
[3711] National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.4
[3712] HM Revenue & Customs, 'HMRC Quarterly Performance Report: October to December 2020' (4 February 2021) <https://www.gov.uk/government/publications/hmrc-quarterly-performance-report-october-to-december-2020> accessed 12th April 2021.
[3713] Ibid; HM Revenue & Customs, 'Charting HMRC's Progress This Financial Year: How the Department has Performed during the First 9 Months of Tax Year 2020-2021' (4 February 2021) <https://www.gov.uk/government/news/charting-hmrcs-progress-this-financial-year> accessed 13th April 2021; HM Revenue and Customs, *Annual Report and Accounts 2019 to 2020 (for the year ended 31 March 2020)* (HC 2019-2020, 891-I) R10
[3714] The OTS noted that it would 'like to look into these areas in a future project', Office of Tax Simplification, 'Tax Penalties: Final Report' (November 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/374509/OTS_tax_penalties_final_report_121114.pdf> accessed 13th April 2021 at p.7
[3715] As HMRC note, 'this fragmentation of legislation hinders confidence in the tax system and makes it particularly difficult for taxpayers and organisations to familiarise themselves with relevant legislation and guidance.' HM Revenue & Customs, 'The Tax Administration Framework: Supporting a 21st Century Tax System: Call for Evidence' (23 March 2021) <https://www.gov.uk/government/consultations/call-for-evidence-the-tax-administration-framework-supporting-a-21st-century-tax-system> accessed 13th April 2021.

applied consistently by HMRC,[3716] contrary to the rule of law, but in keeping with other areas of tax evasion enforcement. This year, HMRC have launched a call for evidence on the tax administration framework, which seeks evidence on aspects of enforcement, including the criminal sanctions and civil penalty regimes.[3717] The review itself highlights the antiquity of the legal framework,[3718] and lends support to the central argument advanced by this thesis; the UK legal framework and enforcement policy is neither internally, nor externally, effective in combatting tax evasion and a comprehensive reform of the UK's approach is long overdue.

7.2.9 Amnesties

Like many other tax authorities, HMRC has regularly used disclosure facilities, or tax amnesties, to recover tax evaded offshore.[3719] The first such facility was the Offshore Disclosure Facility (ODF), which was in operation from April to June 2007.[3720] The ODF was set up in response to HMRC's use of its information powers to obtain information from UK banks regarding customer's offshore accounts.[3721] The ODF provided offshore tax evaders with the opportunity to disclose their non-compliance, pay the tax owed, interest and a 10% penalty, in exchange for immunity from criminal prosecution.[3722] The ODF was effective in recovering evaded taxation, particularly during a time when the international exchange of information in tax matters was not fully developed, leading to the recovery of almost £500million.[3723] When considering administration costs of £6million, this equated to a 67-fold return on investment for HMRC.[3724] Nonetheless, around 40% of suspected offshore tax evaders failed to make a disclosure under the ODF, and yet none were subject to a criminal investigation by HMRC,[3725] potentially reducing the incentive to voluntarily disclose in future. The second disclosure facility was the New Disclosure Opportunity (NDO), which ran from September 2009 to March

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[3716] Office of Tax Simplification, 'Tax Penalties: Final Report' (November 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/374509/OTS_tax_penalties_final_report_121114.pdf> accessed 13th April 2021 at p.27
[3717] HM Revenue & Customs, 'The Tax Administration Framework: Supporting a 21st Century Tax System: Call for Evidence' (23 March 2021) <https://www.gov.uk/government/consultations/call-for-evidence-the-tax-administration-framework-supporting-a-21st-century-tax-system> accessed 13th April 2021.
[3718] Ibid at p.10.
[3719] See generally, OECD, 'Offshore Voluntary Disclosure: Comparative Analysis, Guidance and Policy Advice' (September 2010) <https://www.oecd.org/tax/administration/45967994.pdf> accessed 14th April 2021
[3720] House of Commons Treasury Committee, *Closing the Tax Gap: HMRC's Record at Ensuring Compliance* (HC 2010-12, 1371-I) Written Evidence Submitted by HM Revenue and Customs
[3721] R Clarke, H Foulkes, 'Analysis – Revenue Watch: Do Tax Amnesties Work?' (2010) 20(1045) Tax J 7, 7
[3722] House of Commons Treasury Committee, *Closing the Tax Gap: HMRC's Record at Ensuring Compliance* (HC 2010-12, 1371-I) Written Evidence Submitted by HM Revenue and Customs
[3723] Ibid. See also, p.14.
[3724] Public Accounts Committee, *HMRC: Tackling the Hidden Economy* (HC 2007-08, 712-I) p.9
[3725] R Clarke, H Foulkes, 'Analysis – Revenue Watch: Do Tax Amnesties Work?' (2010) 20(1045) Tax J 7, 7

2010.[3726] The NDO was also set up in response to HMRC obtaining information regarding offshore accounts, this time from more than 300 financial institutions.[3727] The NDO operated on similar terms to the ODF,[3728] and led to the recovery of more than £85million from over 5500 disclosures.[3729] Following the revelation that around 300 UK taxpayers hid £1billion in Liechtenstein, evading £300million in tax,[3730] the Liechtenstein Disclosure Facility (LDF) was introduced,[3731] which offered even better terms than the previous facilities.[3732] The LDF initially provided for immunity from criminal prosecution, a reduction in the years for which tax could be assessed and penalties as low as 10%.[3733] Domestic evasion could also be disclosed using the facility.[3734] As a result, the LDF was widely criticised for being unduly lenient on tax evaders.[3735] In particular, there was a public outcry following the HSBC (Suisse) Scandal, where over 1000 UK account holders were suspected of evading taxation, yet only one individual was prosecuted, with the overwhelming majority settling their liabilities using the LDF.[3736] This led an International Campaign Group to seek judicial review of the decision,[3737] garnering nearly a million supporters,[3738] and the Public Accounts Committee to conduct an enquiry concerning HMRC's response.[3739]

[3726] House of Commons Treasury Committee, *Closing the Tax Gap: HMRC's Record at Ensuring Compliance* (HC 2010-12, 1371-I) Written Evidence Submitted by HM Revenue and Customs
[3727] See fn above. D Sinclair, 'The Persuaders' (2019) 184(4716) Taxation 12, 12
[3728] R Clarke, H Foulkes, 'Analysis – Revenue Watch: Do Tax Amnesties Work?' (2010) 20(1045) Tax J 7, 7
[3729] House of Commons Treasury Committee, *Closing the Tax Gap: HMRC's Record at Ensuring Compliance* (HC 2010-12, 1371-I) p.14
[3730] BBC News, 'UK Probes Liechtenstein Tax Haven' (22 July 2008) <http://news.bbc.co.uk/1/hi/business/7519635.stm> accessed 15th April 2021; M Gould, MD Rablen, 'Voluntary Disclosure Schemes for Offshore Tax Evasion' (2020) 27 International Tax and Public Finance 805, 809
[3731]'Memorandum of Understanding between the Government of the Principality of Liechtenstein and Her Majesty's Revenue and Customs of the United Kingdom of Great Britain and Northern Ireland Relating to Cooperation in Tax Matters' (11 August 2009) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387363/mou-lich.pdf> accessed 15th April 2021
[3732] J Grocott, 'UK Taxpayers Get Chances to Confess' (2009) 20(8) Int'l Tax Rev 18, 18
[3733] D Sinclair, 'The Final Countdown' (2015) 175(4506) Taxation 18, 18
[3734] Ibid
[3735] Including this author, N Ryder, S Bourton, 'HSBC and Tax Evasion Scandal: The Prosecution of White-Collar Criminals and the Legacy of the Coalition Government' (2015) 226 Crim Law 3
[3736] HM Revenue & Customs, 'Statement by HMRC on Tax Evasion and the HSBC Suisse Data Leak' (14 February 2015) <https://www.gov.uk/government/news/statement-by-hmrc-on-tax-evasion-and-the-hsbc-suisse-data-leak> accessed 15th April 2021
[3737] V Houlder, 'UK Revenue Faces Legal Challenge over HSBC Tax Scandal' (Financial Times, 1 May 2015) <https://www.ft.com/content/2109cf90-ef4a-11e4-a6d2-00144feab7de> accessed 15th April 2021
[3738] R Murphy, 'HMRC Threatened with Legal Action over HSBC Tax "Loopholes"' (1 May 2015) <https://www.taxresearch.org.uk/Blog/2015/05/01/hmrc-threatened-with-legal-action-over-hsbc-tax-loopholes/> Accessed 15th April 2021
[3739] Public Accounts Committee, *Oral Evidence: Tax Avoidance and Evasion: HSBC* (HC 2014-15, 1095-I); Public Accounts Committee, *Oral Evidence: Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 974-I)

The same arguments are used to support the use of tax amnesties as are used to justify the utilisation of civil penalties; the disclosure facilities provide for a quicker and cheaper mechanism of addressing tax crimes.[3740] In fact, tax amnesties are even more efficient than other civil investigation procedures, which still provide HMRC with an eight to nineteen fold return on investment.[3741] Moreover, tax amnesties enable tax crimes to be addressed that cannot be brought before the criminal courts, owing to a lack of evidence and the deficiencies in the legal framework.[3742] Indeed, the issues inherent in bringing criminal prosecutions for tax crimes are exacerbated in cases concerning offshore jurisdictions.[3743] In this respect, favourable terms were at one stage needed to induce tax evaders to use disclosure facilities.[3744] However, following fears that the facility was being misused and following fears that the terms of the LDF were too generous to tax evaders, the terms were changed 18 months before its closure in 2015.[3745] Overall, the LDF was somewhat successful, leading to over 5,000 settlements and the recovery of more than £1.2billion.[3746] However, the LDF was not as successful as was initially hoped, recovering less than half of the estimated £3billion sought to be recovered.[3747] The LDF demonstrates that the benefits raised by tax amnesties must be balanced against the diluted

[3740] M Gould, MD Rablen, 'Voluntary Disclosure Schemes for Offshore Tax Evasion' (2020) 27 International Tax and Public Finance 805, 806

[3741] Ibid citing HM Revenue & Customs, *Annual Report 2005-6* (Cm 6983, 2006) p.70. The yield: cost ratio increased in 2010 to 14:1 for Local Compliance and 19:1 for Specialist Investigations, National Audit Office, *HM Revenue & Customs: Managing Civil Tax Investigations* (HC 2010-11, 677-I) p.14. The yield: cost ratio for HMRC compliance activities generally is 7:1 for individuals and 44:1 for large business taxpayers, National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.10.

[3742] See for instance, the response of HMRC Officials to questions regarding HMRC's response to the HSBC Scandal; 'we were clear that we were dealing with incomplete and dirty data and an organisation that was unlikely to proffer us any more information.' Public Accounts Committee, *Oral Evidence: Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 974-I) Lin Homer's (then Chief Executive and Permanent Secretary HMRC) answer to Q12.

[3743] Ibid. See also, J Fisher, 'HSBC, Tax Evasion and Criminal Prosecution' (2015) 1253 Tax Journal 6

[3744] In 2010, the OECD observed 'About half of the countries (21 out of 39) reduce the monetary penalties to nil following a voluntary disclosure by the taxpayer. Sixteen out of those 21 do so by general law (including administrative practice) and 5 through a special programme. Even where penalties are not eliminated they are often substantially reduced in the case of a voluntary disclosure.' OECD, 'Offshore Voluntary Disclosure: Comparative Analysis, Guidance and Policy Advice' (September 2010) <https://www.oecd.org/tax/administration/45967994.pdf> accessed 14th April 2021, p.19

[3745] P Berwick, 'Raising the Bar' (2014) 174(4469) Taxation 12, 12-13

[3746] HM Revenue & Customs, 'Guidance: Liechtenstein Disclosure Facility (LDF) Yield Stats' (3 May 2016) <https://www.gov.uk/government/publications/offshore-disclosure-facilites-liechtenstein/yield-stats> accessed 15th April 2021

[3747] HM Revenue & Customs, 'No Safe Havens: Our Offshore Evasion Strategy 2013 and Beyond' (March 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/193112/offshore-strategy_1_.pdf> accessed 15th April 2021, at p.5

deterrent impact of this enforcement action,[3748] and the widespread feelings of social injustice they may generate, which could itself negatively affect tax compliance.[3749]

The next generation of disclosure agreements was precipitated by the developments in the international exchange of information. The Crown Dependencies Disclosure Facility (CDDF) was introduced in the wake of FATCA, as part of the associated agreements between the UK and the Crown Dependencies.[3750] The CDDF provided less favourable terms than the LDF and only generated £13.9million for HMRC.[3751] This was a significantly lower sum than the £1billion the CDDF was predicted to raise.[3752] In 2015, the LDF and CDDF were closed, and replaced with the Worldwide Disclosure Facility (WDF), which offers much less favourable terms to taxpayers.[3753] The remaining benefits include immunity from criminal disclosure, providing a complete and accurate disclosure is made, and potentially escape from naming and shaming provisions.[3754] Penalties will be calculated in the usual way,[3755] including higher

[3748] See for instance Langenmayr, who argues that voluntary disclosure programmes increase levels of tax evasion, although the costs may be offset by the tax and penalties collected, see D Langenmayr, 'Voluntary Disclosure of Evaded Taxes – Increasing Revenue or Increasing Incentives to Evade?' (2017) 151 Journal of Public Economics 110.

[3749] M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493, 508; P Leighton, 'Fairness Matters—More than Deterrence' (2010) 9 Criminology & Public Policy 525

[3750] J Newton, 'Wider Net, Shrinking Pond' (2013) 171(4398) Taxation 18, 19. Memorandum of Understanding between the Government of the Isle of Man and Her Majesty's Revenue and Customs of the United Kingdom of Great Britain and Northern Ireland Relating to Cooperation in Tax Matters' (19 February 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/386983/isleofman-memorandum.pdf> accessed 15th April 2021; Memorandum of Understanding between the Government of Jersey and Her Majesty's Revenue and Customs of the United Kingdom of Great Britain and Northern Ireland Relating to Cooperation in Tax Matters' (13 March 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387266/memorandum__of__understanding_jersey.pdf> accessed 15th April 2021; Memorandum of Understanding between the Government of the Guernsey and Her Majesty's Revenue and Customs of the United Kingdom of Great Britain and Northern Ireland Relating to Cooperation in Tax Matters' (11 March 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387295/mou-guernsey.pdf> accessed 15th April 2021

[3751] HM Revenue & Customs, 'Crown Dependency Disclosure Facility Figures: Guernsey' (1 April 2016) <https://www.gov.uk/government/publications/offshore-disclosure-facilities-guernsey/crown-dependency-disclosure-facility-figures-guernsey> accessed 15th April 2021; HM Revenue & Customs, 'Crown Dependency Disclosure Facility Figures: Jersey' (1 April 2016) <https://www.gov.uk/government/publications/offshore-disclosure-facilities-jersey/crown-dependency-disclosure-facility-figures-jersey> accessed 15th April 2021; HM Revenue & Customs, 'Crown Dependency Disclosure Facility Figures: Isle of Man' (1 April 2016) <https://www.gov.uk/government/publications/offshore-disclosure-facilities-isle-of-man/crown-dependency-disclosure-facility-figures-isle-of-man> accessed 15th April 2021.

[3752] HM Revenue & Customs, 'Press Release: Island Tax Evaders Told to Come Clean' (9 April 2013) <https://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/island-tax-evaders-told-to-come-clean-853925> accessed 15th April 2021

[3753] HM Revenue & Customs, 'Making a Disclosure Using the Worldwide Disclosure Facility' (6 April 2021) <https://www.gov.uk/guidance/worldwide-disclosure-facility-make-a-disclosure > accessed 15th April 2021

[3754] As long as disclosure is unprompted, The Finance Act 2016, Section 164 (Appointed Day) Regulations 2017, SI 2017/261; H Adams, Y Toumi, 'Any Offshore Income to Declare?' (2020) 186(4762) Taxation 8, 11

[3755] H Adams, 'Q&A- The Worldwide Disclosure Facility' (2016) 23(1324) Tax J 12, 13

penalties for offshore matters and transfers,[3756] and additional penalties for failing to correct offshore non-compliance using CoP9 or the WDF.[3757] HMRC state that the harsher terms of the WDF are intended 'to reflect HMRC's toughening approach'.[3758] In this respect, the dynamics of the game have changed and HMRC no longer need to induce offshore tax evaders to come forward, instead relying on the mass of intelligence generated by the CRS.[3759] From 2016, HMRC have received over 20,000 disclosures and have recovered more than £168million using the WDF.[3760] While the sums may seem impressive, this seems a small amount considering that the CRS has been presented as a game changing tool,[3761] and considering the vast amounts of wealth said to be held offshore.[3762] This raises important questions, including whether the CRS is as effective in practice as is claimed,[3763] or, alternatively, whether the extent of offshore income and assets is as high as previously believed.[3764]

In effect, these initiatives appear to be cost effective from a revenue-raising perspective and have enabled the successful resolution of offshore tax evasion, during a period when evidence of this crime was often unobtainable. Nonetheless, the continued use of tax amnesties in respect of offshore tax evasion is beginning to lack justification, for the CRS should enable authorities to obtain evidence of this crime. Now that prosecution is an option, the deterrent impact and heightened perceptions of social justice this action would create need to be considered more seriously in the UK's enforcement policy and approach.

[3756] Finance Act 2010, Schedule 10; Finance Act 2010, Schedule 10 (Appointed Days and Transitional Provisions) Order 2011, SI 2011/975; Finance Act 2007, Schedule 24, Part 2; Finance Act 2008, Schedule 41, Para 6; Finance Act 2009, Schedule 55, Para 6; Penalties, Offshore Income etc (Designation of Territories) Order 2011, SI 2011/976; Penalties, Offshore Income etc (Designation of Territories) (Amendment) Order 2013, SI 2013/1618. See also Finance Act 2015, s.120, Schedule 20.
[3757] Finance (No.2) Act 2017, Schedule 18
[3758] HM Revenue & Customs, 'Making a Disclosure Using the Worldwide Disclosure Facility' (6 April 2021) <https://www.gov.uk/guidance/worldwide-disclosure-facility-make-a-disclosure > accessed 15th April 2021
[3759] A Puri, 'Transparent Investments' (2016) 177(4545) Taxation 18, 18
[3760] HM Revenue and Customs, *Annual Report and Accounts 2019 to 2020 (for the year ended 31 March 2020)* (HC 2019-2020, 891-I) p.33
[3761] A Pross, P Kerfs, P Hondius, R Housden, 'Turning Tax Policy into Reality – Global Tax Transparency Goes Live' (2017) 27 Int'l Tax Rev 16, 16
[3762] See for instance, G Zucman, 'Taxing Across Borders: Tracking Personal Wealth and Corporate Profits' (2014) 28 Journal of Economic Perspectives 121, 140
[3763] See Chapter 4, pp.
[3764] See Chapter 3, pp.

7.3 The US

7.3.1 Introduction

In the US, the Internal Revenue Service (IRS) is responsible for criminal and civil investigations into noncompliance with tax laws.[3765] The Criminal Investigation (CI) Division of the IRS is responsible for conducting criminal investigations into violations of the tax code (Title 26) and related Title 18 offences, including money laundering and identity theft, as well as BSA violations (Title 31).[3766] The IRS has a similar role to HMRC in that it is responsible for investigating and recommending cases for prosecution, but does not carry out prosecutions itself.[3767] In order to 'achieve uniform, broad, and balanced criminal tax enforcement' all tax prosecutions must be authorised by the Tax Division of the Department of Justice.[3768] This section examines the IRS's approach to the investigation and enforcement of tax evasion offences, before providing a contemporary evaluation and a comparison with the UK approach.

7.3.2 The Prosecution of Tax Evaders

Like its UK counterpart, the US has long addressed tax evasion using civil rather than criminal penalties, with civil penalties predating, and accompanying, the introduction of the income tax.[3769] Indeed, the civil fraud penalty derives from the Civil War era.[3770] The US has also held a similar philosophy to the UK in regards to the use of the criminal justice system to address tax crimes, recognising that smaller numbers of prosecutions enables deterrence to be achieved cost effectively.[3771] In theory, the US enforcement policy concerning tax evasion offences has been consistently based on the sufficiency of evidence and likelihood of securing a conviction.[3772] However, in practice, the decision as to whether to prosecute suspected tax

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[3765] US Department of the Treasury, 'Treasury Order: 150-10' (22 April 1982) <https://www.treasury.gov/about/role-of-treasury/orders-directives/pages/to150-10.aspx> accessed 17th April 2021.

[3766] [3766] IRS, 'How Criminal Investigations Are Initiated' (15th April 2021) <https://www.irs.gov/compliance/criminal-investigation/how-criminal-investigations-are-initiated> accessed 18th April 2021.

[3767] US Department of Justice, 'Justice Manual 4-4.000 Criminal Tax Case Procedures' (Updated June 2020) <https://www.justice.gov/jm/jm-6-4000-criminal-tax-case-procedures> accessed 17th April 2021 at §6-4.010

[3768] Ibid

[3769] DA Winslow, 'Tax Penalties – They Shoot Dogs, Don't They' (1991) 43 Fla L Rev 811, 823-4

[3770] Ibid

[3771] RS Frase, 'The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion' (1980 47(2) The University of Chicago Law Review 246, 300

[3772] PP Lipton, 'The Relationship between the Civil and Criminal Penalties for Tax Frauds' (1968) U Ill L F 527, 531; MS Winer, 'An Appraisal of Criminal and Civil Penalties in Federal Tax Evasion Cases' (1953) 33 BU L Rev 387, 388

evasion depends on IRS policy, priorities, and budgetary constraints,[3773] as well as institutional willingness to refer difficult cases to the DoJ.[3774] Owing to this, the IRS approach to recommending cases for prosecution has been considered 'perplexing'.[3775]

IRS CI receives cases for potential criminal investigation from other IRS divisions, other government authorities, informers, whistle-blowers and general investigations conducted by CI.[3776] IRS employees, most often those working in examination and collection, must refer cases to CI whenever 'firm indications of fraud' are present, and must monitor any indicators of fraud.[3777] If CI accepts the invitation, a Subject Criminal Investigation will begin, whereas non-acceptance by CI will likely result in a civil investigation and an assessment to penalties.[3778] CIs decision is based on whether the case is high profile, involves egregious allegations, is likely to achieve a deterrent effect, and is in accordance with its strategic priorities.[3779] IRS priorities currently include, abusive return preparer enforcement, abusive tax schemes, bankruptcy fraud, corporate fraud, cybercrimes, employment tax enforcement, financial institution fraud, gaming, general fraud investigations, healthcare fraud, identity theft, international investigations, money laundering and BSA violations, narcotics investigations, corruption offences and fraudulent refunds.[3780] Other factors influencing prosecution include the severity of the offence, including the tax loss, whether it is a repeat offence and whether the offence is likely to result in a sentence of imprisonment.[3781] If a referral is made to the Tax

[3773] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §8.01

[3774] MS Winer, 'An Appraisal of Criminal and Civil Penalties in Federal Tax Evasion Cases' (1953) 33 BU L Rev 387, 388

[3775] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §8.01

[3776] Ibid at §4.02[1]. See also, Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 1 Investigation Initiation' (31 July 2020) <https://www.irs.gov/irm/part9/irm_09-004-001> accessed 17th April 2021 at §9.4.1.5.1

[3777] Internal Revenue Service, 'Internal Revenue Manual, Part 25. Special Topics, Chapter 1. Fraud Handbook' (23 January 2014) <https://www.irs.gov/irm/part25/irm_25-001-001> accessed 17th April 2021 at §25.1.1.3

[3778]

[3779] Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 1. Criminal Investigation Mission and Strategies' (6 March 2017) <https://www.irs.gov/irm/part9/irm_09-001-001> accessed 17th April 2021 at §9.1.1.4

[3780] Internal Revenue Service, 'Program and Emphasis Areas for IRS Criminal Investigation' (5 March 2021) <https://www.irs.gov/compliance/criminal-investigation/program-and-emphasis-areas-for-irs-criminal-investigation> accessed 17th April 2021. See also, Internal Revenue Service, 'Criminal Investigation Annual Report 2020' <https://www.irs.gov/pub/irs-pdf/p3583.pdf> accessed 17th April 2021 at p.6

[3781] Comisky notes that 'the precise numerical criteria for case selection are detailed in classified official use only nonpublic portions of the IRM' I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.03, fn.106

Division, authorisation of prosecution will depend upon the application of the ordinary Principles of Federal Prosecution.[3782]

Theoretically, UK and US criminal investigation policies appear to be similar in scope and operation, highlighting the need for deterrent prosecutions and focusing upon the most serious cases. However, one clear distinction is that the US considers corporate prosecutions as a priority within its wider tax evasion enforcement policy and approach; a focus clearly missing within the UK.[3783] The practical impact of making corporate liability for tax evasion a priority in the US is demonstrated by the strong enforcement actions discussed in the previous chapter.[3784]

7.3.3 Number and Type of Prosecutions

Initially, very few prosecutions were brought for tax evasion offences, with enforcement focusing on the collection of revenue.[3785] From 1945, the IRS had an official Voluntary Disclosure Policy, which provided tax evaders who voluntarily disclosed their non-compliance to the IRS with immunity from prosecution.[3786] Following tax scandals in the early 1950s, the policy was officially abandoned and tax evasion prosecutions began to increase.[3787] Nonetheless, the number of criminal actions taken remained modest with, for instance, 445 tax-related convictions secured in 1956,[3788] and less than 700 prosecutions brought in 1966.[3789] The number of prosecutions rapidly increased during the 1980s in response to perceived high levels of noncompliance.[3790] 2,937 cases were referred by CI for prosecution in 1988, doubling to 4,126 cases in 1993.[3791] However, the number of tax related prosecutions rapidly declined after

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[3782] US Department of Justice, 'Justice Manual 4-4.000 Criminal Tax Case Procedures' (Updated June 2020) <https://www.justice.gov/jm/jm-6-4000-criminal-tax-case-procedures> accessed 17th April 2021 at §6-4.211

[3783] HM Revenue & Customs, 'Guidance HMRC's Criminal Investigation Policy' (Updated 13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 13th December 2020.

[3784] See chapter 6, pp.

[3785] PP Lipton, 'Tides and Tenets in Tax Fraud Prosecutions' (1960) 38(12) Taxes 913, 914

[3786] R Barrow Blackwell, 'Supplement: Criminal Prosecution – Voluntary Disclosure; History, Revocation and Revival' [1980] William & Mary Annual Tax Conference 125, 127

[3787] PP Lipton, 'Tides and Tenets in Tax Fraud Prosecutions' (1960) 38(12) Taxes 913, 914. This trend had started to emerge in the 1940s, which saw a 15 fold increase in the number of prosecutions, JH Murphy, 'Criminal Income Tax Evasion' (1953-4) 48(3) Nw U L Rev 317, 317

[3788] JH Murphy, 'The Investigative Procedure for Criminal Tax Evasion' (1958) 27 Fordham L Rev 48, 48

[3789] RS Frase, 'The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion' (1980 47(2) The University of Chicago Law Review 246, 282

[3790] An IRS survey in 1984 revealed that at least one in five US taxpayers evaded tax, TR Hoffman, 'Studies of the Code's Tax Penalty Structure: A Fitful Step Toward Reform' (1989) 43(1) The Tax Lawyer 201, 202

[3791] JA Dubin, 'Criminal Investigation Enforcement Activities and Taxpayer Noncompliance' (2004) <https://www.irs.gov/pub/irs-soi/04dubin.pdf> accessed 17th April 2021 at p.11

1998, following 'horror stories' concerning overzealous IRS enforcement practices and consequent Senate investigations,[3792] which prompted a reorganisation of the IRS.[3793] As a result only 991 tax cases were referred for prosecution in 2001.[3794] In the new millennium, the number of tax prosecutions began to rise again, with an average of 2,529 referrals from the IRS to the DoJ, and 1,303 prosecutions each year from 2001-2008.[3795] This increased by 38.4% from 2009-2013, to an average of 3,499 referrals, and 1,568 prosecutions, annually.[3796] The number of prosecutions began to decline yet again from around 2014, which saw 1,621 prosecution recommendations for legal source tax cases.[3797] More recently, the IRS CI annual reports state that 1050 prosecutions were recommended in 2018,[3798] 942 in 2019,[3799] and 945 in 2020.[3800] The number of referrals for prosecution for legal source tax crimes in the IRS Data Book are lower, with 1,023 referrals in 2016, 795 in 2017, 680 in 2018, and only 663 in 2019.[3801] In 2019, only 494 individuals were sentenced for tax offences - a 25% reduction since 2015.[3802] At times, this comes surprisingly close to the number of cases referred for prosecution by HMRC in the UK, which for instance, referred 917 cases in 2017-18,[3803] and 548 in 2019-

[3792] Many of the stories turned out to be 'unfounded or exaggerated', L Lederman, 'Tax Compliance and the Reformed IRS' (2003) 51 U Kan L Rev 971, 979 citing General Accounting Office, GAO Report on Allegations of IRS Taxpayer Abuse (24 May 1999)
[3793] IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685; Improved Penalty and Tax Compliance Act of 1989 (IMPACT), PL 101-239, 101st Cong, 1st Sess. (1989)
[3794] JA Dubin, 'Criminal Investigation Enforcement Activities and Taxpayer Noncompliance' (2004) <https://www.irs.gov/pub/irs-soi/04dubin.pdf> accessed 17th April 2021 at p.11
[3795] TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <https://trac.syr.edu/tracirs/latest/342/> accessed 18th April 2021
[3796] Ibid
[3797] IRS, 'SOI Tax Stats – Criminal Investigation Program, by Status or Disposition – IRS Data Book Table 24' (Last Updated 29 June 2020) <https://www.irs.gov/statistics/soi-tax-stats-criminal-investigation-program-by-status-or-disposition-irs-data-book-table-24> accessed 18th April 2021, Table for Year 2014
[3798] Internal Revenue Service, 'Criminal Investigation Annual Report 2018' <https://www.irs.gov/pub/irs-utl/2018_irs_criminal_investigation_annual_report.pdf> accessed 18th April 2021 at p.9.
[3799] Internal Revenue Service, 'Criminal Investigation Annual Report 2019' <https://www.irs.gov/pub/irs-utl/2019_irs_criminal_investigation_annual_report.pdf> accessed 18th April 2021 at p.19.
[3800] Internal Revenue Service, 'Criminal Investigation Annual Report 2020' <https://www.irs.gov/pub/irs-pdf/p3583.pdf> accessed 18th April 2021 at p.11.
[3801] IRS, 'SOI Tax Stats – Criminal Investigation Program, by Status or Disposition – IRS Data Book Table 24' (Last Updated 29 June 2020) <https://www.irs.gov/statistics/soi-tax-stats-criminal-investigation-program-by-status-or-disposition-irs-data-book-table-24> accessed 18th April 2021, Tables for Years 2016 through 2019.
[3802] United States Sentencing Commission, 'Quick Facts: Tax Fraud Offenses Fiscal Year 2019' (United States Sentencing Commission Datafiles 2019) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY19.pdf> accessed 18th April 2021. The IRS states that 848 tax criminals were sentenced in 2019, Internal Revenue Service, 'Criminal Investigation Annual Report 2019' <https://www.irs.gov/pub/irs-utl/2019_irs_criminal_investigation_annual_report.pdf> accessed 18th April 2021 at p.19. Followed by 593 in 2020, Internal Revenue Service, 'Criminal Investigation Annual Report 2020' <https://www.irs.gov/pub/irs-pdf/p3583.pdf> accessed 18th April 2021 at p.11.
[3803] HM Revenue and Customs, *Annual Report and Accounts 2017-18 (For the year ended 31 March 2018)* (HC 2017-18, 1222-I) p.25.

20.[3804] This demonstrates the shockingly low level of prosecutions currently taking place for tax evasion in the US, which has a population almost five times as large as the UK.[3805] The IRS itself states that around 3,000 prosecutions annually are needed to produce a deterrent effect.[3806] In this respect, the number of prosecutions for tax evasion in the US is woefully inadequate, and may result in noncompliance becoming commonplace, owing to the diminishing deterrent effect of enforcement actions.[3807]

The low number of prosecutions is largely attributable to the sharp reduction in funding provided to the IRS to carry out its activities.[3808] Some US commentators suggest that curtailing the IRS enforcement budget may have been intentionally designed to restrict enforcement efforts.[3809] Some support for this statement may be found in the fact that the levels of IRS investigations and prosecutions tend to track political developments, declining during the Bush Administration, rising during the Obama Administration,[3810] and then declining again during

[3804] Kingsley Napley, 'HMRC Fails to Deliver on Pledge to Increase Criminal Prosecutions by End of 2020, FOI Request Reveals' (21 December 2020) <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/hmrc-fails-to-deliver-on-pledge-to-increase-criminal-prosecutions-by-end-of-2020-foi-request-reveals> accessed 6th April 2021. HMRC state that 691 prosecutions were brought in 2019-20. The reason for the discrepancy may be that HMRC statistics include offences other than tax evasion, see HM Revenue & Customs, 'HMRC Quarterly Performance Report: October to December 2020' (4 February 2021) <https://www.gov.uk/government/publications/hmrc-quarterly-performance-report-october-to-december-2020> accessed 12th April 2021.

[3805] The US has a population of 330,213,402, United States Census, 'US and World Population Clock' (18 April 2021) <https://www.census.gov/popclock/> accessed 18th April 2021. The UK has a population of 66,796,800, Office for National Statistics, 'Population Estimates' (24 June 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates> accessed 18th April 2021.

[3806] IRS, 'How Criminal Investigations Are Initiated' (15th April 2021) <https://www.irs.gov/compliance/criminal-investigation/how-criminal-investigations-are-initiated> accessed 18th April 2021.

[3807] JO Ungerman, 'Highlights and Observations from the IRS Criminal Investigation Fiscal Year 2016 Annual Business Report – How Diminished Resources at IRS-CI Have Not Deterred the Organization from Making an Impact on Would-Be Criminals Worldwide' (2017) 19(4) J Tax Prac & Proc 33, 34.

[3808] Ibid. See also, B DeBot, E Horton, C Marr, 'Trump Budget Continues Multi-Year Assault on IRS Funding Despite Mnuchin's Call for More Resources' (Center on Budget and Policy Priorities, 17 March 2017) <https://www.cbpp.org/research/federal-budget/trump-budget-continues-multi-year-assault-on-irs-funding-despite-mnuchins> accessed 18th April 2021. C Marr, C Murray, 'IRS Funding Cuts Compromise Taxpayer Service and Weaken Enforcement' (Center on Budget and Policy Priorities, 4 April 2016) <https://www.cbpp.org/research/federal-tax/irs-funding-cuts-compromise-taxpayer-service-and-weaken-enforcement> accessed 18th April 2021. Others believe that this is also part of a strategic move by the IRS to focus on revenue collection DC Shapiro, 'Cryptocurrency and the Shifting IRS Enforcement Model' (2018) 1 Stanford Journal of Blockchain Law & Policy 1, 15

[3809] DK Brown, 'Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute' (2018) 103 Minnesota Law Review 843, 859, fn.55, citing DC Richman, 'Federal Criminal Law, Congressional Delegation, and Enforcement Discretion' (1999) 46 UCLA L Rev 757, 793-99.

[3810] TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <https://trac.syr.edu/tracirs/latest/342/> accessed 18th April 2021.

the Trump administration.[3811] From 2010 to 2016, the IRS budget decreased by 21%,[3812] with enforcement funding specifically experiencing a 20% reduction, leading to 11,000 job losses, and a 28% reduction in the number of criminal investigations.[3813] In 2017, the Chief of IRS CI noted that the IRS had the same number of staff that it did 50 years ago, around 2,200 special agents.[3814] This is particularly concerning as the US population has increased by 125million in the period since,[3815] and, as the Chief notes, 'financial crime has not diminished during that time – in fact, it has proliferated'.[3816] Nonetheless, the number of Special Agents continues to decline with a further 6.4% reduction in 2018,[3817] 0.5% reduction in 2019,[3818] and a slight 1% increase in 2020.[3819] This leaves IRS CI with 2030 Special Agents,[3820] an almost 10% reduction in the number of Special Agents over the past 50 years.

The IRS claims that regardless of its level of resource, it remains focused on high level and complex cases.[3821] There is some support for this statement with, for instance, the US securing a number of high-profile celebrity convictions,[3822] as well as prosecutions and DPAs against individual and corporate facilitators of tax evasion.[3823] Last year, the US brought 'the largest tax evasion case in US history' against an individual who allegedly concealed $2billion from

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[3811] TRAC Reports, 'Taxpayers Referred for Criminal Prosecution by IRS Reach New Low' (26 March 2018) <https://trac.syr.edu/tracreports/crim/502/> accessed 18th April 2021.
[3812] B DeBot, E Horton, C Marr, 'Trump Budget Continues Multi-Year Assault on IRS Funding Despite Mnuchin's Call for More Resources' (Center on Budget and Policy Priorities, 17 March 2017) <https://www.cbpp.org/research/federal-budget/trump-budget-continues-multi-year-assault-on-irs-funding-despite-mnuchins> accessed 18th April 2021 at p.1.
[3813] Ibid at p.5-6.
[3814] Internal Revenue Service, 'Criminal Investigation Annual Report 2017' <https://www.irs.gov/pub/foia/ig/ci/2017_criminal_investigation_annual_report.pdf> accessed 18th April 2021 at p.3.
[3815] KC Davis, EJ Davis, 'The Coming Wave of Federal and State Tax Zapper Prosecutions: Prosecuting Zapper Salespersons and Restaurant Owners While the Masterminds Go Free' (2018) 19(6) J Tax Prac & Proc 19, 19.
[3816] Internal Revenue Service, 'Criminal Investigation Annual Report 2017' <https://www.irs.gov/pub/foia/ig/ci/2017_criminal_investigation_annual_report.pdf> accessed 18th April 2021 at p.3.
[3817] Internal Revenue Service, 'Criminal Investigation Annual Report 2018' <https://www.irs.gov/pub/irs-utl/2018_irs_criminal_investigation_annual_report.pdf> accessed 18th April 2021 at p.7.
[3818] Internal Revenue Service, 'Criminal Investigation Annual Report 2019' <https://www.irs.gov/pub/irs-utl/2019_irs_criminal_investigation_annual_report.pdf> accessed 18th April 2021 at p.15.
[3819] Internal Revenue Service, 'Criminal Investigation Annual Report 2020' <https://www.irs.gov/pub/irs-pdf/p3583.pdf> accessed 18th April 2021 at p.7.
[3820] Ibid.
[3821] Ibid at p.5. See also, the Comments of Richard Weber, former Chief of the IRS, 'Regardless of our budget challenges over the past several years, I am proud that we have not lost sight of our impact or mission and that the quality of our cases remains high.' Internal Revenue Service, 'IRS Criminal Investigation Releases Fiscal Year 2016 Annual Report' (27 February 2017) <https://www.irs.gov/newsroom/irs-criminal-investigation-releases-fiscal-year-2016-annual-report> accessed 18th April 2021.
[3822] Including Wesley Snipes and Leona Helmsley, E Branham, 'Closing the Tax Gap: Encouraging Voluntary Compliance through Mass-Media Publication of High-Profile Tax Issues' (2008) 60 Hastings LJ 1507, 1507
[3823] See chapter six.

the IRS, using offshore accounts and shell companies in locations including Bermuda and Switzerland.[3824] At the end of 2020, the US also charged a creator of a cryptocurrency with evading taxation on approximately $12.5million in income earned through cryptocurrency trading.[3825] In addition, the average guideline minimum sentence for tax evasion offences also remained largely consistent from 2001 until 2017, at around 26 months.[3826] Nevertheless, there are signs that the IRS's diminishing resources are beginning to have an impact on its ability to carry out high value prosecutions. For instance, commentators have criticised the IRS for 'plucking the low-hanging fruit' in targeting businesses, such as restaurants, that use Zapper software to evade taxation, as opposed to the creators of such software.[3827] In addition, the number of investigations relating to facilitators, such as tax return preparers, has declined from 305 preparer investigations in 2014 to 252 in 2016.[3828] Moreover, the average sentence actually imposed for tax fraud decreased from 17 months in 2015, to 16 months in 2019,[3829] with the rate of incarceration also declining from over 80% in 2017 to 75% in 2019.[3830]

Although the optimal use of the criminal justice system to address tax evasion is a question that is yet to be resolved, it is clear that the IRS needs more funding in order to carry out its compliance activities effectively and consistently. Indeed, investing in tax authorities produces significant returns on investment with, for instance, the IRS recovering four dollars for every dollar spent on enforcement.[3831] The Webster Review, published in 1999, highlighted

[3824] New York Times, 'US Brings "Largest Ever Tax Charge" Against Tech Executive' (15th October 2020) <https://www.nytimes.com/2020/10/15/business/robert-brockman-tax-evasion.html#:~:text=A%20Houston%20tech%20executive%20was,said%20the%20executive%2C%20Robert%20T.> accessed 18th April 2021.
[3825] Baker McKenzie, 'Cryptocurrency Founder Charged in the US with Multimillion-Dollar Tax Evasion Scheme; Separate Civil Action by US SEC Follows' (Lexology, 16 December 2020) <https://www.lexology.com/library/detail.aspx?g=cb6d6ebe-dd76-4704-b565-ca3d377fa326> accessed 18th April 2021.
[3826] TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <https://trac.syr.edu/tracirs/latest/342/> accessed 18th April 2021.; TRAC Reports, 'Taxpayers Referred for Criminal Prosecution by IRS Reach New Low' (26 March 2018) <https://trac.syr.edu/tracreports/crim/502/> accessed 18th April 2021.
[3827] KC Davis, EJ Davis, 'The Coming Wave of Federal and State Tax Zapper Prosecutions: Prosecuting Zapper Salespersons and Restaurant Owners While the Masterminds Go Free' (2018) 19(6) J Tax Prac & Proc 19.
[3828] JO Ungerman, 'Highlights and Observations from the IRS Criminal Investigation Fiscal Year 2016 Annual Business Report – How Diminished Resources at IRS-CI Have Not Deterred the Organization from Making an Impact on Would-Be Criminals Worldwide' (2017) 19(4) J Tax Prac & Proc 33, 36.
[3829] United States Sentencing Commission, 'Quick Facts: Tax Fraud Offenses Fiscal Year 2019' (United States Sentencing Commission Datafiles 2019) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY19.pdf> accessed 18th April 2021.
[3830] IRS, 'SOI Tax Stats – Criminal Investigation Program, by Status or Disposition – IRS Data Book Table 24' (Last Updated 29 June 2020) <https://www.irs.gov/statistics/soi-tax-stats-criminal-investigation-program-by-status-or-disposition-irs-data-book-table-24> accessed 18th April 2021, Tables for Years 2017 through 2019.
[3831] S Toscher, D Kellerman, 'The Impact of "Big Data" on IRS Civil and Criminal Tax Enforcement' (2019) 42 La Law 14, 14.

inadequate staffing as a primary tax enforcement concern.[3832] This issue is not only unresolved, but has also been exacerbated, over the last twenty years with worrying implications for tax compliance.[3833]

7.3.4 Criminal Investigation

Like HMRC, the IRS has the power to obtain information on an informal basis, simply by making contact with taxpayers or third parties.[3834] The IRS also the power to issue administrative summonses for both BSA and tax purposes,[3835] which, since 1978, has applied to both civil and criminal investigations.[3836] The administrative summons 'is the principal investigative technique used by special agents in non-Grand Jury cases' in respect of a wide variety of taxes.[3837] IRS summonses enable the IRS to obtain books, records and other documents from the taxpayer and other relevant persons, as well as to compel the taxpayer or third parties to appear and testify before the IRS.[3838] However, the power can only be used to further criminal investigations before a referral has been made to the DoJ Tax Division.[3839] This power will be considered in further detail below.[3840] The IRS also obtains information for criminal investigations from informants, other government authorities and databases,[3841] and through interviewing suspects and witnesses.[3842] Similarly to HMRC, the IRS also has the

[3832] WH Webster, 'Review of the Internal Revenue Service's Criminal Investigation Division' (Prepared for the Commissioner of the IRS, April 1999) <https://permanent.access.gpo.gov/lps19053/www.irs.gov/pub/irs-utl/27623d99.pdf> accessed 20th April 2021, at p.62-64

[3833] Davis and Ashby note that the IRS had 3000 special agents at this time. RE Davis, DS Ashby, 'Federal Criminal Tax Enforcement in 2009: The Role of Tax Enforcement in the Federal "Voluntary" Self-Assessment and Payment Tax System' (2009) 9 Hous Bus & Tax L J 234, 239-240.

[3834] 26 USC § 7601. 'The Internal Revenue Service is under a statutory mandate to investigate' *United States v Silkman*, 543 F2d 1218, 1220 (8th Cir 1976)

[3835] 31 USC § 5318(4); 26 USC § 7602(a)

[3836] In order to overrule the decision in *United States v LaSelle National Bank*, 437 US 298 (1978), Congress enacted 26 USC § 7602(b), which provides that the power to summon may be used for 'the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.' L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §13.01[2]

[3837] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.04[4]

[3838] 26 USC § 7602(a)(1),(2)&(3)

[3839] 26 USC § 7602(d)(1)

[3840] See section titled Civil Investigations below.

[3841] Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 2. Sources of Information' (2 August 2018) <https://www.irs.gov/irm/part9/irm_09-004-002> accessed 17th April 2021 at §9.4.2.1

[3842] 26 USC § 7602; Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 5. Interviews' (12 May 2020) <https://www.irs.gov/irm/part9/irm-_09-004-005> accessed 17th April 2021 at §9.4.5.1

power to execute search warrants,[3843] to arrest suspects,[3844] and to search suspects following arrest.[3845] Following the involvement of the IRS in the US 'war on drugs', the IRS has made increasing use of intrusive investigation methods, including the use of undercover operations in serious cases.[3846] IRS Special Agents are able to use techniques such as surveillance,[3847] and, in BSA or money laundering cases, interception.[3848]

In the 1970s, Grand Jury investigations for tax evasion offences were the exception, rather than the norm, with administrative investigations being utilised in the majority of cases.[3849] During the 1980s, the use of Grand Jury investigations began to expand beyond serious cases,[3850] and this investigative tool is now used in over 50% of investigations.[3851] Grand Jury investigations are often more efficient and effective than obtaining evidence via administrative routes, owing to the use of less-restrictive tools, such as, the Grand Jury Subpoena and possibility of offering immunity to cooperating witnesses.[3852] Some restrictions are imposed on the use of information obtained through Grand Jury investigations in civil tax matters.[3853]

7.3.5 Conviction and Sentencing

The US has a similar conviction rate for tax evasion offences as the UK, with over 90% of prosecutions resulting in conviction.[3854] This is similar to the US conviction rate for other

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[3843] 26 USC § 7608; Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 9. Search Warrants, Evidence and Chain of Custody' (27 March 2013) <https://www.irs.gov/irm/part9/irm_09-004-009> accessed 17th April 2021 at §9.4.9

[3844] 26 USC § 7608; Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 12. Arrests' (11th August 2008) <https://www.irs.gov/irm/part9/irm_09-004-012> accessed 17th April 2021 at §9.4.12.1

[3845] Ibid at §9.4.12.11.2

[3846] RE Davis, DS Ashby, 'Federal Criminal Tax Enforcement in 2009: The Role of Tax Enforcement in the Federal "Voluntary" Self-Assessment and Payment Tax System' (2009) 9 Hous Bus & Tax L J 234, 239-240.

[3847] Including physical/visual, electronic, internet, video and aerial surveillance, see Internal Revenue Service, 'Internal Revenue Manual, Part 9. Criminal Investigation, Chapter 4. Investigative Techniques, Section 6. Surveillance and Non-Consensual Monitoring' (3rd September 2020) <https://www.irs.gov/irm/part9/irm_09-004-006> accessed 17th April 2021 at §9.4.6.1

[3848] Interception is not permitted for Title 26 offences, 18 USC §2516. 18 USC §2703 provides access to stored electronic communications.

[3849] RE Davis, DS Ashby, 'Federal Criminal Tax Enforcement in 2009: The Role of Tax Enforcement in the Federal "Voluntary" Self-Assessment and Payment Tax System' (2009) 9 Hous Bus & Tax L J 234, 241.

[3850] Ibid; WH Webster, 'Review of the Internal Revenue Service's Criminal Investigation Division' (Prepared for the Commissioner of the IRS, April 1999) <https://permanent.access.gpo.gov/lps19053/www.irs.gov/pub/irs-utl/27623d99.pdf> accessed 20th April 2021, at p.9

[3851] LS Horn, 'Overview of Federal Criminal Tax Investigations and Prosecutions' (2010) 311 NYC BAR 1

[3852] Ibid; see also, I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.04[13]

[3853] *United Stated v Sells Engineering Inc,* 463 US 418 (1983); *United States v Baggot*, 463 US 476 (1983); B Bittker, L Lokken, *Federal Tax of Income, Estates and Gifts* (Thomson Reuters, Updated 2021) at §114.3.8

[3854] Internal Revenue Service, 'Criminal Investigation Annual Report 2020' <https://www.irs.gov/pub/irs-pdf/p3583.pdf> accessed 18th April 2021 at p.6.

offences.[3855] The most commonly charged offences in the US are the false statements and tax evasion offences contained in 26 USC §§7206 and 7201, which routinely compete for top position.[3856] Other commonly used offences include theft of public money, property or records,[3857] conspiracy,[3858] making false statements,[3859] money laundering,[3860] and mail fraud.[3861] The maximum sentence for the §7201 tax evasion offence is five years imprisonment, while the maximum sentence for the §7206 offence is three years imprisonment.[3862] In contrast, money laundering offences may result in a maximum sentence of 20 years imprisonment.[3863] As in the UK, sentences for tax evasion offences depend on the nature of the offence, including the actual or intended tax loss, the defendant's criminal history, and the presence of aggravating or mitigating factors warranting adjustment.[3864] A higher proportion of convicted tax evaders face imprisonment in the US than in the UK, with 65% receiving a custodial sentence.[3865] This is perhaps unsurprising considering that the Justice Manual states that 'a term in prison is almost always warranted in a criminal tax case', owing to the limited number of tax evasion prosecutions and the need to send a deterrent message.[3866]

7.3.6 Civil Investigation

The IRS has the power to obtain information on an informal basis for the purposes of civil or criminal investigations, simply by making contact with taxpayers or third parties.[3867] During civil, but not criminal, investigations, notice must be provided to the taxpayer before the IRS

[3855] E Rasmusen, M Raghav, M Ramseyer, 'Convictions versus Conviction Rates: The Prosecutor's Choice' (2009) 11 American Law and Economics Review 47, 49; US Department of Justice Executive Office for United States Attorneys, 'United States Attorneys' Annual Statistical Report Fiscal Year 2010' (September 2011) <https://www.justice.gov/sites/default/files/usao/legacy/2011/09/01/10statrpt.pdf> accessed 24th April 2021
[3856] TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <https://trac.syr.edu/tracirs/latest/342/> accessed 18th April 2021
[3857] 18 USC §641
[3858] 18 USC §371, §286
[3859] 18 USC §287
[3860] 18 USC §1956
[3861] 18 USC §1341; TRAC IRS, 'IRS Criminal Prosecutions Rise Under Obama' (Transactional Records Access Clearinghouse, Syracuse University, 4 February 2014) <https://trac.syr.edu/tracirs/latest/342/> accessed 18th April 2021
[3862] 26 USC §§7201 & 7206
[3863] 18 USC §1956
[3864] United States Sentencing Commission, *Guidelines Manual* (November 2018) §2T1.1-4.1
[3865] United States Sentencing Commission, 'Quick Facts: Tax Fraud Offenses Fiscal Year 2019' (United States Sentencing Commission Datafiles 2019) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY19.pdf> accessed 18th April 2021.
[3866] US Department of Justice, 'Justice Manual 4-4.000 Criminal Tax Case Procedures' (Updated June 2020) <https://www.justice.gov/jm/jm-6-4000-criminal-tax-case-procedures> accessed 17th April 2021 at §6-4.010; see also, United States Sentencing Commission, *Guidelines Manual* (November 2018) §2T1.1
[3867] 26 USC § 7601. 'The Internal Revenue Service is under a statutory mandate to investigate' *United States v Silkman*, 543 F2d 1218, 1220 (8th Cir 1976)

may initiate contact with third parties.[3868] The IRS also the power to issue administrative summonses for both BSA and tax purposes,[3869] and for both civil and criminal investigations.[3870] However, additional restrictions are imposed for the purposes of civil investigations, including a requirement to notify the taxpayer of third-party recordkeeper summonses,[3871] as well as a limitation on investigating a taxpayer's books and records more than once within a given tax year.[3872] The IRS summons power can be used for a number of purposes including checking the accuracy of a return, making a return for a non-filer, and determining or collecting any internal revenue tax.[3873] The IRS may use the power to obtain books, records and other documents from the taxpayer and other relevant persons, or to compel the taxpayer or third parties to appear and testify before the IRS.[3874] There is no need for the IRS to demonstrate probable cause.[3875] However, the information sought must be 'relevant or material' to an inquiry or investigation.[3876] In addition to taxpayer and third party recordkeeper summonses, the IRS is able to obtain 'John Doe' summonses, which are similar to identity unknown notices in the UK,[3877] permitting the IRS to obtain information regarding unidentified taxpayers.[3878] John Doe summonses have been used to obtain long lists of US account holders

[3868] 26 USC § 7602(c). The taxpayer must be provided with 45 days' notice, 26 USC §§7602(c)(1)(A)&(B). The statute previously required 'reasonable advance notice' of an unspecified period, until amended by the Taxpayer First Act of 2019, Pub L No. 116-25, §1207 (1 July 2019)
[3869] 31 USC § 5318(4); 26 USC § 7602(a)
[3870] In order to overrule the decision in *United States v LaSelle National Bank*, 437 US 298 (1978), Congress enacted 26 USC § 7602(b), which provides that the power to summon may be used for 'the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.' L Book, M Saltzman, *IRS Practice and Procedure* (Thomson Reuters, Updated 2021) §13.01[2]
[3871] 26 USC §§ 7602(c) & 7603(b). The taxpayer must be provided with 45 days' notice, 26 USC §§7602(c)(1)(A)&(B). The statute previously required 'reasonable advance notice' of an unspecified period, until amended by the Taxpayer First Act of 2019, Pub L No. 116-25, §1207 (1 July 2019)
[3872] 26 USC §§7605(b)
[3873] 26 USC § 7602(a)
[3874] 26 USC § 7602(a)(1),(2)&(3)
[3875] *United States v Powell*, 379 US 48, 57 (1964)
[3876] Ibid. 26 USC § 7602(a)
[3877] Finance Act 2008, Schedule 36, para 5.
[3878] *United States v Bisceglia*, 420 US 141 (1975). In response to this decision, Congress enacted the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, which added 26 USC § 7609(f). Under § 7609(f), judicial approval must be sought for a John Doe Summons, C Kehoe Dempsey, 'The Application of the John Doe Summons Procedure to the Dual-Purpose Investigatory Summons' (1984) 52(4) 52 Fordham L Rev 574, 575

from offshore banks, including UBS,[3879] and the names of individuals using fraudulent tax shelters.[3880]

7.3.7 Voluntary Disclosure

The IRS had a confidential policy of accepting a voluntary disclosure of tax non-compliance in exchange for immunity from prosecution from at least 1919.[3881] However, the policy was only officially announced in 1945, owing to the IRS's inability to address the numerous, and increasing, instances of tax evasion during and after the Second World War.[3882] Nonetheless, the policy was officially abandoned only seven years later, owing to tax scandals in the early 1950s,[3883] as well as public dissatisfaction with the process and the perceived unfairness it generated.[3884] After this, voluntary disclosure was retained as an informal policy, which theoretically did not guarantee freedom from prosecution.[3885] Yet, in practice, individuals who voluntarily disclosed tax evasion were seldom, if ever, prosecuted.[3886] The voluntary disclosure practice was explicitly announced by the IRS in 2002 and made widely available to the general public in 2013.[3887]

The IRS Voluntary Disclosure Policy (VDP) differs from HMRC's CoP9 in two important respects. First, the VDP does not provide immunity from criminal prosecution, even if its terms

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[3879] US Department of Justice, 'Federal Judge Approves IRS Summons for UBS Swiss Bank Account Records' (1 July 2008) <https://www.justice.gov/archive/tax/txdv08584.htm> accessed 20 July 2019. Although in the UBS case, an agreement was ultimately reached between the US and Switzerland, see Agreement between the United States of America and the Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America regarding UBS AG, A Corporation Established under the Laws of the Swiss Confederation' (19 August 2009) <https://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf> accessed 20 July 2019

[3880] *United States v BDO Seidman,* 345 F3d 465 (7th Cir 2003), I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.04[4][d][ii]

[3881] L Lederman, 'The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion' (2012) 57 Vill L Rev 499, 502

[3882] R Barrow Blackwell, 'Supplement: Criminal Prosecution – Voluntary Disclosure; History, Revocation and Revival' [1980] William & Mary Annual Tax Conference 125, 127

[3883] PP Lipton, 'Tides and Tenets in Tax Fraud Prosecutions' (1960) 38(12) Taxes 913, 914.

[3884] 'In the minds of many, the voluntary disclosure policy suggested an indifference to willful evasion. It is this inherent weakness is in the policy, rather than administrative difficulties, which more probably sounded the death knell of the policy.' R Barrow Blackwell, 'Supplement: Criminal Prosecution – Voluntary Disclosure; History, Revocation and Revival' [1980] William & Mary Annual Tax Conference 125, 139. See also, GP Moran, 'Tax Amnesty: An Old Debate as Viewed from Current Public Choices' (1992) 1 Fla Tax Rev 307, 317.

[3885] L Lederman, 'The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion' (2012) 57 Vill L Rev 499, 502-3.

[3886] Ibid. See also, LS Horn, 'Overview of Federal Criminal Tax Investigations and Prosecutions and What Is All This Fuss Concerning Unreported and Undisclosed Foreign Bank Accounts' (2012) 509 NYC BAR 1.

[3887] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.03[5][a][i]

are fully complied with, but rather, may result 'in prosecution not being recommended'.[3888] In addition, the VDP requires the voluntary disclosure to not only be accurate and complete, but also, timely.[3889] This means that the disclosure must be made before the IRS has started a civil examination or criminal investigation, or has obtained information from a third party or criminal enforcement action.[3890] This is in contrast to HMRC's CoP9; a process which is most often initiated by HMRC in cases of suspected non-compliance. In order to make a disclosure under the VDP, a taxpayer is required to gain 'preclearance' by sending information to the IRS who will determine whether they are eligible or already under investigation.[3891] If eligible, the taxpayer then proceeds to make a full disclosure to the IRS.[3892] Although the VDP does not strictly provide immunity from criminal prosecution, a taxpayer who makes a full disclosure is unlikely to face criminal prosecution for fear of jeopardising further disclosures.[3893] In addition, although US courts have not directly addressed the issue,[3894] several decisions seem to suggest that the judiciary would be willing to protect taxpayers from prosecution who fully comply with the terms of the VDP.[3895] On the other hand, no protection is afforded to taxpayers who do not fully disclose or who do not make payment to the IRS.[3896]

7.3.8 Civil Penalties Regime

In the US, there is a 'mind-numbing assortment' of civil penalties to address various forms of tax non-compliance.[3897] Indeed, the number of civil penalties grew from fourteen penalties in

[3888] Internal Revenue Service, 'IRS Criminal Investigation Voluntary Disclosure Practice' (20th October 2020) <https://www.irs.gov/compliance/criminal-investigation/irs-criminal-investigation-voluntary-disclosure-practice> accessed 20th April 2021.
[3889] Ibid
[3890] Ibid
[3891] I Comisky, L Feld, S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) at §4.03[5][b][i]
[3892] ibid
[3893] ED Urquhart, S Schwyn Martinez, 'Handling Investigations Involving Civil and Criminal Tax Cases' (2003) 45 S Tex L Rev 195, 197
[3894] The Seventh Circuit overturned convictions following compliance with the Voluntary Disclosure Policy in the Shotwell Manufacturing Case, but this decision was vacated by the Supreme Court as it was later discovered that the defendants had made false disclosures, see *Shotwell I,* 255 F2d 394 (7th Cir 1955); *Shotwell II,* 371 US 341 (1963); AD Madison, 'An Analysis of the IRS's Voluntary Disclosure Policy' (2001) 54(4) Tax Law 729, 733
[3895] ED Urquhart, S Schwyn Martinez, 'Handling Investigations Involving Civil and Criminal Tax Cases' (2003) 45 S Tex L Rev 195, 200-201; *United States v Tenzer,* 127 F3d 222 (2nd Cir 1997); *United States v Knottnerus,* 139 F3d 558 (7th Cir 1998)
[3896] Ibid
[3897] B Bittker, L Lokken, *Federal Tax of Income, Estates and Gifts* (Thomson Reuters, Updated 2021) at §117.1

1955,[3898] to 64 penalties in 1975, to over 150 penalties by 1988.[3899] The number of civil penalties caused 'unfairness, complexity, and incoherence',[3900] leading to a comprehensive review of the civil penalty framework by an IRS Task Force in the late 1980s.[3901] The review was followed by the enactment of the Improved Penalty Administration and Compliance Act (IMPACT),[3902] which consolidated and simplified some of the existing penalty provisions.[3903] The civil penalty provisions were also reviewed and refined as part of the reorganisation of the IRS in 1998.[3904] Nonetheless, a similar number of penalties remain in force to this day,[3905] prompting many experts to call for simplification.[3906] Accordingly, this section necessarily only provides an overview of some of the most relevant penalties.

The most pertinent penalty for tax evaders is the civil fraud penalty, which is a penalty of 75% of the portion of a tax underpayment that has occurred owing to fraud.[3907] There is little distinction between the elements of criminal and civil tax fraud, with both requiring proof of a willful attempt to evade taxation.[3908] Rather, the key distinction is the burden of proof required, specifically, civil fraud must be demonstrated by 'clear and convincing evidence';[3909] a lower standard than criminal evasion, yet a higher standard than typical civil cases, which require

[3898] National Taxpayer Advocate, '2008 Annual Report To Congress: Volume Two' (31 December 2008) <https://www.irs.gov/pub/tas/08_tas_arc_vol2.pdf> accessed 22nd April 2021 at p.7
[3899] Hearings Before the Subcommittee on Private Retirement Plans and Oversight of the Internal Revenue Service of the Senate Committee on Finance, *IRS Penalty Reform*, 100th Cong., 2d Sess 166 (1988) p.1
[3900] TR Hoffman, 'Studies of the Code's Tax Penalty Structure: A Fitful Step Toward Reform' (1989) 43(1) The Tax Lawyer 201, 201
[3901] Ibid. Executive Task Force for the Commissioner's Penalty Study, Internal Revenue Service, *Report on Tax Penalties* (23rd February 1989)
[3902] Improved Penalty and Tax Compliance Act of 1989 (IMPACT), PL 101-239, 101st Cong, 1st Sess. (1989)
[3903] J Coder, 'Achieving Meaningful Civil Penalty Reform and Making it Stick' (2012) 27 Akron Tax Journal 153, 159
[3904] Ibid at p.160. IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685. Department of the Treasury, 'Report to the Congress on Penalty and Interest Provisions of the Internal Revenue Code' (October 1999) <https://home.treasury.gov/system/files/131/Report-Penalty-Interest-Provisions-1999.pdf> accessed 22nd April 2021
[3905] 'In 1955, there were approximately 14 penalty provisions in the Internal Revenue Code. There are now more than ten times that number.' Internal Revenue Service, 'Internal Revenue Manual, Part 20. Penalty and Interest, Chapter 1. Penalty Handbook, Section 1 Introduction and Penalty Relief' (19 October 2020) <https://www.irs.gov/irm/part20/irm_20-001-001> accessed 17th April 2021 at §20.1.1.1.1
[3906] The AICPA cites 17 reports calling for reform between 1999 and 2013, including by the American Bar Association, the General Accounting Office, and the National Taxpayer Advocate, see American Institute of Certified Public Accountants, 'Report on Civil Tax Penalties: The Need for Reform (11 April 2013) <https://www.aicpa.org/Advocacy/Tax/TaxLegislationPolicy/DownloadableDocuments/AICPA-report-civil-tax-penalty-reform-2013.pdf> accessed 22nd April 2021, at p.3
[3907] 26 USC § 6663(b)
[3908] IRS, 'Internal Revenue Manual: 25.1.1.2.3 Civil vs. Criminal' (23 January 2014) <https://www.irs.gov/irm/part25/irm_25-001-001> accessed 28th January 2021
[3909] 26 USC § 7454, Tax Court Rule 142, *Estate of Lisle v Commissioner of Internal Revenue*, 341 F3d 364, 368 (5th Cir 2003); *Patton v Commissioner of Internal Revenue*, 799 F2d 166, 171 (5th Cir 1986)

proof by a 'mere preponderance of the evidence'.[3910] The penalty can be imposed either following a conviction, or in lieu of a conviction, for a Title 26 offence,[3911] even if the defendant is formally acquitted.[3912] The penalty will not apply if the taxpayer can show reasonable cause, through good faith misunderstanding,[3913] or lack of wilfulness, for instance, through reliance on professional advice.[3914] One of the most frequently used civil penalties is the understatement or inaccuracy penalty, which imposes penalties on underpayments caused by several factors, including negligence, disregarding rules and regulations, or substantially understating income tax.[3915] Penalties are also imposed for failing to file returns and failing to pay tax,[3916] or for submitting a frivolous tax return,[3917] or a false and excessive refund claim.[3918] Penalties may also be imposed on employers for a number of failures, including for failing to withhold and collect taxes of employees.[3919] Penalties are separately imposed for noncompliance with excise, estate and gift taxes.[3920] Relief from penalties is usually provided if the taxpayer can demonstrate reasonable cause, for instance, through taking 'ordinary business care and prudence' in complying with obligations.[3921] However, some penalties are strict liability, either in form or operation.[3922]

As in the UK, a range of penalties apply to the facilitators or enablers of tax evasion and other forms of deliberate non-compliance. For instance, penalties are imposed on promoters of abusive tax shelters,[3923] as well as those who aid and abet the understatement of tax by

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[3910] This is designed to 'reduce the risk to the defendant of having his reputation tarnished erroneously' *Addington v Texas*, 441 US 418, 424 (1979)
[3911] Indeed, a criminal conviction collaterally estops the taxpayer from denying the fraudulent nature of the return, *Armstrong v United States*, 354 F2d 274, 290-91 (Ct CI 1965). Imposing the civil fraud penalty following conviction does not amount to double jeopardy, *Helvering v Mitchell*, 303 US 391, 404 (1938)
[3912] *Helvering v Mitchell*, 303 US 391, 405-6 (1938); *Stone v United States*, 167 US 178, 186-9 (1897)
[3913] 26 USC § 6663(c)(1)
[3914] *Marinzulich v Comissioner of Internal Revenue*, 31 TC 487, 492 (1958)
[3915] 26 USC § 6662, A Roberson, K Spencer, 'Expect More Civil Tax Penalties: So, Now What' (2019) 71(5) Tax Executive 53, 54
[3916] 26 USC § 6651(a)
[3917] 26 USC § 6702(a)
[3918] 26 USC § 6676(a)
[3919] 26 USC § 6672
[3920] The IRM mentions 26 USC §4103, §5000A, §6166, §6653, §6675, §6715, §6715A, §6717, §6718, §6719, §6720A, §6725, §7270, §7271, §7272, §7273, §7275, §7304, §7342. Internal Revenue Service, 'Internal Revenue Manual, Part 20. Penalty and Interest, Chapter 1. Penalty Handbook, Section 1 Introduction and Penalty Relief' (19 October 2020) <https://www.irs.gov/irm/part20/irm_20-001-001> accessed 17th April 2021 at §20.1.1.1.2
[3921] Ibid at §20.1.1.3
[3922] Such as the penalties for understatements relating to transactions without 'economic substance' 26 USC §§6662A & 6662(i), see E Lopresti, 'What's Wrong with Strict Liability and Nonmonetary Penalties? The Case for Reasonable Fault-Based Civil Tax Penalties and Procedural Protections' (2019) 72 Tax Law 589, 601-2
[3923] 26 USC § 6700

another.[3924] Penalties are also imposed on tax return preparers who prepare returns or claims for others that result in understatements owing to the adoption of unreasonable positions.[3925] Like its UK counterpart, the US imposes higher penalties for inaccuracies relating to undisclosed foreign assets, specifically, 40%, as opposed to 20%, of the understatement.[3926] Although these penalties are lower than in the UK,[3927] the US also imposes a range of penalties for failing to comply with reporting obligations relating to foreign assets and interests, including corporations, partnerships, trusts, and financial assets.[3928] One of the most important penalties is the penalty for failing to file a FBAR, which, if willful, can result in penalties of $100,000 or 50% of the account balance.[3929] Accordingly, both jurisdictions have the ability to impose significant penalties on those who deliberately or willfully evade tax offshore. Unlike the UK, the details of delinquent taxpayers are not published at a federal level, but may be published at state level.[3930] However, the US does make use of non-financial penalties including the revocation of passports.[3931]

The US appears to have recovered significant sums from imposing penalties on individuals and corporations that fail to comply with their tax obligations. In 1995, 34million penalties were assessed at a value of over $15billion.[3932] By 2005, the value of penalties assessed increased to almost $24billion, and by 2015, the number of penalties assessed increased to 40million, worth $24billion.[3933] In 2019, over 40million penalties had been assessed with a value of

[3924] 26 USC § 6701
[3925] 26 USC § 6694
[3926] 26 USC §§6662(a), 6662(b)(7), 6662(j)(3), Hiring Incentives to Restore Employment Act of 2010, Pub L No 111-147, 124 Stat. 71, §512(a)(1)
[3927] Where the penalties imposed for offshore noncompliance can reach 200% of the PLR, Finance Act 2007, Schedule 24, Part 2; Finance Act 2008, Schedule 41, Para 6; Finance Act 2009, Schedule 55, Para 6.
[3928] The IRM mentions 26 USC §6038, §6038A, §6038D, §6039E, §6039G, §6039F, §6652(f), §6677, §6679, §6683, §6686, §6688, §6689, §6712. Internal Revenue Service, 'Internal Revenue Manual, Part 20. Penalty and Interest, Chapter 1. Penalty Handbook, Section 1 Introduction and Penalty Relief' (19 October 2020) <https://www.irs.gov/irm/part20/irm_20-001-001> accessed 17th April 2021 at §20.1.1.1.2
[3929] 31 U.S.C §§ 5314, 5321(a)(5)(C)&(D); 31 CFR §1010.350
[3930] A Wilford, 'At Least 19 States Still Publish Draconian "Shame Lists" for Delinquent Taxpayers' (National Taxpayers Union Foundation, 21 July 2020) <https://www.ntu.org/foundation/detail/at-least-18-states-still-publish-draconian-shame-lists-for-delinquent-taxpayers> accessed 22nd April 2021. This is with the exception of 26 USC §6039G, which enables the publication of citizens who renounce citizenship, whether or not for tax reasons. MS Kirsch, 'Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy' (2004) 89 Iowa L Rev 863, 890
[3931] 26 USC §7345; Fixing America's Surface Transportation (FAST) Act, Pub L No.114-94, 129 Stat 1312, §32101. E Lopresti, 'What's Wrong with Strict Liability and Nonmonetary Penalties? The Case for Reasonable Fault-Based Civil Tax Penalties and Procedural Protections' (2019) 72 Tax Law 589, 617-8
[3932] Internal Revenue Service, 'SOI Tax Stats – Civil Penalties Assessed and Abated, by Type of Tax and Type of Penalty – IRS Data Book Table 26' (Updated 29 June 2020) <https://www.irs.gov/statistics/soi-tax-stats-civil-penalties-assessed-and-abated-by-type-of-tax-and-type-of-penalty-irs-data-book-table-26> accessed 22nd April 2021, Table for 1995
[3933] Ibid, Tables for 2005 and 2015

$40billion.[3934] Accordingly, the US penalty system appears to be effective at raising revenue. However, there is recent evidence to suggest that penalties are not being applied consistently to all taxpayers, meaning that significant sums are going uncollected.[3935] In addition, regardless of the potential revenue gains, the significant number of penalties enacted in the US engenders complexity and potentially unfairness, and has prompted a multitude of calls for reform and simplification.[3936] Accordingly, the US model of civil penalties does not seem to be internally effective. The US model thus provides limited insights into reform in the UK, being in need of consolidation and simplification itself.

7.3.9 Amnesties

The first tax amnesty in the US followed the IRS's use of John Doe summonses from 2000-2002 to obtain information from credit card companies, including American Express, MasterCard and Visa, concerning cards issued by banks in a plethora of secrecy jurisdictions to US customers.[3937] This action followed reports of widespread noncompliance with FBAR reporting obligations, and was accompanied by the introduction of the Offshore Voluntary Compliance Initiative (OVCI) in 2003.[3938] The OVCI enabled taxpayers to disclose offshore tax non-compliance in exchange for immunity from criminal prosecution and reduced penalties.[3939] In some respects, the OVCI was successful, leading to a 17% increase in compliance with FBAR obligations.[3940] In addition, the IRS claimed that it recovered

[3934] Ibid, Table for 2019

[3935] Treasury Inspector General for Tax Administration, 'Few Accuracy-related Penalties Are Proposed in Large Business Examinations and They Are Generally Not Sustained On Appeal' (31 May 2019) <https://www.treasury.gov/tigta/auditreports/2019reports/201930036_oa_highlights.html> accessed 22nd April 2021.

[3936] The AICPA cites 17 reports calling for reform between 1999 and 2013, including by the American Bar Association, the General Accounting Office, and the National Taxpayer Advocate, see American Institute of Certified Public Accountants, 'Report on Civil Tax Penalties: The Need for Reform (11 April 2013) <https://www.aicpa.org/Advocacy/Tax/TaxLegislationPolicy/DownloadableDocuments/AICPA-report-civil-tax-penalty-reform-2013.pdf> accessed 22nd April 2021, at p.3

[3937] LA Campagna, 'Changing Ethics in Light of Recent IRS Voluntary Disclosure Initiatives' (2012) 60 Tul L Sch Ann Inst on Fed Tax'n 20-01, 20-17

[3938] 'The IRS estimates that there may be as many as 1 million U.S. taxpayers who have signature authority or control over a foreign bank account and may be required to file FBARs. Thus, the approximate rate of compliance with the FBAR filing requirements based on this information could be less than 20 percent.' Secretary of the Treasury, 'A Report to Congress in Accordance with §361(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT)' (26th April 2002) <https://www.treasury.gov/press-center/press-releases/Documents/fbar.pdf> accessed 21st April 2021, at p.6; SM Brown, 'One-Size-Fits-Small: A Look at the History of FBAR Requirement, the Offshore Voluntary Disclosure Programs, and Suggestions for Increased Participation and Future Compliance' (2014) 18(1) Chapman Law Review 243, 248.

[3939] Ibid

[3940] Ibid citing Secretary of the Treasury, 'A Report to Congress in Accordance with §361(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of

$75million from the OVCI at a cost of $2million,[3941] a 37.5:1 return on investment. However, other reports disputed the IRS's claims, stating that only $3.3million had been assessed and only $744,546 actually collected under the OVCI at a cost of $56million.[3942] In hindsight, the OVCI appears to have had limited success.[3943] Following Bradley Birkenfeld's revelations surrounding tax evasion by wealthy US citizens at UBS, the US attempted to obtain information from UBS using a John Doe summons, and eventually obtained the names of around 4,450 of UBS's wealthiest account holders.[3944] Following this, in March 2009, the IRS introduced the Offshore Voluntary Disclosure Program (OVDP), which provided immunity from criminal prosecution in exchange for payment of tax, interest and a collection of penalties, including a 20% FBAR penalty applying to the highest value in an undisclosed account from 2003-2008.[3945] The OVDP was seemingly more successful than the OVCI recovering approximately $5.5billion from 39,000 participants.[3946] However, only $125million each year was attributable to evaded taxation, with the remainder of the yield consisting of interest and penalties.[3947] In addition, the OVDP raised concerns around consistency and fairness, with taxpayers with low-value accounts facing the highest penalties,[3948] and penalties being applied regardless of whether the taxpayer had acted willfully.[3949] In response, an 'escape hatch' was introduced whereby taxpayers could opt out of the program penalties in exchange for traditional statutory penalties, which are designed to reflect culpability.[3950] The IRS also introduced streamlined

2001 (USA PATRIOT ACT)' (8th April 2005) <https://www.fincen.gov/sites/default/files/shared/fbar_report_2004.pdf> accessed 21st April 2021, at p.11

[3941] L Lederman, 'The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion' (2012) 57 Vill L Rev 499, 507

[3942] Ibid

[3943] SM Levy, *Federal Money Laundering Regulation: Banking, Corporate and Securities Compliance* (2nd edn, Aspen 2020) § 17.16

[3944] 'Agreement between the United States of America and the Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America regarding UBS AG, A Corporation Established under the Laws of the Swiss Confederation' (19 August 2009) <https://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf> accessed 20 July 2019

[3945] CP Rettig, K Keneally, 'The Last, Best Chance to Disclose Foreign Financial Accounts and Assets – The 2011 Offshore Voluntary Disclosure Program and Beyond' (2011) 13 J Tax & Proc 21, 22

[3946] United States Government Accountability Office, 'Offshore Tax Evasion: IRS Has Collected Billions of Dollars, but May be Missing Continued Evasion' (March 2013) <https://www.gao.gov/assets/660/654211.txt> accessed 21st April 2021

[3947] Ibid. PW Martin, GM Ferreira, 'The 2013 GAO Report of the IRS Offshore Voluntary Disclosure Program' (2014) 40(1) International Tax Journal 23, 24

[3948] Ibid. Concerns were also expressed regarding inconsistency in the application of penalties under the OVCI, see Treasury Inspector General for Tax Administration, 'The Offshore Credit Card Project Shows Promise but Improvements Are Needed to Ensure That Compliance Objectives Are Achieved' (August 2003) <https://www.treasury.gov/tigta/auditreports/2003reports/200330160fr.pdf> p.5

[3949] SM Brown, 'One-Size-Fits-Small: A Look at the History of FBAR Requirement, the Offshore Voluntary Disclosure Programs, and Suggestions for Increased Participation and Future Compliance' (2014) 18(1) Chapman Law Review 243, 254.

[3950] MJ Miller, 'Look before You Leap: Recent FBAR Case Highlights Need to Weigh All Options Before Entering the Offshore Voluntary Disclosure Program' (2017) 65 Can Tax J 531, 534

filing compliance procedures for non-resident, non-willful, taxpayers,[3951] which have been retained beyond the closure of the OVDP.[3952]

The OVDP closed in October 2009, replaced by the Offshore Voluntary Disclosure Initiative (OVDI) in 2011, and then replaced by another OVDP in 2012.[3953] Each time, the offshore penalty was increased.[3954] The OVDP was modified in 2014, before being closed in September 2018.[3955] From 2009-2014, the IRS recovered more than $6.5billion from 45,000 disclosures under the 2009 ODVP, the 2011 OVDI and the 2012 OVDP.[3956] By the time the OVDP closed in 2018, $11.1billion from over 56,000 taxpayers had been recovered since 2009.[3957] Like HMRC, the IRS appear to have used tax amnesties effectively to recover evaded taxation during a period of strong bank secrecy and limited international cooperation in tax matters. However, unlike the UK, the US seems to have accompanied these disclosure facilities with the prosecution of the facilitators of offshore tax evasion, as well as those who fail to disclose.[3958] Indeed, 1,545 offshore tax evaders were prosecuted from 2009-2018.[3959] To put this into perspective, less than 50 prosecutions for offshore tax evasion were achieved in this period by the UK.[3960] This discrepancy may be partly attributable to the fact that facilitating

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[3951] M Fellner Bramwit, 'Has the IRS Found its Mojo Just Like Austin Powers? A Commentary on the Trilogy of IRS Offshore Voluntary Disclosure Programs' (2013) 26(6) Journal of Taxation and Regulation of Financial Institutions 15, 20

[3952] Internal Revenue Service, Streamlined Filing Compliance Procedures' (17th February 2021) <https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures> accessed 21st April 2021

[3953] MJ Miller, 'Look before You Leap: Recent FBAR Case Highlights Need to Weigh All Options Before Entering the Offshore Voluntary Disclosure Program' (2017) 65 Can Tax J 531, 533

[3954] Ibid

[3955] N Noked, 'The Future of Voluntary Disclosure' (2018) 160 Tax Notes 783, 784

[3956] Internal Revenue Service, 'IRS Offshore Voluntary Disclosure Efforts Produce $6.5bilion; 45,000 Taxpayers Participate' (June 2014) <https://www.irs.gov/newsroom/irs-offshore-voluntary-disclosure-efforts-produce-65-billion-45000-taxpayers-participate> accessed 21st April 2021

[3957] Internal Revenue Service, 'IRS to End Offshore Voluntary Disclosure Program; Taxpayers with Undisclosed Foreign Assets Urged to Come Forward Now' (13 March 2018) <https://www.irs.gov/newsroom/irs-to-end-offshore-voluntary-disclosure-program-taxpayers-with-undisclosed-foreign-assets-urged-to-come-forward-now> accessed 21st April 2021

[3958] See for instance, the multitude of indictments resulting from the UBS Scandal, Internal Revenue Service, 'Offshore Tax-Avoidance and IRS Compliance Efforts' (Updated 8 July 2020) <https://www.irs.gov/newsroom/offshore-tax-avoidance-and-irs-compliance-efforts> accessed 21st April 2021. See also, United States Department of Justice, 'Offshore Compliance Initiative News, Indictments, Pleas, Sentencings, and Other Developments' (Updated 4 March 2021) <https://www.justice.gov/tax/offshore-compliance-initiative> accessed 21st April 2021.

[3959] Internal Revenue Service, 'IRS: Offshore Voluntary Compliance Program to end Sept 28' (4 September 2018) <https://www.irs.gov/newsroom/irs-offshore-voluntary-compliance-program-to-end-sept-28> accessed 21st April 2021

[3960] HM Revenue & Customs, 'Press Release: Tough New Sanctions Announced for Offshore Tax Evaders' (24 August 2016) <https://www.gov.uk/government/news/tough-new-sanctions-announced-for-offshore-tax-evaders> accessed 6th April 2021; HM Revenue & Customs, *Annual Report and Accounts 2018-19 (For the year ended 31 March 2019)* (HC 2018-19, 2394-I) p.30.

prosecution of tax crimes is one of the stated objectives of US disclosure facilities.[3961] Yet, like its UK counterpart, the US seems to be scaling back the use of such initiatives in the wake of developments facilitating the prosecution of offshore tax evaders. This is a sensible move, considering that open-ended amnesties on favourable terms tend to increase tax non-compliance and perpetuate perceptions of unfairness in tax enforcement.[3962] Noked argues that the disclosure facilities should be retained on a permanent basis to increase certainty for non-compliant taxpayers, facilitating voluntary disclosures.[3963] However, this certainty could be achieved through reform of the US civil penalty regime and the VDP,[3964] rather than through the utilisation of temporary amnesties, which often offer favourable terms to some of the most egregious tax evaders.

7.4 Comparison

This chapter has demonstrated that there are substantial similarities in the approaches taken to address tax evasion in the UK and US. For instance, both countries adopt selective criminal investigation and prosecution policies, preferring not to use the criminal justice system to address all instances of tax evasion. Theoretically, these approaches should also lead to similar outcomes, for both policies emphasise the importance of bringing prosecutions against the most egregious offenders. However, in practice, there are also significant differences in the enforcement of tax evasion offences in the UK and US. While the US has prosecuted complex and high-value cases, the low number of prosecutions may jeopardise the deterrent impact of US enforcement actions. The reduction in the number of prosecutions is largely attributable to the significant reductions in the IRS budget. In contrast, the UK's criminal investigation and enforcement policy, particularly when combined with prosecutorial targets, has led to the prosecution of low-value cases. This is unlikely to be due to the budget of HMRC,[3965] but rather, deficiencies in the underlying legal framework. Accordingly, the targets of criminal

[3961] S Ferraro, 'Effect of United States v Williams on the Offshore Voluntary Disclosure Program' (2014) 10 Int'l L & Mgmt Rev 27, 32. However, the IRS were criticised for failing to take enforcement action against those who were unable to participate in, or withdrew from, the OVDP, see Treasury Inspector General for Tax Administration, 'Improvements are Needed in Offshore Voluntary Disclosure Compliance and Processing Efforts' (2 June 2016) <https://www.treasury.gov/tigta/auditreports/2016reports/201630030fr.pdf> accessed 21st April 2021

[3962] CM Boise, 'Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty' (2007) 14 Geo Mason L Rev 667, 707-8; L Lederman, 'The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion' (2012) 57 Vill L Rev 499, 507

[3963] N Noked, 'The Future of Voluntary Disclosure' (2018) 160 Tax Notes 783, 792

[3964] Ibid

[3965] HMRC has been provided with additional funding to finance its compliance activities, National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.10, p.38

enforcement differ in these two jurisdictions. In particular, the US consistently takes action against the facilitators of tax evasion, including corporations, yet corporations are not even mentioned in HMRC's enforcement policy. This may have significant implications if and when the failure to prevent tax evasion offence is used in the UK, for the UK approach to corporate economic crime, particularly voluntary disclosure, is inconsistent with the practice adopted for other tax evasion cases.[3966]

Both countries provide mechanisms for taxpayers to avoid prosecution through domestic or offshore disclosure programs. However, while the UK permits those already under investigation to take advantage of these processes, the same cannot be said for its US counterpart. If the decision is made to pursue a criminal investigation, both the IRS and HMRC have appropriate tools to carry out the investigation, having similar powers to other LEAs. In addition, both authorities have ample civil investigation powers, being able to obtain information from taxpayers and third parties, on both identified and unidentified individuals. In lieu of prosecution, the UK and US impose a number of civil penalties on those who evade taxation or otherwise fail to comply with tax responsibilities. The civil penalty regimes are comprehensive in scope, covering the failures of both evaders and facilitators, in respect of both domestic and onshore non-compliance. However, both systems seem to lack simplicity and coherence, retaining a number of overlapping and redundant penalties. While the UK has taken steps to reform its civil penalties regime, the US still has an expansive and complicated framework, consisting of over 140 different penalties.

Overall, it is clear that both the UK and US have enacted a comprehensive system of enforcement policies and tools to address tax crimes. However, parts of these systems lack doctrinal coherence and are not applied consistently in practice. Neither the UK nor the US have conducted a comprehensive review of their tax evasion enforcement policies and approaches in the last twenty years. This is sorely needed in order to restore consistency and fairness to this area of law and its enforcement.

7.5 Evaluation

So far, this chapter has demonstrated that the prosecution policies, investigation frameworks and civil penalty systems pertaining to tax evasion in the UK and US often lack internal, or

[3966] See for instance, the prosecution of Skansen Interiors Ltd for failing to prevent bribery under Bribery Act 2010, s.7, after it voluntarily disclosed its criminal conduct, *R v Skansen Interiors Ltd*, December 2015 (Southwark Crown Court)

doctrinal effectiveness, owing to the lack of certainty, foreseeability and consistency inherent in both their form and application; key corollaries of the rule of law.[3967] However, thus far, this chapter has been unable to determine the external effectiveness of these enforcement frameworks. In other words, the extent to which they achieve their aims in practice. The first issue is that the aims of prosecution policies and penalty systems are not entirely clear; while in the US, promoting voluntary compliance and deterring noncompliance are recognised as the foundations of tax evasion enforcement,[3968] the UK approach to addressing this financial crime focuses on the need to collect revenue.[3969] This may be attributable to HMRC's role as a revenue collection authority, as compared to the IRS's role in investigating a plethora of criminal activities. In the past, the preference for the civil settlement of tax liabilities either through domestic or offshore disclosure facilities has also been explained by the difficulties inherent in obtaining evidence for the purposes of criminal prosecution in tax evasion cases.[3970] Although investigatory issues have not been fully resolved, national and global authorities have drastically improved the mechanisms used to detect tax crimes, enabling a more fruitful discussion to take place regarding optimal, as opposed to viable, enforcement frameworks.

However, HMRC and the IRS have been persistently criticised for their lack of knowledge regarding the deterrent impact of enforcement actions.[3971] While the IRS conducted research

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[3967] A Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 LQR 606, 615-6; T Bingham, *The Rule of Law* (Penguin Books, 2011) p.46-7; J Raz, 'The Law's Own Virtue' (2019) 39(1) OJLS 1,3

[3968] 'Penalties exist to encourage voluntary compliance by supporting the standards of behavior required by the Internal Revenue Code', Internal Revenue Service, 'Internal Revenue Manual, Part 20. Penalty and Interest, Chapter 1. Penalty Handbook, Section 1 Introduction and Penalty Relief' (19 October 2020) <https://www.irs.gov/irm/part20/irm_20-001-001> accessed 17th April 2021 at §20.1.1.2; The objective of the OVDP was 'to bring taxpayers that have used undisclosed foreign accounts and undisclosed foreign entities to avoid or evade tax into compliance with United States tax laws.' Internal Revenue Service, 'Voluntary Disclosure: Questions and Answers' (Updated 5 March 2020) <https://www.irs.gov/newsroom/voluntary-disclosure-questions-and-answers> accessed 24th April 2021. Over the past twenty years, deterrence has also become a focus, National Taxpayer Advocate, '2008 Annual Report To Congress: Volume Two' (31 December 2008) <https://www.irs.gov/pub/tas/08_tas_arc_vol2.pdf> accessed 22nd April 2021, at p.11

[3969] HM Revenue & Customs, 'Guidance HMRC's Criminal Investigation Policy' (Updated 13 May 2019) <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy> accessed 13th December 2020.

[3970] See for instance, Public Accounts Committee, *Oral Evidence: Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (HC 2014-15, 974-I). See also, J Fisher, 'HSBC, Tax Evasion and Criminal Prosecution' (2015) 1253 Tax Journal 6

[3971] National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.41; National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) p.10; National Audit Office, *HM Revenue & Customs: Managing Civil Tax Investigations* (HC 2010-11, 677-I) p.5; National Taxpayer Advocate, '2008 Annual Report To Congress: Volume Two' (31 December 2008) <https://www.irs.gov/pub/tas/08_tas_arc_vol2.pdf> accessed 22nd April 2021 at p.5; United States Government Accountability Office, Tax Administration: IRS Should Evaluate Penalties and Develop a Plan to Focus its Efforts (Report to the Committee on Finance US Senate, June 2009) <https://digital.library.unt.edu/ark:/67531/metadc296326/m1/1/> accessed 23rd April 2021; WH Webster,

into this issue in the early 2000s,[3972] HMRC have begun to seriously research this question over the past ten years.[3973] As a result, both HMRC and the IRS have been able to determine that both criminal prosecutions and civil penalties have a deterrent impact, thereby decreasing tax evasion.[3974] However, less is known about the differential impact of each type of enforcement action.[3975] This is a significant oversight, for this information is essential in formulating optimal tax evasion enforcement practice. HMRC has undertaken qualitative research that provides persuasive evidence of the deterrent impact of prosecutions.[3976] However, HMRC have failed to determine the optimal number of criminal prosecutions of tax evaders, providing no rationale for its prosecution referral target numbers.[3977] In the US, IRS studies have attempted to measure the deterrent impact of enforcement actions, with contradictory results.[3978] Plumley found that criminal investigations have a significant deterrent effect, yet criminal investigations have the lowest indirect effects relative to the cost of the

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'Review of the Internal Revenue Service's Criminal Investigation Division' (Prepared for the Commissioner of the IRS, April 1999) <https://permanent.access.gpo.gov/lps19053/www.irs.gov/pub/irs-utl/27623d99.pdf> accessed 20th April 2021, p.14

[3972] Internal Revenue Service, 'IRS – Understanding Taxpayer Compliance Behaviour' (Updated 16th February 2021) <https://www.irs.gov/statistics/irs-understanding-taxpayer-compliance-behavior> accessed 23rd April 2021.

[3973] National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) p.10; National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.41. An earlier report noted 'To maximise deterrence the Revenue need to ensure that a high proportion of criminal prosecutions result in guilty verdicts or pleas, while at the same time not avoiding those cases where the outcome is less certain. With a conviction rate of around 75 per cent, the Revenue appear to have struck a reasonable balance.' National Audit Office, *Tackling Fraud Against the Inland Revenue* (HC 2002-03, 429-I) p.5.

[3974] National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.41; AH Plumley, 'The Impact of the IRS on Voluntary Tax Compliance: Preliminary Empirical Results' (National Tax Association 95th Annual Conference on Taxation, Orlando, Florida 2002) p.11-12; AH Plumley, *The Determinants of Individual Income Tax Compliance: Estimating the Impacts of Tax Policy, Enforcement and IRS Responsiveness* (IRS Publication 1916, 1996) p.36-41; JA Dubin, 'Criminal Investigation Enforcement Activities and Taxpayer Noncompliance' (2004) <https://www.irs.gov/pub/irs-soi/04dubin.pdf> accessed 17th April 2021 at p.21.

[3975] The National Audit Office concluded that HMRC know 'its compliance work has a deterrent effect but not whether one type of activity is a more effective deterrent than another', National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.41

[3976] Ibid. Other studies have found prosecution to have a variable impact, depending on the motivations and characteristics of the offender, see C Turley, J Keeble, 'HMRC Report 396: Qualitative Research with People Convicted of Tax Evasion' (Research Report prepared for HMRC, May 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/459617/Qualitative_research_with_people_convicted_of_tax_evasion.pdf> accessed 23rd April 2021, p.22-24.

[3977] 'HMRC was set a target(…), based on what HMRC thought it and the wider criminal justice system could cope with at the time. HMRC achieved this target by focussing on lower complexity cases. (…) HMRC does not know what impact prosecuting an extra 1,000 people has had or what the optimum number would be to provide an effective deterrent.' Public Accounts Committee, *Tackling Tax Fraud* (HC 2015–16, 674-I) p.6.

[3978] Internal Revenue Service, 'IRS – Understanding Taxpayer Compliance Behaviour' (Updated 16th February 2021) <https://www.irs.gov/statistics/irs-understanding-taxpayer-compliance-behavior> accessed 23rd April 2021.

enforcement action, with examinations having more than twice as much impact.[3979] In contrast, Dubin highlighted the important impact of convictions on compliance, finding that 'incarceration and probation (rather than fines) have the most influence on taxpayers.'[3980] The IRS states that 3,000 prosecutions are needed annually for a deterrent impact, with little explanation regarding the adoption of this precise number.[3981] In addition, both HMRC and the IRS have been criticised for their lack of knowledge surrounding the optimal level and use of civil penalties.[3982]

Academic studies from a plethora of disciplines have shed light on the factors influencing taxpayer compliance, potentially enabling insights to be gained into the effectiveness of the UK and US approaches to enforcement. Traditional economic models have portrayed taxpayers as rational actors that are influenced by external factors, including the probability of detection and the penalties faced if caught.[3983] This research suggests that high penalties are needed to deter tax evasion efficiently, owing to the costs of detection.[3984] Later studies extended this foundational model by including additional factors that could affect this rational choice.[3985] In recognising the deficiencies of the traditional approach,[3986] other studies have examined

[3979] AH Plumley, 'The Impact of the IRS on Voluntary Tax Compliance: Preliminary Empirical Results' (National Tax Association 95th Annual Conference on Taxation, Orlando, Florida 2002) p.11-12; AH Plumley, *The Determinants of Individual Income Tax Compliance: Estimating the Impacts of Tax Policy, Enforcement and IRS Responsiveness* (IRS Publication 1916, 1996) p.36-41.
[3980] JA Dubin, 'Criminal Investigation Enforcement Activities and Taxpayer Noncompliance' (2004) <https://www.irs.gov/pub/irs-soi/04dubin.pdf> accessed 17th April 2021 at p.21
[3981] Internal Revenue Service, 'How Criminal Investigations Are Initiated' (15th April 2021) <https://www.irs.gov/compliance/criminal-investigation/how-criminal-investigations-are-initiated> accessed 18th April 2021.
[3982] National Taxpayer Advocate, '2008 Annual Report To Congress: Volume Two' (31 December 2008) <https://www.irs.gov/pub/tas/08_tas_arc_vol2.pdf> accessed 22nd April 2021 at p.5; United States Government Accountability Office, Tax Administration: IRS Should Evaluate Penalties and Develop a Plan to Focus its Efforts (Report to the Committee on Finance US Senate, June 2009) <https://digital.library.unt.edu/ark:/67531/metadc296326/m1/1/> accessed 23rd April 2021; National Audit Office, *Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* (HC 2015-16, 610-I) p.9; National Audit Office, *HM Revenue & Customs: Managing Civil Tax Investigations* (HC 2010-11, 677-I) p.5
[3983] MG Allingham, A Sandmo, 'Income Tax Evasion: A Theoretical Analysis' (1972) 1 J Pub Econ 323, 323, applying the model of GS Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 J Pol Econ 169
[3984] L Lederman, 'The Interplay Between Norms and Enforcement in tax Compliance' (2003) 64(6) Ohio State Law Journal 1453, 1465; J Andreoni, B Erard, J Feinstein, 'Tax Compliance' (1998) 36 J Econ Lit 818, 823; J Skinner, J Slemrod, 'An Economic Perspective on Tax Evasion' (1985) 38 Nat'l Tax J 345, 350
[3985] J Alm, 'Measuring Explaining and Controlling Tax Evasion: Lessons for Theory, Experiments, and Field Studies' (2011) 19 Int Tax Public Finance 54, 62; J Slemrod, 'Cheating Ourselves: The Economics of Tax Evasion' (2007) 21(1) The Journal of Economic Perspectives 25, 36
[3986] Namely, that the low levels of audit should lead to greater levels of noncompliance than exist in practice, if not for the influence of other factors, ibid. see also, L Lederman, 'The Interplay Between Norms and Enforcement in tax Compliance' (2003) 64(6) Ohio State Law Journal 1453, 1457-58.

sociological and psychological factors influencing tax compliance.[3987] This has led to recognition of the benefits of a cooperative enforcement approach,[3988] and to the development of graduated enforcement models.[3989] However, as Freedman notes, cooperative enforcement models based on copious levels of discretion may violate the rule of law, if not accompanied by sufficient legal safeguards.[3990]

Fewer studies have attempted to measure the differential impact of criminal prosecutions and civil penalties on noncompliance.[3991] Devos found that criminal penalties do not have a direct effect on tax non-compliance,[3992] while Feld and Frey find that punishing serious cases of evasion had more of an impact than prosecuting minor cases.[3993] Researchers such as Levi and Leighton have suggested that more prosecutions may be necessary to deter tax evaders, if only for the increased perceptions of social justice they provide.[3994] On the other hand, Leighton warns that too many prosecutions may have the opposite effect, leading to taxpayer 'revolt'.[3995] Indeed, this seen in the backlash against IRS efforts to increase the number of prosecutions in the 1980s,[3996] although such a reaction may not be seen outside the US, a country where 'anti-tax sentiment has a cultural resonance.'[3997] De la Feria has emphasised the dangers of the UK

[3987] For a review see, M Pickhardt, A Prinz, 'Behavioural Dynamics of Tax Evasion – A Survey' (2014) 40 Journal of Economic Psychology 1; T Ritsatos, 'Tax Evasion and Compliance; From the Neo Classical Paradigm to Behavioural Economics, A Review' (2014) 10(2) Journal of Accounting & Organizational Change 244; A Lewis (ed), *Psychology and Economic Behaviour* (CUP, 2008); E Kirchler, *The Economic Psychology of Tax Behaviour* (CUP, 2007)

[3988] For a review, see J Alm, E Kirchler, S Muehlbacher, 'Combining Psychology and Economics in the Analysis of Compliance: From Enforcement to Cooperation' (2012) 42(2) Economic Analysis and Policy 133

[3989] Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, 2003); Incorporating regulatory theory, including the theory of responsive regulation developed by J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press 1985); I Ayres, J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992); J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 UBC L Rev 475; see also V Braithwaite (ed), *Special Issue on Responsive Regulation* (2007) 1 Law & Policy 1

[3990] See J Freedman, 'Responsive Regulation, Risk, and Rules: Applying the Theory to Tax Practice' (2012) 44 UBC Law Review 627

[3991] 'There has been no compelling empirical evidence addressing how noncompliance is affected by the penalty for detected evasion, as distinct from the probability that a given act of noncompliance will be subject to punishment.' J Slemrod, 'Cheating Ourselves: The Economics of Tax Evasion' (2007) 21(1) The Journal of Economic Perspectives 25, 38; M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493

[3992] K Devos, 'Penalties and Sanctions for Taxation Offences in Selected Anglo-Saxon Countries: Implications for Taxpayer Compliance and Tax Policy' (2004) 14 Revenue J 32, 85

[3993] LP Feld, BS Frey, 'Deterrence and Tax Morale: How Tax Administrations and Taxpayers Interact' (2003) 3 OECD Papers (Special Issue on Taxation) 1, 15

[3994] M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493, 508; P Leighton, 'Fairness Matters—More than Deterrence' (2010) 9 Criminology & Public Policy 525, 529.

[3995] Ibid at p.526, citing HM Revenue & Customs, 'Protecting Tax Revenues' (2009) <http://aka.hmrc.gov.uk/pbr2009/protect-tax-revenue-5450.pdf> (no longer available) at p.16

[3996] L Lederman, 'Tax Compliance and the Reformed IRS' (2003) 51 U Kan L Rev 971, 979

[3997] P Leighton, 'Fairness Matters—More than Deterrence' (2010) 9 Criminology & Public Policy 525, 526.

approach of managing, rather than deterring, tax fraud, as undermining voluntary compliance and perpetuating selective enforcement, contrary to the rule of law.[3998] Some studies have highlighted the benefits of publicising penalties,[3999] as well as convictions of tax evaders and the details of those required to pay penalties for serious tax deficiencies.[4000] However, others have argued that publicising tax evasion may have the unintended effect of encouraging others to participate.[4001] There is also contradictory evidence on the utility of tax amnesties, with some studies finding amnesties to be cost-effective options in addressing tax crimes,[4002] and others finding that amnesties reduce overall levels of compliance, particularly if offered on a repeated basis.[4003] Research has also highlighted the negative impact of tax amnesties on perceptions of fairness,[4004] as well as the importance of perceptions of procedural and distributional fairness on voluntary compliance generally.[4005]

Consequently, empirical research provides strong support for selective prosecution policies in addressing tax evasion. In addition, there is evidence to support the UK and US use of tax amnesties to address offshore tax evasion, as well as the subsequent restriction of such

[3998] R de la Feria, 'Tax Fraud and Selective Law Enforcement' (2020) 47(2) Journal of Law and Society 240, 269-270.
[3999] See for instance, T Cranor, J Goldin, T Homonoff, L Moore, 'Communicating Tax Penalties to Delinquent Taxpayers: Evidence from a Field Experiment' (2020) 73(2) National Tax Journal 331; N Gemmell, M Ratto, 'The Effects of Penalty Information on Tax Compliance: Evidence From a New Zealand Field Experiment' (2018) 71(3) National Tax Journal 547
[4000] See for instance, R Perez-Truglia, U Troiano, 'Shaming Tax Delinquents' (2018) 167 Journal of Public Economics 120
[4001] JD Rosenberg, 'The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane' (1996) 16 Va Tax Rev 155, 199; MS Kirsch, 'Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy' (2004) 89 Iowa L Rev 863, 912
[4002] M Gould, MD Rablen, 'Voluntary Disclosure Schemes for Offshore Tax Evasion' (2020) 27 International Tax and Public Finance 805; RC Bayer, H Oberhofer, H Winner, 'The Occurrence of Tax Amnesties: Theory and Evidence' (2015) 125 Journal of Public Economics 70; RC Fisher, JH Goddeeris, JC Young, 'Participation in Tax Amnesties: The Individual Income Tax' (1989) 42(1) National Tax Journal 15
[4003] SV Junpath, MSE Kharwa, LJ Satinbank, 'Taxpayer's Attitudes Towards Tax Amnesties and Compliance in South Africa: An Exploratory Study' (2016) 30 South African Journal of Accounting Research 97; H Sharan Luitel, RS Sobel, 'The Revenue Impact of Repeated Tax Amnesties' (2007) 27(3) Public Budgeting & Finance 19; P Stella, 'An Economic Analysis of Tax Amnesties' (1991) 46(3) Journal of Public Economics 383; AS Malik RM Schwab, 'The Economics of Tax Amnesties' (1991) 46(1) Journal of Public Economics 29
[4004] CM Boise, 'Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty' (2007) 14 Geo Mason L Rev 667, 708; L Lederman, 'The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion' (2012) 57 Vill L Rev 499, 507; A Rechberger, M Hartner, E Kirchler, FK Hämmerle, 'Tax Amnesties, Justice Perceptions, and Filing Behaviour: A Simulation Study' (2010) 32(2) Law & Policy 214
[4005] M Hartner, S Rechberger, E Kirchler, A Schabmann, 'Procedural Fairness and Tax Compliance' (2008) 38(1) Econ Anal Policy 137; K Murphy, 'Regulating More Effectively: The Relationship Between Procedural Justice, Legitimacy and Tax Non-Compliance' (2005) 32 Journal of Law and Society 562; M Wenzel, 'The Impact of Outcome Orientation and Justice Concerns on Tax Compliance: The Role of Taxpayer's Identity' (2002) 87(4) J Appl Psychol 629; KK Chung, 'Does Fairness Matter in Tax Reporting Behaviour?' (2002) 23 Journal of Economic Psychology 771

amnesties owing to diminishing returns on revenue collection, voluntary compliance and perceptions of fairness. However, existing research does not provide a clear answer to the optimal use of civil and criminal sanctions in addressing tax crimes, preventing a true evaluation of the external effectiveness of the UK and US enforcement approaches. This is an area that would benefit from further research. In addition, the relevant literature does highlight important factors in tax compliance that should be reflected in the objectives of a tax evasion enforcement system. Specifically, such a system should endeavour to facilitate voluntary compliance, to collect revenue, to deter future criminal activity and should be applied fairly to all sectors of the population. In this respect, the UK's historic focus on revenue collection was misguided, while its contemporary focus on increasing deterrence by prosecuting low-value cases may have taken place at the expense of deterrence, as well as perceptions of fairness in the system, leading to lower levels of voluntary compliance. In contrast, the US's contemporary focus on egregious cases helps to ensure equity in tax enforcement, as well as revenue collection, but the continuous reduction in IRS funding is likely to have a significant impact on levels of deterrence. As Levi notes, 'the core aspects of the civil versus criminal debate are really policy questions',[4006] for decision makers must decide what balance they wish to strike between these competing objectives. However, this chapter has demonstrated that a successful tax enforcement system needs to consider all of these aims, compliance, deterrence, collection and fairness, rather than pursue one in isolation, as has often been the case in the UK and US.

As a result, the UK's enforcement framework, particularly HMRC's Criminal Investigation Policy and practice, should be amended to reflect the need to balance these objectives. A greater deference to the multiple aims of enforcement, including fairness, should also lead to the rejection of prosecution referral targets based on the quantity, as opposed to the quality, of prosecutions. HMRC should also continue to obtain evidence on the relative costs and benefits of its toolbox of enforcement actions, including indirect benefits such as deterrence. This would enable the fulfilment of these aims to be more accurately informed by evidence than they are at present.

7.6 Conclusion

This chapter has identified and evaluated the policies and approaches adopted in the UK and US towards the enforcement of tax evasion offences. The chapter has demonstrated that there

[4006] M Levi, 'Serious Tax Fraud and Noncompliance' (2010) 9(3) Criminology and Public Policy 493, 508

is a logical rationale for the adoption of selective enforcement policies in each jurisdiction. However, the chapter has also demonstrated that the UK's adoption of a selective enforcement policy, when combined with prosecutorial targets, led to inequitable outcomes. Despite the significant changes in the UK's enforcement policy and approach, a comprehensive evaluation has not been carried out for over twenty years, and is now long overdue. This chapter also explored the use of civil alternatives to prosecution in each jurisdiction, analysing the scope and application of civil investigations and penalties, including the use of tax amnesties. This section demonstrated that, despite being the favoured tool to address tax crimes, both civil penalty regimes suffer from a lack of clarity and simplicity. The final section of this chapter compared and evaluated the enforcement policies adopted in each jurisdiction, using the standards of evaluation put forward by tax compliance literature in a variety of disciplines. Although there is inconclusive evidence on the impact of enforcement actions, this research suggests that an optimal tax enforcement policy should incorporate a number of objectives, specifically, compliance, deterrence, collection and fairness, rather than pursue one in isolation. At present, the UK and US focus on one or more of these objectives at the expense of others, depending on institutional priorities and pressures. This significantly jeopardises the external effectiveness of the UK and US approaches to combatting tax evasion and these objectives should be considered holistically in future.

Chapter 8 – Conclusion

8.1 Introduction

The aim of this thesis was to identify how the law responds to tax evasion in the UK and US, and to evaluate whether it does so effectively, in light of contemporary national and international developments. This thesis has demonstrated the necessity of this endeavour, given the increasing focus afforded to tax evasion at the international and domestic level, as well as the plethora of legislative measures that have been introduced to combat this financial crime as a result. Despite these important developments, this thesis has also highlighted the absence of comprehensive legal research studies pertaining to this financial crime, illustrating the contribution to knowledge made by this thesis. To achieve this research aim, this thesis focused on answering one primary research question - what are the laws and enforcement policies pertaining to tax evasion in the UK and US and are they effective in its prevention? To answer this question, this thesis provided a contemporary account and evaluation of the laws and enforcement policies used to address tax evasion in the UK and US. The results of this evaluation suggest that the UK legal framework and enforcement policy is neither internally, nor externally, effective in combatting tax evasion and comprehensive reform of the UK's approach is long overdue. This comparative study has also demonstrated that significant insights can be gained from the US in improving both the internal and external effectiveness of the UK legal framework. This chapter explores the conclusions reached by this thesis in further detail, highlighting recommendations for reform and summarising the contributions made by this research to the existing body of knowledge.

8.2 The International Anti-Tax Evasion Framework

The first part of this thesis set out to discover the international legal measures that have been developed to combat tax evasion, and to discover whether these measures help the UK and US to detect and address this financial crime. To answer this research question, chapter three examined the pertinent context, specifically, the problems countries face in detecting the concealment of income or assets offshore, the harm caused by this activity, and the role played by secrecy jurisdictions in facilitating this financial crime. This chapter also illustrated the historical reluctance of countries to afford international cooperation in tax matters, in large part owing to the common law Revenue Rule.[4007] In consequence, tax matters were often excluded

[4007] *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 (HL)

from the scope of international agreements providing for cooperation in both civil and criminal matters. While the changing attitude towards tax evasion in many countries prompted the inclusion of tax matters and tax offences in more recent agreements, there are still gaps in the international cooperation framework. This is unfortunate, for comprehensive international cooperation is essential in providing countries with the information, evidence and assistance necessary to combat offshore tax evasion. Chapter three also set the scene for chapter four, which examined the international measures that have recently been developed to address the gaps left in the general international cooperation framework, providing much needed information and assistance in combatting tax crimes.[4008] In this respect, these chapters provide a contribution to knowledge by contrasting the historical reluctance to combat tax crimes with the modern focus on developing extensive cooperation frameworks, providing greater insight into the value of the AEOI in combatting tax evasion in the UK and US.

Chapter four illustrated how the US, through unilateral action, and the UK, through international organisations and multilateral agreements, made significant advances in their ability to detect offshore tax evasion. In evaluating the impact of these agreements in the UK and US, this chapter concluded that the AEOI through the CRS and FATCA could lead to the near eradication of offshore tax evasion, providing that any loopholes are closed and that such information is utilised effectively. Indeed, FATCA and the CRS have already enabled the recovery of significant sums. However, despite these benefits, these agreements also impose significant financial costs, as well as personal costs, particularly on financial institutions and individuals. Unfortunately, little attempt has been made to conduct a cost benefit analysis of the AEOI by either national or international decision-makers, prompting this thesis to call for a comprehensive evaluation.

The second subsidiary research question focused on the relationship between tax evasion and money laundering, enquiring into the incorporation of tax evasion into the international AML framework, as well as UK and US AML legislation. This question was answered in chapter five, which provided an evaluation of the effectiveness and appropriateness of combatting tax evasion using the AML framework. In answering this question, chapter five demonstrated that whereas tax evasion was formerly considered to be a distinct crime, requiring 'a different

[4008] Including FATCA and the CRS. FATCA provisions were originally introduced by the Foreign Account Tax Compliance Act of 2009 (H.R. 3933) and were subsequently enacted by the Hiring Incentives to Restore Employment Act of 2010, Public Law 111-147 (the HIRE Act), which added 26 USC §§1471-1474; OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (2nd edn, OECD Publishing 2017).

methodological approach',[4009] the international AML framework now requires countries to include tax evasion as a predicate offence to laundering.[4010] However, while the UK has long included tax evasion within its AML framework, the US does not strictly include tax evasion as a predicate offence to laundering. Nonetheless, other offences that can be used to prosecute tax evaders are encompassed within the scope of the AML framework, enabling the use of the AML framework to combat tax crimes, but to a more limited extent than in the UK. The comparison of the UK and US AML frameworks illustrated that many benefits stem from including tax evasion as a predicate offence to laundering, specifically, the provision of an additional offence to criminalise the evasion of taxation, as well as those who facilitate this offence. Additionally, the application of the AML framework to tax offences generates vast amounts of intelligence for law enforcement authorities, which can be used to initiate or support investigations into this offence, leading to the recovery of significant sums in evaded taxation and penalties. However, the UK also demonstrates the problems inherent in applying the AML framework to this financial crime, including conceptual and practical obstacles that generate significant costs for those convicted of this crime, as well as the regulated sector and law enforcement agencies. At the same time, the US demonstrates that the failure to include tax evasion as a predicate offence to laundering might not be a decision solely taken by notorious secrecy jurisdictions to facilitate tax crimes, but may also represent a conscious choice to combat this financial crime through a more appropriate legal framework. As a result, chapter five argues that while the AML framework may be externally effective in combatting tax crimes, this amalgamation often causes doctrinal incoherence and negative externalities, rendering the internal effectiveness and appropriateness of applying the entirety of the AML framework to tax crimes questionable.

This thesis offers a unique consideration of both international cooperation and AML frameworks enabling distinctive insights to be made into the detection and prevention of tax evasion. This includes the problems presented by the failure to define tax evasion within international agreements,[4011] which itself reflects the 'ambivalence' expressed in all areas of

[4009] M Menkes, 'The Divine Comedy of Governance in Tax Matters. Or Not?' (2015) 30(6) JIBLR 325, 327

[4010] See for instance, FATF, 'The FATF Recommendations: International Standard on Combatting Money Laundering and the Financing of Terrorism & Proliferation' (2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 25th April 2021, Recommendation 3, Interpretative Note to Recommendation 3 at p.32.

[4011] Including the FATF Recommendations and the transposing EU Directives, 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

tax evasion law and enforcement.[4012] If countries seriously desire to tackle tax evasion, as suggested by international developments, then they should be prepared to set out the scope and contours of the offence that they wish to criminalise and investigate. This again demonstrates the exceptional treatment of tax evasion,[4013] with other financial crimes, such as terrorism financing and bribery, being the subject of multilateral treaties that clearly set out the definition and scope of these offences.[4014] In addition, a persistent theme throughout this thesis has been the continuous introduction of additional measures to combat tax evasion without prior evaluation of previous reforms. For instance, this thesis' examination of both the AML and CRS frameworks has revealed that there has been little reflection on whether there is a need to retain both mechanisms of obtaining information for the purposes of combatting tax evasion. In answering this question, it is important to conduct a cost benefit analysis to determine whether it is proportional to retain both measures. This is important in examining steps taken to combat tax evasion, where enforcement decisions are intertwined with economic considerations.

If tax evasion is considered to be a serious crime worthy of extensive international cooperation, and the CRS is deemed effective in detecting and preventing tax crimes, then the potential harm and costs posed by the CRS would likely be outweighed by its benefits. However, if every jurisdiction commits to, implements and enforces the CRS, there should be little need for tax evasion to be a predicate offence to laundering,[4015] at least for the purposes of the reporting obligation. The primary advantage in retaining both financial intelligence frameworks is that there is no system akin to the CRS to detect domestic tax offences in the UK,[4016] justifying the use of the AML framework, and even when information is obtainable via the CRS, SARs concerning tax evasion will facilitate enforcement by showing authorities where to look in the mass of data generated. However, the fact that there are greater restrictions on powers to obtain

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 [2015] OJ L141/73, Article 3(4)(f), see also Recital 11.

[4012] P Alldridge, *Criminal Justice and Taxation* (OUP 2017) p.91

[4013] On tax exceptionalism, see AG Abreu, RK Greenstein, 'Tax as Everylaw: Interpretation, Enforcement and the Legitimacy of the IRS' (2016) 69(3) Tax Lawyer 493

[4014] For instance, International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197, Article 2; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997, entered into force 15 February 1999) 2802 UNTS 225, Article 1

[4015] P Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave MacMillan 2016) p.71.

[4016] For instance, the UK refused to implement a central register of bank accounts and instead implemented a retrieval mechanism for the purposes of 5MLD, The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511, Regulation 6 adding Regulation 5A to the 2017 Regulations. In addition, HMRC does not obtain information automatically, but rather, must obtain information concerning domestic bank accounts using the powers discussed in chapter 7.

information on domestic financial accounts, owing to privacy concerns, lends significant weight to arguments around the detrimental impact of the CRS. If the CRS is considered too costly, either in personal or financial terms, it may need to be abolished. In this case, if all jurisdictions prescribed tax evasion as a predicate offence to laundering, SARs would be submitted whenever tax offences are suspected, providing valuable intelligence to national authorities. Although this arrangement would not catch as many instances of tax evasion as the CRS, infringements of privacy and data protection are more proportionate when there is at least a suspicion that an offence has been committed.[4017] However, this arrangement would necessitate full cooperation by FIUs and a return to the former international tax standard, the exchange of information on request, so that authorities may follow up SARs by obtaining further information. This could be coupled with a more restricted form of automatic exchange, as in the past.[4018] It is highly unlikely that the CRS will be abolished, or that the AML system will be reformed to exclude tax evasion, owing to the significant expense incurred and the benefits that have been obtained. Yet, it is important to consider areas of overlap in further detail to provide greater protection for individuals, as well as greater efficiency savings for tax authorities and other LEAs. There is also a need for further research exploring the use other LEAs could make of data collected for the purposes of combatting tax evasion, including the cooperation provided by tax authorities to other LEAs, multiplying the benefits that could be gained from the expansive and expensive cooperation frameworks.[4019]

8.3 The Domestic Anti-Tax Evasion Frameworks

Chapter six identified the legislative responses to tax evasion in the UK and US and provided a doctrinal, or internal, evaluation of their effectiveness, analysing their clarity, consistency and applicability. While the UK and US appear to have comprehensive criminal law frameworks pertaining to tax evasion, applying to both the individual and corporate perpetrators and facilitators of this financial crime, this chapter identified key weaknesses in the UK's approach to criminalising tax evasion. Specifically, the UK has enacted a patchwork of broad, overlapping and, at times, unjust offences often pertaining to specific types of

[4017] Here, the limitation on the right to privacy and data protection is more likely to be 'limited to what is strictly necessary' Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] OJ C 398, para. 93.
[4018] See Chapter 4, pp.
[4019] The importance of cooperation in this area was recently illustrated by allegations that HMRC did not cooperate sufficiently with intelligence services allowing the proceeds of VAT and benefit fraud to be channelled to terrorists. SE Williams, '£80m of British Taxpayers' Money 'Funnelled to Al-Qaeda' in Decades-Long Scam' (The Telegraph, 31 March 2019) <https://www.telegraph.co.uk/news/2019/03/31/80m-british-taxpayers-money-funnelled-al-qaeda-decades-long/> accessed 25th April 2021.

taxation, while continuing to rely on an over expansive common law offence to prosecute tax crimes, which retains a maximum sentence of life imprisonment. In addition, the form of *mens rea* employed for tax evasion offences in the UK, or more specifically, the tests formulated for its ascertainment,[4020] has hindered the prosecution of tax evasion offences owing to the lack of clarity and certainty surrounding the use of the term dishonesty. Moreover, the UK's approach to attributing liability to corporations for criminal offences is in need of reform.[4021] The current approach sets the attribution threshold too high and has hindered the prosecution of corporations that have been culpable in facilitating egregious crimes by UK tax evaders.[4022]

This thesis has attempted to gain insights into the utility of the laws and enforcement policies pertaining to tax evasion in the UK by comparing this legal framework to its counterpart in the US. This has enabled this thesis to provide a more significant contribution to knowledge, by not only identifying the weaknesses in the UK framework, but also, by providing insights into how these weaknesses can be overcome. For instance, the US demonstrates the benefits of enacting a 'complete criminal code' pertaining to tax evasion,[4023] employing different sanctions and labels for different categories of offending, as opposed to the type of tax evaded. Through this approach, the US is also able to differentiate between culpable acts and omissions pertaining to tax evasion; a distinction that is not reflected in the UK framework. In addition, the US provides insights into the benefits that would be gained from providing a definition of dishonesty for the purposes of tax evasion offences, whether of legislative or judicial origin. In this respect, decades of US judicial decisions defining the scope and contours of the term willfullness have provided a higher level of clarity in regards to the ambit of tax crimes, facilitating criminal prosecutions and providing greater protection to the constitutional rights of taxpayers.[4024] Moreover, the US approach to attributing criminal liability to corporations,

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[4020] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, confirmed in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7, modifying the test set out in *R v Ghosh* [1982] 1 QB 1053 (CA)

[4021] *Lennard's Carrying Co Ltd v Asiatic Petroleum* [1915] AC 705 (HL); *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL)

[4022] For instance, HSBC (Suisse) is alleged to have actively assisted UK taxpayers to conceal their wealth in offshore accounts, see D Leigh, J Ball, J Garside, D Pegg, 'HSBC Files Show How Swiss Bank helped Clients Dodge Taxes and Hide Millions' (Guardian, 8 February 2015) <https://www.theguardian.com/business/2015/feb/08/hsbc-files-expose-swiss-bank-clients-dodge-taxes-hide-millions> accessed 25th April 2021.

[4023] G Szott Moohr, 'Tax Evasion as White Collar Fraud' (2009) 9 Houston Business and Tax Law Journal 208, 209; US tax evasion offences were 'calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.' *Spies v United States* 317 US 492, 497 (1943).

[4024] *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Trevino*, 419 F.3d 896, 901 (9th Cir. 2005)

the respondeat superior doctrine, is far more effective than the identification doctrine in the UK. This can be seen in the significant actions taken by the US against corporate facilitators of financial crimes, including tax evasion.[4025] The UK has already taken inspiration from the US in improving its ability to address companies that fail to prevent tax evasion, enacting a more expansive criminal offence,[4026] and making use of DPAs to resolve corporate malfeasance.[4027] However, the US comparison yet again provides more detailed insights by demonstrating the need for the UK to rectify the problems inherent in the wider identification doctrine, as opposed to enacting a limited statutory offence that often fails to appropriately label the offending conduct.

8.4 Enforcement Policies and Approaches

This thesis also aimed to provide an external evaluation of the laws pertaining to tax evasion in the UK and US, examining the extent to which they achieve their aims in practice. Accordingly, it was essential for this thesis to also consider the enforcement policies and approaches used in these jurisdictions, which often negate the use of criminal offences. This objective was achieved in chapter seven, which provided a comparison and evaluation of the investigative powers afforded to tax authorities to combat tax evasion in the UK and US, as well as the factors influencing the decision to conduct a criminal as opposed to civil investigation. The chapter also identified the role of tax authorities in the prosecution decision, how this decision is made, as well as the number and type of prosecutions undertaken in practice. This was followed by a consideration of the rationale behind the use of selective enforcement policies in the UK and US, as well as an evaluation of their outcomes. Using tax compliance research from a variety of disciplines, as well as official statistical data and reports, this chapter found that there is significant empirical support for the use of selective prosecution policies for the purposes of addressing tax evasion. However, this chapter also found that the UK's adoption of a selective enforcement policy, when combined with prosecutorial targets, led to inequitable outcomes. Indeed, the UK's enforcement policy and approach has altered significantly over the past twenty years, making increasing, then decreasing, use of the criminal justice system in combatting tax crimes. This thesis makes a significant contribution to

[4025] See for instance, the US Swiss Bank Program, discussed in chapter 6, Department of Justice, 'Swiss Bank Program' (Announced 29 August 2013) <https://www.justice.gov/tax/swiss-bank-program> accessed 29th March 2021
[4026] Criminal Finances Act 2017, ss.45-46
[4027] Crime and Courts Act 2013, s.45, Schedule 17.

knowledge by carrying out an evaluation of the UK's enforcement policy and approach, in light of these fundamental changes and in the absence of an official evaluation.[4028]

The results of this evaluation demonstrated that the UK and US enforcement powers, policies and penalties are effective in collecting revenue. There is also strong evidence to suggest that both prosecution and civil penalties have a deterrent impact. Nevertheless, neither HMRC, the IRS, nor other tax compliance experts, have been able to determine the optimal relative use of enforcement actions.[4029] Despite this inconclusive evidence, the existing body of empirical research suggests that an optimal tax enforcement policy should incorporate a number of objectives, specifically, compliance, deterrence, collection and fairness, rather than pursue one in isolation. In contrast, this thesis found that the UK and US focus on one or more of these objectives at the expense of others, depending on institutional priorities and pressures. As a result, the UK and US enforcement frameworks cannot be said to be truly effective in combatting tax evasion at present. Moreover, even though civil investigations and penalties were found to be the preferred tool by UK and US tax authorities to combat tax crimes, this chapter demonstrated that both civil penalty regimes suffer from a lack of clarity and simplicity. The UK has taken some steps to modernise and simplify this framework, but some areas of overlap and redundancy remain necessitating action. In addition, while it is positive to see that the UK has recently consulted on measures to improve its tax administration framework, the enforcement of tax evasion offences should be the focus of its own comprehensive evaluation.[4030]

Ultimately, in answering the central research question, this thesis argues that the UK legal framework and enforcement policy is neither internally nor externally effective in combatting tax evasion and a comprehensive reform of the UK's approach is long overdue. Significant insights can be gained from the US in improving both the internal and external effectiveness of this framework.

[4028] HMRC's criminal investigation policy was last subject to a comprehensive review by the Keith Committee, see Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983)

[4029] For instance, in 2019, The National Audit Office concluded that HMRC know 'its compliance work has a deterrent effect but not whether one type of activity is a more effective deterrent than another', National Audit Office, *HM Revenue & Customs: Tackling the Tax Gap* (HC 2019-21 372-I) p.41.

[4030] HM Revenue & Customs, 'The Tax Administration Framework: Supporting a 21st Century Tax System: Call for Evidence' (23 March 2021) <https://www.gov.uk/government/consultations/call-for-evidence-the-tax-administration-framework-supporting-a-21st-century-tax-system> accessed 13th April 2021.

8.5 Summary of Recommendations

This thesis provides several recommendations for the UK, which would improve the internal and external effectiveness of its anti-tax evasion legal framework and enforcement policy. First, the UK should reform its patchwork of offences pertaining to evasion, replacing it with a coherent US style system, which focuses on the conduct involved, as opposed to the particular type of tax evaded. As in the US, it would also be useful for the UK to distinguish between culpable acts and omissions. Second, the UK should define dishonesty, or enact an alternative form of *mens rea*, in the hope of providing similarly levels of clarity to that seen in the US through judicial interpretation of the term willfullness. Reform would simplify and clarify the nature and scope of the offence of tax evasion, improving its foreseeability and certainty, itself providing greater adherence to the rule of law.[4031] This is imperative considering the dramatic advances that have been made in obtaining information and evidence for the purposes of combatting this financial crime. Moreover, reform would itself help to establish standards in society, supressing ambivalent attitudes and approaches to tax evasion, in a similar manner to that achieved by the Fraud Act 2006 for the offence of fraud.[4032]

Second, the UK should conduct a comprehensive evaluation of the investigation powers and enforcement policies pertaining to tax crimes, with a particular focus on the use of prosecution and civil penalties. This is long overdue, considering the momentous transformation in tax evasion enforcement over the past twenty years. The review should consider how all of the objectives underpinning a successful enforcement approach, specifically, compliance, deterrence, collection and fairness, can be reflected in enforcement policies and practices. At the very least, this will require the rejection of enforcement policies based on the volume, as opposed to the value, of criminal prosecutions. Focusing on these objectives holistically, rather than focusing on one objective at the expense of all others, as is the case at present, will improve both the internal and external effectiveness of the enforcement of tax laws in the UK. In addition, the enforcement of the failure to prevent tax evasion offence should be addressed

[4031] A Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 LQR 606, 615-6; T Bingham, *The Rule of Law* (Penguin Books, 2011) p.46-7; J Raz, 'The Law's Own Virtue' (2019) 39(1) OJLS 1,3

[4032] See for instance the comments of Page, prior to the enactment of the Fraud Act 2006, which remind the author of the evolving position regarding tax evasion offences in the UK. 'The legislature has managed to avoid reform on a fundamental, substantive level since the early 'eighties. This is probably because fraud is still relatively new as a crime, so society maintains a slightly ambivalent attitude towards it. There is a residual tendency to subscribe to the view that if a conman is clever enough to find some greedy fools to rip off, then good luck to him'. F Page, 'Defining Fraud: An Argument in Favour of a General Offence of Fraud' (1997) 4(4) JFC 287, 306.

within HMRC's criminal investigation policy to ensure consistency in the application of the law to the facilitators of tax crimes.

8.6 Further Research

While this thesis endeavoured to provide a comprehensive evaluation of this topic, several issues were too large to examine within the scope of this work, warranting their own comprehensive study. For instance, technological innovation has dramatically altered the work of tax authorities, providing both benefits and challenges. On the one hand, technological innovation has exacerbated the issues inherent in detecting tax evasion, with criminals making increased use of innovative payment methods to conceal income and assets from tax authorities. For instance, cryptocurrencies have been branded 'the weapon-of-choice for tax-evaders', owing to the levels of anonymity and independence from financial institutions they provide.[4033] In addition, owing to technological innovation, new sectors of the economy, such as the gig and sharing economies,[4034] have developed that are particularly conducive to facilitating tax evasion and non-compliance.[4035] On the other hand, HMRC has begun to use technological innovation to its advantage. For instance, HMRC has responded to the risks posed by the sharing economy, by imposing joint and several liability for VAT on online market places.[4036] The Making Tax Digital project has also recently been introduced, which requires businesses to use certain software to maintain digital records and submit tax return data for the purposes of VAT.[4037] HMRC claim that the project will reduce the level of error and non-compliance in the system, enabling HMRC to more efficiently detect and address

[4033] O Marian, 'Are Cryptocurrencies Super Tax Havens?' (2013) 112 Mich. L. Rev. First Impressions 38, 38.
[4034] 'Both the gig and sharing economies are defined as enabling individuals (but also businesses) to offer their resources on very flexible terms to a whole world of potential customers that they would not have been able to reach economically in the pre-digital age.' R Asquith, 'The Gig and Sharing Economies: Millions of New Entrepreneurs; Billions in Lost VAT' [2020] BTR 5, 7
[4035] HMRC determined 'the extent of online VAT fraud and error by non-EU sellers in 2015-16 to be in the range £1 billion to £1.5 billion', National Audit Office, *HM Revenue & Customs Investigation into Overseas Sellers Failing to Charge VAT on Online Sales* (HC 2016-17, 1129-I) p.19.
[4036] Finance Act 2018, s.38, amending Value Added Tax Act 1994.
[4037] Finance (No. 2) Act 2017, s.62. The Value Added Tax (Amendment) Regulations 2018, SI 2018/261. HM Revenue & Customs, Making Tax Digital: An Evaluation of the VAT Service and Update on the Income Tax Service' (Budget 2020 Supplementary Document, March 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873574/Making_Tax_Digital_-_An_evaluation_of_the_VAT_service_and_update_on_the_Income_Tax_Service.pdf> p.3

those who evade taxation.[4038] The MTD project will be extended to income tax,[4039] and potentially corporation tax.[4040] These developments have the potential to revolutionise both the commission and detection of tax crimes, necessitating further study by legal researchers.

This thesis has also briefly highlighted the role of whistleblowers in addressing tax crimes, through revealing the extent of wealth hidden in offshore financial institutions, or the anonymous companies established by corporate service providers.[4041] However, for the sake of brevity, the role of whistleblowers, as well as the legal protections and benefits afforded to those who assist tax authorities, has not been explored in depth within this thesis. The decision to forgo an examination of this topic was based on its scope and complexity, again deserving individualised study. While some legal researchers have begun to explore the benefits of affording legal protections to whistleblowers for the purposes of combatting tax crimes,[4042] the important role played by whistleblowers necessitates further study of this legal framework. This thesis has demonstrated the benefits that could be gained from further comparison with the US legal framework.

8.7 Conclusion

Overall, this thesis has established an increased appetite to combat tax crimes, particularly using the tools and methods provided by the criminal justice system, by both international organisations and national governments. These actors have been influenced by the negative public reactions to apathetic law enforcement efforts following notorious tax evasion scandals, as well as the need to recoup revenues following the financial crisis. As a result, many

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[4038] HM Treasury, HM Revenue & Customs, 'Tackling Tax Avoidance, Evasion, and Other Forms of Non-Compliance' (March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785551/tackling_tax_avoidance_evasion_and_other_forms_of_non-compliance_web.pdf> accessed 15th April 2021 at p.8

[4039] Finance (No. 2) Act 2017, ss.60-61. MTD will come into force for income tax in April 2023, see HM Revenue & Customs, 'Overview of Making Tax Digital' (12 November 2020) <https://www.gov.uk/government/publications/making-tax-digital/overview-of-making-tax-digital> accessed 15th April 2021

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[4042] See for instance, CFS Del Mundo, 'How Countries Seek to Strengthen Anti-Money Laundering Laws in Response to the Panama Papers and the Ethical Implications of Incentivizing Whistleblowers' (2019) 40 Nw J Int'l L & Bus 87; AP Dourado, 'Whistle-Blowers in Tax Matters: Not Public Enemies' (2018) 46(5) Intertax 422

countries, including the UK and US, have made significant advances in their ability to detect and address this financial crime. Despite these fundamental improvements, there is 'too much "ad hoccery"'.[4043] In other words, legislation has been enacted to expand the scope and nature of tax investigations and offences, often in response to scandal,[4044] without reflecting on the need to evaluate and systematise the various aspects of the underlying law and enforcement framework. After more than twenty years,[4045] this has recently been recognised by the UK call for evidence on the tax administration framework, which noted that 'fragmentation of legislation hinders confidence in the tax system and makes it particularly difficult for taxpayers and organisations to familiarise themselves with relevant legislation and guidance, resulting in reduced trust, and increased error and non-compliance.'[4046] While this is a positive development, the enforcement of tax evasion offences should not be subsumed within the ambit of a wider study. This topic has been subjected to too many changes, with too little review, to warrant anything less than a comprehensive evaluation. Ultimately, this thesis illustrates that the UK legal framework and enforcement policy is neither internally nor externally effective in combatting tax evasion and a comprehensive reform of the UK's approach is long overdue. Significant insights can be gained from the US in improving both the internal and external effectiveness of the UK legal framework.

[4043] M Gammie, J Kay, 'Taxation, Authority and Discretion' (1983) 4(3) Fiscal Studies 46, 61
[4044] As noted by S Oei, D Ring, 'Leak-Driven Law' (2018) 65 UCLA L Rev 532
[4045] HMRC's criminal investigation policy was last subject to a comprehensive review by the Keith Committee, see Keith Committee, *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983)
[4046] HM Revenue & Customs, 'The Tax Administration Framework: Supporting a 21st Century Tax System: Call for Evidence' (23 March 2021) <https://www.gov.uk/government/consultations/call-for-evidence-the-tax-administration-framework-supporting-a-21st-century-tax-system> accessed 13th April 2021, at p.10.

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