THE WILBERFORCE SOCIETY

Combatting Offshore Tax Evasion after Brexit

Editor: Emil Sondaj Hansen

Writers: Duvessa Bandeen, Juliette Bowen, Mark O’Brien, Will Melling and Zeki Dolen

The Wilberforce Society

Cambridge, UK

www.thewilberforcesociety.co.uk

February 2020

ACKNOWLEDGEMENTS

We are grateful for the helpful comments and advice from Professor Jason C. Sharman, Professor Ronen Palan, Professor Duncan Wigan, and May Hen.

ABSTRACT

In the wake of its departure from the European Union, Britain is in a position to consider and pursue a new strategy towards combatting domestic and global tax evasion. This paper outlines the context for such a strategy, analyses various options for Britain, and makes a series of recommendations. The two key proposals are (1) that the country ought to support the multilateral efforts of the OECD by exerting pressure on the US to join the Common Reporting Standard (CRS), and (2), that it should also use its position to highlight problems with privacy in the architecture of Automatic Exchange of Information (AEI). The paper further sees an opportunity for Britain to be a leading protagonist in the establishment of a Global Asset Registry (GAR) as well as contributing to more global representation and inclusion in tax governance, potentially through the Commonwealth. Lastly, the paper makes a series of recommendations for domestic reform including combatting tax evasion in the City of London by ensuring that Corporate Service Providers (CSPs) have verifiable information about their clients, as well and introducing registers of beneficial ownership in Overseas Countries and Territories (OCTs) through Orders in Council. The paper thus fundamentally argues that a British strategy on tax evasion must be based on multilateralism, reciprocity, transparency and privacy, as well as pay attention to the historical role played by Britain in the development of offshore as a legal category.

EXECUTIVE SUMMARY

Purpose of the Paper

Since the financial crisis of 2007-08, governments around the world have made unprecedented efforts to tackle offshore tax evasion and avoidance. After Brexit, Britain is in a unique position to articulate a new strategy on these matters, since it is no longer bound by the requirements of unanimity of the European Union. The focus of our paper is on offshore tax evasion and avoidance, predominantly conducted by wealthy individuals and multinational companies, as opposed to tax mitigation that is either primarily domestic or within both the spirit and letter of UK tax law.

Historical Context

It is crucial to situate any approaches to combating tax evasion within British historical relations to tax havens, in order to make appropriate contemporary recommendations. British officials, both in the Overseas Territories and in the Foreign and Commonwealth Office, actively encouraged the administrations of these islands to enact tax haven legislation – cutting corporation tax rates and increasing corporate secrecy provisions – as an alternative development strategy.

What Does Britain Leave Behind?

The EU's two major interventions on tax havens - the EU Savings Directive and tax haven blacklist - have had relatively limited effects on tax evasion and avoidance to date. The fact that European law obliges taxation decisions to be unanimous in the Council of Ministers has impaired the EU's ability to take stronger action against tax evasion and avoidance. The UK's overseas territories and the UK itself are likely to face greater EU pressure after Brexit.

Unilateral efforts: Analysis of the US Foreign Tax Compliance Act

While the American FATCA has had some success in curbing tax evasion by US companies and individuals, the costs of compliance for foreign countries and businesses are considerable. While these parties have strong incentives to comply for access to US income sources, the

incentives are clearly weaker for the smaller UK market. A British 'FATCA' is therefore firstly unfeasible due to the UK lack of monetary power, but more importantly because of the problem of FATCA's non-reciprocity as well as the costs involved with compliance.

Multilateral efforts

Having rejected unilateral action in the form of FATCA, the paper proceeds to analyse multilateral efforts.

a) Early Efforts of the OECD

The OECD's early efforts against tax evasion from 1998 to 2002 and tax havens ability to contest the blacklists, show that international reputation and perceived hypocritical approaches to non-interference matters, so a British strategy towards tax evasion must take this into account.

b) Contemporary Efforts of the OECD

The OECD's automatic exchange of information standard and the Common Reporting Standard ('CRS') has been broadly successful. However, it suffers from the fact that the US, as the only G20 nation, is not committed to the automatic exchange standard. There are also legitimate criticisms of the CRS regarding privacy. More data is shared between participating countries than between private citizens and their domestic authorities.

c) Trends in the Developing World

Any multilateral strategy must pay attention to the dynamics of the wider world economy and this section therefore analyses the approaches to tax evasion among rising economies. Both China and India have implemented stringent unilateral General Anti-Avoidance Rules (GAARs) that have allowed their tax authorities to aggressively pursue cases of multinational corporations avoiding tax, going so far as to ignore the existence of offshore holding companies when assessing whether tax structures and transactions should be classed as avoidance. This has the potential to undermine the position of tax havens and increase the likelihood that they will comply with anti-evasion efforts.

UK Unilateral Domestic Measures

Due to Britain's unique role in global networks of tax evasion, any strategy must be accompanied with a comprehensive analysis about the domestic efforts to combat UK tax evasion. There have been 200 measures introduced in the UK to curb tax evasion since 2010. These measures have recovered £2.9 billion from offshore tax non-compliance since 2010. However, the British Crown Dependencies and Overseas Territories pose difficulties to British efforts at combatting tax evasion. Privacy poses another difficulty for the UK's push to introduce trust ownership registers. The UK has transposed the 5th EU Anti-Money Laundering Directive. This has been severely criticised on privacy grounds. It introduces a blanket measure applying to a wide category of financial assets. The UK must ensure that future efforts to increase tax transparency are proportionate and do not tread on the legitimate privacy concerns of law-abiding citizens.

Policy Recommendations

On the basis of the above analysis, the paper argues that a British strategy on tax evasion must be based on **multilateralism**, **reciprocity**, **transparency** and **privacy**, as well as pay attention to the **historical role** played by Britain in the development of 'offshore' as a legal category. It proposes the following specific recommendations:

a) Pressure on the US to Reciprocate Automatic Exchange of Information

The UK must put more pressure on the US to sign up to the global standard of automatic exchange and the due diligence requirements contained in the CRS. This will not be easy, and it has been noted that many in the US believe that FATCA is a like-for-like replacement for the CRS[1], and therefore that the USA administration does not recognise the need to join global efforts. However, the case must be made that efforts are undermined significantly unless the US adopts the global standard, that increasingly many jurisdictions currently operate under.

[1] Craig Rose, *The Biggest Tax Haven of Them All? The US., FATCA and the CRS*, Bloomberg Law International Tax Blog (29 March 2016), https://www.bna.com/biggest-tax-haven-b57982069147 , Accessed 21 February 2021

b) Addressing Privacy in the CRS

The UK will no longer have to implement Directives after leaving the European Union, and instead it can pursue a reasonable, proportionate and effective regime of transparency. It will have to limit those who can have access to the information to the authorities and ensuring proper data security to avoid the risk of breaches discussed in this paper with regard to privacy and the CRS. Proportionality is key when governments enact measures that conflict with the private rights of their citizens, going forward this should be the key operating principle for new UK policies.

c) Increasing Representation in Multilateral Fora

If no new body for discussing global taxation matters is formed, existing bodies, and especially the OECD, should expand the range of people and groups that it consults when formulating tax policy, so as to be more representative and democratic. The Commonwealth could potentially serve as such an inclusive body for combating tax evasion.

d) A Global Asset Registry

The UK should lead the international campaign for a Global Asset Registry (GAR), a worldwide register of securities that would function like a central depository. A GAR would also allow wealth inequality to be properly measured and understood, ultimately facilitating more effective tax schemes. A GAR requires countries to levy sanctions proportional to the costs that tax havens impose on other countries to force them to relinquish their opacity. The UK has the weight, and now the independence, to levy those sanctions, especially as it has a large internal market.

e) Learning from China and India: Modifying the UK's GAAR

The UK should significantly rework its GAAR, reframing it as an Anti-Avoidance Rule rather than an Anti-Abuse Rule, to bring it more in line with international practice, including the successful examples of China and India. A 'reasonable commercial purpose' test should replace the convoluted and subjective 'double reasonableness' test for assessing

whether a tax arrangement falls within the scope of the GAAR. This would also ensure that the UK GAAR goes further than it does at present in tackling avoidance through the use of tax havens for arbitrage, which is presently excluded from the scope of the GAAR. Moreover, a number of provisions within the GAAR that fundamentally undermine its ability to tackle tax avoidance, from permitting established practices to continue to placing the burden of proof on HMRC, should be removed if it is to be fit for purpose

f) Reform City of London

The UK should ensure that the HRMC have the resources and power to make sure that CSPs in the City of London have verifiable identity about the identities of their clients. A strong symbolic Given that the City of London has played an historically important role in the formation of international tax evasion networks and mechanisms since the 1950s, City of London is an obvious place to start if Britain wants to make a strong symbolic stance against tax evasion, the

g) Reworking Relationship with Overseas Territories (OTs)

The UK should aim to extend future UK anti-tax evasion legislation through Orders in Council to the Overseas Territories, and it should aim to secure the consent of the Crown Dependencies to do the same. However, the UK must be careful as to not overstep its authority in its dealings with tax havens over which it has sovereignty Abusing its position would likely lead to accusations of neo-colonialism or inflame separatist movements, making it more difficult to exert its influence in future. It should therefore changing the ministry responsible for the Overseas Territories. By making them the responsibility of the Cabinet Office, the UK would simultaneously adhere to the wishes of some among the administration of the Overseas Territories and make their administration a matter of domestic concern, potentially increasing the likelihood that domestic legislation is extended to them. This may have the additional advantage of ensuring greater parliamentary scrutiny of their affairs, particularly in relation to facilitating tax evasion, by making them eligible for investigation by a broader range of select committees.

Table of Contents

ACKNOWLEDGEMENTS 1

EXECUTIVE SUMMARY 2

I. INTRODUCTION 8

I.I DEFINING TAX EVASION AND AVOIDANCE 10

I.II BREXIT AND TAX EVASION 16

I.III THE HISTORICAL CONTEXT 22

I.IV THE EU AND TAX EVASION 32

II. UNILATERAL SOLUTIONS 40

II.I FATCA 40

III. MULTILATERAL EFFORTS: 45

III.I. THE EARLY EFFORTS OF THE OECD: 1998-2002 45

III.II THE CONTEMPORARY EFFORTS OF THE OECD 52

III.III TAX EVASION AND THE RISE OF THE DEVELOPING WORLD 62

IV. UK DOMESTIC MEASURES 70

V. RECOMMENDATIONS 77

V.I UNILATERAL RECOMMENDATIONS 78

V.II MULTILATERAL RECOMMENDATIONS 79

V.III DOMESTIC REFORMS 93

VI. CONCLUSION 100

V.II BIBLIOGRAPHY 102

V.III APPENDIX 114

I. INTRODUCTION

The last decade has seen a renewed and unprecedented push against the offshore tax limitation strategies of large corporations and wealthy individuals. The financial crisis of 2007-8, wave of anti-globalist sentiment in the latter half of the 2010s, and singular events such as the Panama paper leaks, have put continual pressure on governments to act to defend their tax base. This paper examines international policies to curb offshore tax evasion, and specifically considers the role and effects on Britain in the wake of its exit from the European Union this year.

The UK has played an historically important role in facilitating offshore banking. To a large extent rooted in the City of London during the 1950s (as part of the formation of the Eurodollar market avoiding British currency controls), offshore tax evasive practices have developed over the last half century. As the British Crown Dependencies, Overseas Territories and former British colonies became involved, a network of offshore centres connected to financial hotspots in Western countries, particularly London, developed.

Globalisation and the democratization of trade has abetted, rather than limited, this network. As the structure of multinational companies has become harder to delineate in the wake of globalisation, so too has the distinction between legitimate economic activity and mendacious tax limitation.

In the wake of the 2007-8 financial crisis, which buoyed public opinion against perceivably abusive financial and multinational companies, politicians looked partly to curbing offshore tax evasion as a way of tackling hefty fiscal deficits. This led to legal innovations, such as 'FATCA' in the US and the OECD's Common Reporting Standards, which have both had some success in reducing the offshore accounts of domestic companies and individuals. These will both be examined.

The paper begins by addressing the definitional and conceptual surroundings of the concept of tax evasion. It then analyses the current foreign policy objectives in the wake of Brexit. After this, the paper situates Britain and its Crown Dependencies and Overseas Territories in the historical development of offshore and tax havens. After having explored the historical connection between the United Kingdom and global tax evasion, the paper moves on to contemporary efforts.

It first examines EU measures to combatting tax evasion, highlighting the limits of the European Commission's approach. After leaving the EU, Britain is therefore at a juncture when it comes to strategies of combatting tax evasion. It can pursue a multilateral or unilateral approach. It must be noted that it has not been possible to investigate the implications of the recent withdrawal deal, since the majority of the paper was written in 2020. We therefore apologise if any specific content of the paper is not consistent with recent events. However, our overall argument for a new strategy towards tax evasion, and our analysis of the principles that should underpin such a strategy, are unaffected by the withdrawal deal.

The paper analyses the merits and shortcomings of the unilateral United States' Foreign Account Tax Compliance Act (FATCA). It then proceeds to analyse the multilateral efforts of the Organisation for Economic Cooperation and Development (OECD). However, any genuinely multilateral effort must pay attention to the dynamics and preferences of the world's rising economies and developing countries. The paper therefore investigates the measures of particularly China and India. Given Britain's role in global tax evasion, we argue that any international effort must be complemented by domestic reforms within the UK. The paper therefore investigates the merits and shortcomings of domestic UK efforts at curbing tax evasion. The paper concludes by offering a series of policy recommendations.

As a final introductory point, at the heart of this paper there is a tension between increasing transparency to tackle international tax evasion and protecting the legal right to privacy for

citizens in these jurisdictions. This issue will be discussed further both in assessing the domestic steps the UK has taken to tackle international tax evasion and in evaluating the success of the OECD's efforts to make the automatic exchange of information the global standard. This tension is unavoidable and runs throughout many of the discussions below. An effective remedy to illegal tax evasion is better information and, in an increasingly globalised economy, that information must be shared between governments if any progress is to be made. However, sharing such information carries risk. As will be discussed below, several scholars have recently raised concerns about whether the efforts to tackle illegal tax evasion are losing sight of what constitutes effective information sharing, and instead are becoming excessive.[2] This paper therefore recognises the need for greater transparency; however, it will be advocating that this greater transparency must be coupled with the principle of proportionality. It is a general feature of individual legal rights that there are exceptions – for instance, the right to free speech and demonstration is always set within the boundary of public order and safety. However, these exceptions are fair and proper. There must be sufficiently good justifications to interfere with the private rights of citizens; sharing information should be encouraged but not without good reason. The excesses of transparency will be critiqued below where they are perceived to be disproportionately overstepping the demarcated boundaries enshrined in the right to privacy (such as has been the case with the 5th EU Anti-Money Laundering Directive – *see section IV*.

I.I DEFINING TAX EVASION AND AVOIDANCE

In the UK, there is no statutory definition of tax avoidance.[3] Despite this, any instance of behaviour to reduce tax liabilities which *is* strictly illegal constitutes tax evasion. This tautological distinction is of little use, however, in delineating the scope of tax reducing behaviours tackled by this paper.

---

[2] For instance, see: Lynne Oats and Penelope Tuck, 'Corporate tax avoidance: is tax transparency the solution?' (2019) *Accounting and Business Research*, 49:5; or Filippo Noseda, 'CRS and Benfifical Ownership Registers: A Call to Action' (2017) 23(5) *Trusts and Trustees* 496

[3] House of Commons Library (Antony Seely), *Tax Avoidance and Tax Evasion*, House of Commons Library (Briefing Paper, Cm 7948, 18th April 2020).

A more useful criteria was given in 2010 by Treasury Minister David Gauke, who drew a distinction between tax evasion, tax avoidance *and* tax planning (in order of decreasing sinfulness):

> "Tax evasion occurs **when someone acts against the law**. Tax avoidance involves **compliance with the letter but not the spirit of the law**, and it is right that the Government seek to minimise that. Tax planning is a case of **acting in both the spirit and the letter of the law**. There is a distinction, although there will be occasions when the line is a little blurred."[4]

Both tax avoidance and tax planning or 'mitigation', involve minimizing one's tax liabilities through legal means. However, the former is supposed to be 'inappropriate' or 'exploitative' in that it 'has tax consequences that were not intended by the legislature'.[5] The distinction between the two clearly hangs on the notion of a 'Parliamentary intention', a concept used by judges in the legal interpretation of statutes.

The range of behaviours that fall under the broad category of tax evasion is very wide indeed. Tax evasion includes, among other things, offences which are often primarily domestic such as:

- Non-reporting of taxable trading income or suppression of trading revenues or failing to file tax returns.
- Importing goods VAT-free, selling them to customers and charging them VAT and then disappearing without accounting to HMRC for the VAT charged – otherwise known and missing trader fraud and its cousin, carousel fraud.
- Claiming to have made tax allowable expenditure on film production or eco-forests to support a claim for a tax allowance but diverting the funds to other uses instead of the claimed purpose.

[4] ibid.

[5] ibid.

- Creation of false invoices to support claims for non-existent expenditure or claiming personal expenditure on home renovations as the expenses of a building trade.
- Failing to declare imported goods or dishonestly understating the value of imported goods in order to evade import duties.
- Using cash or cryptocurrency to carry out taxable transactions in order dishonestly to avoid a traceable record of the trading transaction.
- Assuming the identity of someone else to carry out taxable transactions in their name and then retaining the proceeds and disappearing.[6]

It is also important to emphasize the range of behaviours which are *not* included as tax evasion. For example, the often-cited effective tax rates of multinational companies such as Amazon and Google in the UK are not due to tax evasive behaviour. The UK government does not even classify such low rates as primarily due to tax avoidance.[7]

i. Offshore Financial Centres and Tax Evasion

This paper is primarily focused on large multinational companies and wealthy individuals that make use of offshore tax havens to limit their global tax contribution. While there is no universally agreed definition, tax havens, or offshore financial centres, are generally thought of as countries or jurisdictions that offer low-to-non-existent tax liabilities to foreign individuals and companies.[8] They provide a means to escape domestic tax liabilities, often through maintaining financial secrecy.

---

[6] Patrick Cannon, 'What Are the Penalties for Tax Evasion (UK)?', (*Patrick Cannon: Barrister at law*) www.patrickcannon.net/news/tax-evasion-penalties-uk/ accessed 17 October 2020

[7] Ashley Armstrong, 'Amazon Pays Just £220m tax on British Revenue of £10.9bn' *The Times* (London, 4 September 2019) www.thetimes.co.uk/article/amazon-pays-just-220m-tax-on-british-earnings-of-10-9bn-vv9fwxx52 accessed 17 October 2020.

[8] OECD, 'Glossary of Tax Terms', (*OECD*) www.oecd.org/ctp/glossaryoftaxterms.htm accessed 17 October 2020.

As the Tax Justice Network, a non-partisan think tank, acknowledges, there is a continuum of tax regimes globally ranging from the more onerous to the highly competitive.[9] Where to draw the line is hotly disputed, thus there is no definitive list of tax haven jurisdictions. However, in 1998, the OECD provided a list of four criteria for identifying tax havens[10]:

- No or nominal tax on the relevant income;
- Lack of effective exchange of information;
- Lack of transparency;
- No substantial activities.

These vague criteria still only provide a general indication of the features commonly attributed to purported tax havens. Thus, the OECD's recent focus on BEPS (Base Erosion and Profit Shifting) arrangements more accurately captures the focus of this paper. The OECD defines BEPS as "tax planning strategies that exploit gaps and mismatches in tax rules to make profits disappear for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low resulting in little or no overall corporate tax relief". In addition to tax evasion practices by large multinational and wealthy individuals, we are also interested in assessing measures to curb strategies constituting BEPS arrangements under the OECD's definition.

ii. The Cost to the UK

Most work on estimating the cost of tax evasion and avoidance has focused on the annual loss to government coffers, as opposed to the wider economic and social costs to society. In 2018-19, HMRC estimated the tax gap - "the [annual] difference between the amount of tax that

[9] Tax Justice Network, 'Tax Havens', (*Tax Justice Network*) www.taxjustice.net/faq/tax-havens/ accessed 17 October 2020.

[10] OECD, *Countering Offshore Tax Evasion: Some Questions and Answers on the Project*, (*OECD*, 28 September 2009) www.oecd.org/ctp/harmful/42469606.pdf accessed 17 October 2020.

should, in theory, be paid to HMRC, and what is actually paid."[11] - to be £31bn (4.7% of total tax liabilities of £651bn). £4.6bn was attributed to evasion and £1.5bn to avoidance, for a total of £6.1bn (0.94% of total tax liabilities). Using figures for the tax gap due to large businesses (which are more likely to be multinational) and wealthy individuals produces a similar figure (£7bn, or 1.08% of total tax liabilities). HMRC does not directly estimate the tax gap due to offshore tax evasion, but the Treasury claimed last year that it has raised £2.9bn from tackling offshore tax non-compliance since 2010.[12]

In addition to losses due to intentional tax avoidance and evasion, the tax gap includes: losses due to 'failure to take reasonable care' in preparing or recording tax returns; unknown and untaxed revenue in the 'hidden economy', such as that earned cash-in-hand by a wedding band; and 'criminal attacks' such as smuggling goods like alcohol and tobacco to avoid paying VAT. Table 1.7 details the full set of behaviours covered by the tax gap.[13] The tax gap cannot be eliminated entirely in practice since, because of how 'theoretical tax liabilities' are defined, HMRC cannot, for example, "collect outstanding tax from businesses that become insolvent".[14]

External analysts have claimed that HMRC's estimate both over- and undercounts lost tax revenue each year. For example, Richard Murphy of Tax Research UK, using a far less robust, 'back-of-the-envelope' calculation, produces a much larger (~£90bn) tax gap. Murphy uses macro estimates of revenue from the hidden economy (9.3% of GDP) and applies the average effective tax rate (33.1%) on collected revenue to this figure. The exact breakdown, which creates a total loss of £89.4bn, is as follows:

---

[11] HM Revenue & Customs, *Measuring Tax Gaps 2020 edition: Tax Gap Estimates for 2018 to 2019* (30 July 2020) www.gov.uk/government/statistics/measuring-tax-gaps accessed 17 October 2020.

[12] HM Revenue & Customs & HM Treasury, *No Safe Havens 2019: HMRC's Strategy for Offshore Tax Compliance*, (13 March 2019) www.gov.uk/government/publications/no-safe-havens-2019 accessed 17 October 2020.

[13] HMRC (n 10).

[14] HMRC (n 10).

- Domestic evasion: £66.7bn
- Evasion by the wealthy using offshore: £5bn
- Avoidance: £11bn
- Error: £3.2bn
- Non-payment: £3.4 bn

Still others claim the tax gap is overestimated, in that it "includes legitimate disagreements over legal interpretation, which is a perfectly valid position for them to take".[15]

David Gauke in particular criticised Tax Research's methodology for producing a much larger tax gap figure because (1) it relies on applying the VAT tax gap to lost revenue generally, whereas there are good reasons to think the VAT tax gap is much larger than for other taxes, and (2) double counting is involved, since the VAT tax gap already includes losses due to tax avoidance and tax debt (i.e. income is taxed before VAT on consumption using disposable income).[16]

These criticisms point to damning flaws in Tax Research UK's approach, suggesting it is a gross overestimation of the actual tax gap. However, it is correct to point out that HMRC uses a narrow definition of tax avoidance that excludes "corporate profit shifting by the likes of Google, and losses because of artificial incorporation to save national insurance". As HMRC admits, their estimate of losses due to tax avoidance explicitly excludes "BEPS [Base Erosion and Profit Shifting] arrangements that cannot be addressed under UK law and that will be tackled multilaterally through the OECD"[17]. The admission that such arrangements will be curbed in the future seems to place them squarely in Gauke's egregious avoidance definition, above.

[15] Seely (n 1) p. 12; Donald Drysdale, 'The UK tax gap: A variety of views', (*ICAS*, 15 August 2019) www.icas.com/professional-resources/tax/tax-resources/the-uk-tax-gap-a-variety-of-views accessed 17 October 2020.

[16] Seely (n 1) pp. 15-17.

[17] [17] HMRC (n 10).

The Public Accounts Committee's conclusion from December 2013 provides a balanced summary of the current system:

> "The tax gap is a theoretical concept to assess tax revenues lost to the Exchequer. It does not cover the full amount lost through tax avoidance. It sets out to measure the difference between the amount collected and the amount that should be collected. The stated tax gap underestimates the amount of money lost to the Exchequer … HMRC should be explicit about the limitations of its current measure of the tax gap and gather intelligence about the value of tax lost through aggressive tax avoidance schemes."[18]

HMRC's estimate seems to place a lower bound on the annual cost of offshore tax evasion and avoidance at around 1% of total tax liabilities. However, as noted, this estimate does not account for wider costs to output and society (for example, from criminal activity financed by funds in offshore accounts hidden from relevant authorities). Moreover, even if the annual cost of tax evasion and avoidance to the government coffers is comparatively small, the accumulated losses over many years will be considerable.

Finally, it is important to also note the significant cost to developing countries whose tax-base is being eroded as corruptly acquired money is laundered into secrecy havens[19] Tax evasion and avoidance hence create significant costs both to government and society at large, making an appropriate strategy to combat the issue- domestically and internationally- imperative.

I.II BREXIT AND TAX EVASION

Brexit marks a particularly crucial juncture in British politics for considering new strategies on tax evasion. Brexit has caused a political schism throughout Britain. This, coupled with the

[18] Seely (n 1) p. 19.

[19] Nicolas Shaxson, *Treasure islands: tax havens and the men who stole the world.* Bodley Head, London.2011

growing recession and social unrest caused by Covid-19, has placed a strain on Britain's current domestic politics. Redistributing this burden by initiating more aggressive international financial regulation has helped countries in similar situations. It is now important for the British government to consider new strategies on tax evasion. Furthermore, Brexit means that Britain is now politically and legally in a position to adopt a more aggressive Foreign Policy on Tax Regulation, as the country will no longer be tied to the EU's unanimous decision-making process. It will now have the option to become a more significant agent in the shaping of global tax regulation.

The UK's desire to remain internationally competitive has significantly shaped British foreign policy on tax reform. For decades Britain has carefully adopted specific tax laws and has often avoided enforcing stricter tax regulations to ensure this. Britain's previous support for OECD- and EU-initiated tax reforms has consequently been negligible. In 2011 and 2016, the country withheld its support for the implementation of a Financial Transaction Tax (FTT) and a Common Consolidated Corporate Tax Base (CCCTB) respectively.[20] In addition, although the UK changed its CFC legislation to comply with the EU Anti-Tax Avoidance Directive (ATAD) in 2016, it ultimately refused to support its much more comprehensive Accounting Directive.[21] As a result, on January 22nd 2019, John Christensen recommended to the European Parliament that they increase the UK's secrecy score due to its lack of cooperation.[22]

---

[20] 'The EU Common Consolidated Corporate Tax Base (CCCTB)' (*Tax-News*, 23 June 2015) <https://www.taxnews.com/features/The_EU_Common_Consolidated_Corporate_Tax_Base_CCCTB__572906.html> accessed 12 August 2020.

[21] Mark Bryan and Michael Paterson, 'Controlled Foreign Companies and EU Anti-Tax Avoidance Directive' (*Gov.uk*, 7 November 2018) <https://www.gov.uk/government/publications/controlled-foreign-companies-and-eu-anti-tax-avoidance-directive/controlled-foreign-companies-and-eu-anti-tax-avoidance-directive> accessed 28 August 2020.

[22] John Christensen, 'Impact of Brexit on Tax Havens' (*TaxJustice.net*, 23 January 2019) <https://www.taxjustice.net/2019/01/23/brexit-and-the-future-of-tax-havens/> accessed 10 August 2020.

The current UK Government reaffirmed their commitment to remaining internationally competitive on May 27th 2020.[23] In order to be competitive, however, Britain must remain in the single market. This, coupled with the rising tide of globalisation and an increase in financial losses, means that Britain has had to adopt a newfound willingness to keep up with EU and international standards. The UK's decision to "seek equivalence across all c.40 equivalence regimes, which currently exist in EU legislation"[24] instead of transforming London into a "Singapore-on-Thames" is evidence of this shift in British foreign policy, as is John Glen's declaration that: '[t]he UK recognises the value in continued engagement at multilateral fora and is committed to the development of global standards in areas of common interest'.[25] The existence of bipartisan support for greater tax transparency, demonstrated by the failed Financial Service Bill in 2019[26], is symptomatic of the fact that international interest in tax regulation is aligning more closely with British interests than before. Following the UK's exit from the EU on the 31st of January 2020, the UK entered the transition period, agreed as part of the Withdrawal Agreement between the UK and EU. The transition period is due to end on the 31st of December 2020. It is in both parties' interests to agree upon a withdrawal agreement before this period comes to an end.

The EU's decision to place the Cayman Islands on its tax haven blacklist was both a warning, indicative of the EU's fears that Britain would significantly deregulate its tax laws post Brexit, and a potential attempt to drive business to Luxembourg.[27] In 2019, the UK's 'corporate tax haven network' was judged to be, by far, the world's greatest enabler of corporate tax avoidance

[23] John Glen, 'Recommendation Letter to Lord Sharkey and House of Lords EU financial affairs sub-committee on financial services post-Brexit' (*Committees Parliament*, 27 May 2020). <https://committees.parliament.uk/publications/1436/documents/13130/default/> accessed 11 August 2020.

[24] ibid

[25] John Glen, 'Recommendation Letter'; Matthew Vincent and Jim Brunsden, 'Top City bosses reject post-Brexit 'Singapore on Thames' (*Financial Times,* 26 February 2020) <https://www.ft.com/content/03c1e302-58a2-11ea-a528-dd0f971febbc> accessed 13 August 2020.

[26] Mark D'Arcy, 'Last Bipartisan Action against British Tax Havens' (*BBC*, 4 March 2019) < https://www.bbc.com/news/uk-politics-parliaments-47445153> accessed 11 August 2020.

[27] Daniel Boffey, 'In wake of Brexit, EU to put Cayman Islands on tax haven blacklist' (*The Guardian*, 13 February 2020) <https://www.theguardian.com/us-news/2020/feb/13/eu-to-put-cayman-islands-on-tax-haven-blacklist> accessed 31 June 2020.

by the Tax Justice Network.[28] Yet, multiple EU state run tax havens, which have higher secrecy scores than the Cayman Islands, have remained off the blacklist for years. Brexit has brought tax regulation to the forefront of foreign agendas. Britain now must be internationally minded when it comes to its self-governance on tax laws.

It is not in Britain's best interest to deregulate its economy. Despite indicating that London could become a low-tax, lightly-regulated economy, the UK government has chosen to seek Equivalence, seeking to implement a similar approach to tax as the EU.[29] Senior City officials now view being co-operative as a requirement to remaining competitive. Equivalence does allow for slight divergence in regulations. FTSE 100 chairman Adrian Montague has advised seeking slight divergence in specific business to promote competitiveness 'within reason'.[30] This is because the cost of equivalence for certain industries is higher than not having EU approval. The UK government, however, has decided 'to seek equivalence across all the c.40 equivalence regimes' on May 27th.[31] This is because UK government modelling suggests that regulatory divergence could cause a £7.9 billion hit to the GDP.[32] Small alterations in British tax regulation may benefit certain sectors, but general tax reform is fiscally irresponsible.

Equivalence requires Britain to co-operate at the same level it has always done. Equivalence does not mean that Britain has to take a more active role in combatting tax evasion. Switzerland and Bermuda also have equivalence deals with the EU, allowing them to access the single market, yet in 2009, Switzerland held an estimated 30% of private wealth hidden in tax havens around the world.[33]

---

[28] Daniel Boffey, 'In Wake of Brexit, EU to Put Cayman Islands on Tax Haven Blacklist' where is the rest of this?

[29] John Glen, 'Recommendation Letter to Lord Sharkey and House of Lords EU financial affairs sub-committee on financial services post-Brexit' (*Committees Parliament*, 27 May 2020) <https://committees.parliament.uk/publications/1436/documents/13130/default/> accessed 11 August 2020.

[30] 'Top City Bosses Reject Post-Brexit 'Singapore on Thames'', (*Financial Times*, February 26 2020) <https://www.ft.com/content/03c1e302-58a2-11ea-a528-dd0f971febbc> accessed 5 August 2020.

[31] John Glen, 'Recommendation Letter to Lord Sharkey and House of Lords EU Financial Affairs Sub-Committee on Financial Services Post-Brexit'

[32] Professor Daniel Wincott, 'UK Internal Market Bill: Risks and Challenges' (*UK and EU*, September 14 2020) <https://ukandeu.ac.uk/uk-internal-market-bill-risks-and-challenges/> accessed 4 August 2020.

[33] 'In the Country Where Tax Evasion is No Crime, Swiss Private Banks are Unrepentant about Siphoning Off Other Governments' Income' (*The Guardian,* February 5 2009) < https://www.theguardian.com/business/2009/feb/05/tax-gap-avoidance-switzerland#:~:text=11%20years%20old ,In%20the%20country%20where%20tax%20evasion%20is%20no%20crime%2C%20Swiss,siphoning%20off%20other%20governments'

Current equivalence negotiations between the EU and UK have ground to a halt over several issues including the issue of its permanence. Currently the EU can withdraw its equivalence ruling within just 30 days if they deem that a state is not maintaining equivalent standards. The current ruling means that UK equivalence could be politicised and could result in significant market instability. To prevent this, the UK has already asked for 'clear and coherent structures' to be put in place 'in the event that equivalence is withdrawn by either party', and for their equivalence ruling to be made more permanent.[34] Although this would be beneficial to the UK, permanence is not feasible. The EU's chief Brexit negotiator, Michel Barnier, said that equivalence would neither be 'global nor permanent', operating under the belief that if equivalence is made more permanent, Britain will be able to relax its regulations.[35] Equivalence might not legally bind Britain into taking a more active role in the EU's endeavours to combat tax evasion, but if Britain were to indicate its continued interest in maintaining international standards it would fortify its position in trade negotiations.

Although the UK demonstrated its commitment to keeping up with financial global standards by promising to implement the remaining Basel 3 reforms in 2019, the recent UK internal market bill proposal undermines this good will, despite its attempt to safeguard the British economy.[36] The internal market bill undermines two previously agreed upon points in the withdrawal agreement, specifically concerning aid to Northern Ireland. This has only increased tension and mistrust between the UK and the EU during the current trade negotiations. If this bill is passed, Britain will lose its international moral high ground. Brussels' threats to take legal action against the UK should also be taken seriously, even if it is not in the EU's best interest. Evidenced by the fact that Michel Barnier, on September 22nd, claimed that he would try to

%20income&text=Swiss%20bankers%20themselves%20estimate%20that,in%20the%20world's%20tax%20havens.> accessed 14 August 2020.

[34] John Glen, 'Recommendation Letter to Lord Sharkey and House of Lords EU financial affairs sub-committee on financial services post-Brexit' is there more to this reference?
[35] 'Top City bosses reject post-Brexit 'Singapore on Thames'', (*Financial Times*, February 26 2020) <https://www.ft.com/content/03c1e302-58a2-11ea-a528-dd0f971febbc> accessed 5 August 2020.
[36] 'Queen's Speech 2019' (*Gov.uk,* 14 October 2019) <https://www.gov.uk/government/speeches/queens-speech-2019> accessed 20 August 2020.

secure a trade deal before the 'realistic deadline' of October 31st.[37] An equivalence ruling, thus, benefits both parties.

Britain's stance towards tax evasion is largely governed by its desire to remain financially competitive. Currently, remaining competitive requires a fine balance between divergence and international co-operation. British foreign policy currently aims to maintain the tax regulation status quo to retain access to the single market. It is, however, in Britain's best interest to participate more actively in international attempts to combat tax evasion. Brexit, in conjunction with Covid-19, has placed British domestic politics under considerable strain. A government's willingness to propose and create international institutions is motivated by its domestic politics, not solely international pressures.[38] The US' promotion of the Basel reforms provides a ready example of this. Countries become more actively involved in international regulation when they cannot shift the tax burden onto the working class, who are not in a position to suffer any more fiscal losses, and when there is potential for redistributive co-operation so that their costs burden can be shouldered by others.[39] Britain is currently in this position and should consider altering its stance on tax evasion. Furthermore, Brexit means that Britain has the autonomy to effect this international change.

Britain is now politically and legally in a position to adopt a more aggressive foreign policy on Tax Regulation and has the incentive to do so. As Britain will no longer be tied to the EU's unanimous decision-making process, it will have the capacity to be a more significant agent in the shaping of global Tax Regulation should it choose to. It is in this political context that the paper will examine the opportunities and prospects for British engagement with global tax evasion. There are broadly two approaches that Britain can take, multilateral or unilateral. Before analysing the cases of the EU, OECD and US, the paper first examines Britain's historical role in the development of offshore and global tax evasion. This is crucial to understand Britain's contemporary position in the global network of tax evasion.

[37] Top City Bosses Reject Post-Brexit 'Singapore on Thames'', (*Financial Times*, 26 February 2020)
[38] Thomas Oatley and Robert Nabors, 'Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord" (1998) 52 *International Organization* 35.
[39] Lukas Hakelberg, 'Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power' (2016) 23 *Review of National Political Economy* 3.

I.III THE HISTORICAL CONTEXT

A glance at the Tax Justice Network's 2019 Corporate Tax Haven Index reveals a substantial association between Britain and the offshore financial centres that have become notorious sites of tax evasion. Of the top ten tax havens listed, including the top three, four are British Overseas Territories or Crown Dependencies.[40] The same organisation's Financial Secrecy Index has the Cayman Islands, an Overseas Territory, as the most financially secret jurisdiction.[41] This connection is sufficiently strong that activists and academics have taken to labelling the network of offshore financial centres extending outwards from the City of London a 'second British Empire'.[42] Taken together, in 2009 they accounted for 31% of all outstanding international loans, adding former colonies that are now fully independent takes the total to 40%.[43] This framing is particularly apt in light of the history of the first major expansion of tax havens in the late 1950s, and the crucial role played by the British state in facilitating it. Although Britain later abandoned the policy of promoting the development of tax havens in its colonies and subsequently took part in international efforts to curb tax evasion, its approach has not proven unproblematic. In order to understand possible contemporary British strategies for combatting tax evasion, the historical link between Britain and its expansion offshore must first be examined.

i. The British Empire and Regulatory Evenness

[40] 'Corporate Tax Haven Index - 2019 Results' <https://corporatetaxhavenindex.org/en/introduction/cthi-2019-results> accessed 28 August 2020.

[41] 'Financial Secrecy Index - 2020 Results' <https://fsi.taxjustice.net/en/introduction/fsi-results> accessed 28 August 2020.

[42] R Palan, 'The Second British Empire: The British Empire and the Re-Emergence of Global Finance' in S Halperin and R Palan (eds), *Legacies of Empire Imperial Roots of the Contemporary Global Order* (Cambridge University Press, 2015) <https://openaccess.city.ac.uk/id/eprint/12698/> accessed 28 August 2020.

[43] Ronen Palan, 'International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics' (2010) 11 *Theoretical Inquiries in Law* 149.

Tax havens existed before the 1950s. They initially emerged as a response to the increasing permanence of income taxes, with Switzerland leading the way by the 1930s due to its strict principle of bank secrecy.[44] In the late nineteenth and early twentieth centuries, the British Empire was characterised by regulatory 'unevenness', where different jurisdictions, even within the same empire, often had differing tax and regulation policies.[45] Colonies, for example, would frequently offer considerably lower income tax rates to attract potential settlers from the metropole. This opened up possibilities for individuals and companies to exploit these differences. Individuals could claim non-domiciled status, arguing that they were merely present in the UK for work purposes and for purposes of taxation were resident in other, lower-tax jurisdictions.[46] At the same time, companies could exploit a loophole created by two court cases in 1906 and 1929, that established the principle that they would be taxed not where they were registered but where real control over the company's operations was exercised, by moving their headquarters to jurisdictions with lower corporation tax.[47] The Bahamas, among other low tax jurisdictions, would go on to exploit this. In 1955 its government allowed Wallace Groves to establish a free port under his control which was permitted to license companies and waive taxes for companies active in the port for up to 30 years after their establishment.[48] This even lighter fiscal and regulatory touch stood to attract companies seeking to minimise their tax obligations through avoidance and evasion. The structure of the empire thus stood at the heart of the early development of tax havens as we know them today.

[44] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010), 115-123.

[45] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 *The American Historical Review* 1431.

[46] Vanessa Ogle, '"Funk Money": The End of Empires, The Expansion of Tax Havens, and Decolonization as an Economic and Financial Event' [2020] Past & Present gtaa001. What is gtaa?

[47] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010) 112-5.

[48] Ogle (n 6).

The empire was also central to the early growth of tax havens by providing them with their initial clientele, who sought the secrecy and favourable fiscal conditions that they offered. An analysis of the early business conducted by one of the first trust companies to establish itself in the Bahamas after Groves' acquisition, shows that a considerable proportion of its business came from within the Empire. 39% of the clients of the Bahamas International Trust Company (BITCO) in the years from 1958-63 were from British colonies, with 17% from East Africa alone.[49] Their interest in the services offered by tax havens was directly related to the Empire, or more specifically its demise. From 1960, fears of decolonisation sparked by the Mau Mau rebellion and Congolese independence led wealthy settlers in Kenya to liquidate their assets, for fear of dramatically increased taxes or even asset seizures if, and when, Kenya was to become independent. Rather than send these assets to metropolitan Britain, however, and incur a considerably higher level of taxation than they were used to, or indeed prepared to accept, these settlers entrusted their funds and assets to Bahamian discretionary trusts provided by companies such as BITCO or Arawak, even as they prepared to return to live in Britain. These trusts enabled the evasion of taxes in Kenya, Britain and the Bahamas while also shrouding in secrecy the identity of the beneficial owner of the trust should postcolonial governments come looking for missing assets.[50]

ii. The City of London and the Euromarket

The regulatory quirks of the empire, therefore, created the conditions that enabled the emergence of modern tax havens and the demise of the empire created incentives that pushed people to make use of them for the purposes of tax evasion. The traditional starting point for their subsequent, substantial stage of development, however, is the emergence of the Euromarket in the City of London in the late 1950s.[51] This was the burgeoning trade in dollars (Eurodollars) and dollar-denominated bonds (Eurobonds) outside of the jurisdiction of the United States and hence the US ability to enforce the reserve requirements and cap on interest rates that it had imposed domestically. The first Eurodollar transactions are traditionally held

[49] Vanessa Ogle (n 7).

[50] ibid.

[51] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010), 135.

to have been made in the City of London in 1957, between foreign companies and British merchant banks. The latter had been hit particularly hard by tightened restrictions on the use of sterling in foreign trade between third parties. They therefore sought alternative sources of finance. These transactions in foreign currencies did not fall under British currency controls because these did not apply to transactions between non-residents. As a result, and with the Bank of England taking no actions to curb or regulate this developing market, they effectively took place in an entirely unregulated offshore space. It meant that British merchant banks could offer more favourable interest rates on dollar deposits than American banks in the US and could operate with effectively no reserve requirements. As a result, American banks opened branches in London in the late 1950s and 1960s, in order to try to make most of the influx of dollar denominated currency trade and spurred on by a number of newly introduced US regulations.[52] This abundance of Eurodollars in turn paved the way for the issuing of Eurobonds in this offshore space, removed from the authority of the United States. The City of London became the centre of the offshore financial economy.

The development of the Euromarket spurred the growth of tax havens within the British Empire for a number of reasons. First, because Eurodollar transactions were only unregulated between non-resident banks and companies, British banks were locked out of the Euromarket. In order to access this lucrative market, therefore, British banks set up subsidiaries in tax havens in order to book Euromarket transactions that actually took place in London.[53] Second, these tax havens offered additional advantages to companies. Minimal regulatory oversight and bank secrecy was accompanied by little or no corporation tax on company profits, making them an enticing location even for those banks who were able to participate in the Euromarket out of

[52] Gary Burn, 'The State, the City and the Euromarkets' (1999) 6 Review of International Political Economy 225, 230-1; Ronen Palan, 'International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics' (2010) 11 Theoretical Inquiries in Law 149, 163-4.

[53] Ronen Palan, 'International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics' (2010) 11 Theoretical Inquiries in Law 149, 167.

London.[54] In the case of Caribbean tax havens such as the Bahamas, their relative proximity to the continental United States and similar time zone was another attraction.[55] Indeed, many British Empire tax havens passed legislation in order to make themselves more attractive to companies establishing themselves there in order to participate in offshore finance. The Cayman Islands, for example, only established themselves as a tax haven after they passed a number of laws in 1966 to reduce regulation and increase bank secrecy.[56] As a result, while the City was undoubtedly the centre of the Euromarket, the burgeoning trade led prospective participants to extend networks out from this centre to financial centres in tax havens on the periphery of the declining British Empire. The tax havens in turn responded by making themselves more attractive for companies seeking to evade regulation and taxation.[57]

iii. State Support for the Development of Tax Havens

The development of tax havens was by no means an historical accident. On the contrary, at every stage in this process the British state either tacitly approved or, in some cases, actively promoted it. The emergence of the Euromarket in London was only possible because the Bank of England, in spite of the concerns of the Treasury, refused to regulate these transactions in the hope that their growth would help London regain its past prominence as an international financial centre which it had enjoyed before the slow erosion of sterling's position as an international reserve currency.[58] This desire stemmed partially from the close personal connections between the personnel of the Bank of England and the City's merchant banking community. For example, Sir George Bolton, from 1957 chairman of the Bank of England and South Africa, which by 1960 had dollar deposits of $282 million, had until that point been an

[54] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 The American Historical Review 1431, 1447.

[55] Ronen Palan, 'International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics' (2010) 11 Theoretical Inquiries in Law 149, 167.

[56] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010), 137.

[57] Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010), 149.

[58] Gary Burn, 'The State, the City and the Euromarkets' (1999) 6 Review of International Political Economy 225, 239-243; 248-9.

adviser to the Governors of the Bank of England and subsequently became an executive director.[59] Such ties led the Bank of England to prioritise the interests of British finance over those of industry, an arrangement that has come to be known as the City-Bank-Treasury nexus.[60] The state had an even greater role in the Eurobond market, which only came into being after restrictions were lifted in 1963 and in which British state institutions, such as municipal governments, actively participated. By 1976, 44% of Eurobond issues were for non-US governments, including Britain.[61]

Developments in the tax havens were equally steered by the actions of both local and central government. Local authorities in the overseas territories readily enacted legislation that encouraged companies seeking to avoid regulation and evade tax to incorporate themselves there, in some cases in conversation with those companies themselves. For example, after Price Waterhouse & Co. were hired in 1968 by the Department for Overseas Development to survey Montserrat, the company instead decided to advise the overseas territory on how best to modify its tax legislation to become attractive as a tax haven.[62] Once overseas territories began enacting such legislation, officials in other overseas territories looked to imitate these early examples. The secretary for Financial Affairs in the New Hebrides, at the time the British-French condominium which contained Vanuatu, visited Bermuda and the Cayman Islands in the late 1960s to learn from their approach, leading the territory to enact its own tax haven legislation in 1970 and 1971.[63]

[59] Gary Burn, 'The State, the City and the Euromarkets' (1999) 6 Review of International Political Economy 225, 233-5.

[60] Gary Burn, 'The State, the City and the Euromarkets' (1999) 6 Review of International Political Economy 225, 239-249.

[61] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 The American Historical Review 1431, 1449.

[62] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 The American Historical Review 1431, 1444-5.

[63] Palan (n 4).

Such tax haven legislation generally needed approval from London, and the central government was more than ready to comply. The Overseas Territories and crown Dependencies were the responsibility of the Foreign and Commonwealth Office (FCO), which tended to adhere to a belief that, in the absence of natural resources or industry, the best road to development available to these island states was to become tax havens in order to attract investment and eventually allow them to become self-sustaining.[64] This was a conviction pervasive in the ranks of the British government in the 1960s and into the 1970s.[65] When Harold Wilson was confronted by his Australian counterpart about the development of Vanuatu as a tax haven in 1974, his reply emphasised the 'need to promote the territory's economic development' so that it could become suitable for 'genuine business activity' to take place.[66] Indeed, in some cases the government in London itself passed legislation that, deliberately or otherwise, promoted these burgeoning tax havens' development. This was the case with the Sterling Rescheduling Act 1972, which lifted the tight controls on Channel Island banking activity imposed by the Exchange Control Act 1947 and effectively allowed banks registered in the Channel Islands to participate in the Euromarket, leading to a dramatic increase in the rate of their development as tax havens.[67]

iv. Turning of the Tide

By the late 1970s, however, the idea that encouraging overseas territories to pass tax haven legislation would promote their economic development without becoming a major problem for the British tax base increasingly lost currency within the British administration.[68] The Bank of England, the Treasury and Inland Revenue began to sound warning noises about agreements

[64] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 The American Historical Review 1431, 1441; 1443; 1445.

[65] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 The American Historical Review 1431, 1445.

[66] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 The American Historical Review 1431, 1443-4.

[67] Ronen Palan, 'International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics' (2010) 11 Theoretical Inquiries in Law 149, 170.

[68] Ogle (n 6) 1445.

struck by the FCO, Ministry of Overseas Development and local officials in British dependencies with private individuals and companies which would establish tax havens in overseas territories.[69] The late 1970s and 1980s were defined by the abolition of exchange controls globally in 1979 and the deregulation of finance that saw the dramatic expansion of the offshore sector and, therefore, of tax haven business. Part of the motivation for these measures in the United States came from a desire to win back business from tax havens, and British policymakers came to stop approving specific legislation that would create new tax havens in its overseas territories.[70] The 1980s also saw some changes to the definition of residence for the purposes of corporate taxation and the trust benefits available to residents.[71] Howver, an even bigger shift in British policy towards tax evasion came in the late 1990s, as the UK joined multilateral efforts coordinated by the OECD, to tackle the problems of 'Harmful Tax Competition', and the EU, to establish a Code of Conduct on Business Taxation.[72]

In spite of cooperating on an international level with these efforts to clamp down on tax havens, the UK seems to have remained somewhat wary of taking a hard-lined approach to those tax havens that have existed within its jurisdiction. The Edwards Report on financial regulation in the Crown Dependencies, commissioned by the Home Office in 1998 and published in the same year, is such an example. Although the report does make several recommendations as to how the regulation of companies and financial transactions could be improved, on the whole it is keen to praise the CDs for being in the 'top division' of offshore financial centres and dismisses criticism on the grounds of secrecy and lack of regulation as being 'quite wide of the mark'.[73] This reluctance to deal with tax havens under British rule continued to a greater or lesser extent into the 2010s, with David Cameron writing a letter in 2013 to the President of the European

[69] ibid., 1443–5.

[70] Ronen Palan, 'International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics' (2010) 11 Theoretical Inquiries in Law 149, 170; Ogle (n 66) 1452; 1445.

[71] Palan, Murphy and Chavagneux (n 5) 196–202.

[72] ibid., 210–225.

[73] Home Office, *Review of Financial Regulation in the Crown Dependencies* (1998).

Commission, Herman van Rompuy, arguing that trusts should be exempt from inclusion on public registries of beneficial ownership that the EU was pushing tax havens to adopt.[74]

v. Recent Developments

The decade since the beginning of the Conservative-Liberal Democrat Coalition government has seen the UK continue to participate in international efforts to combat tax evasion. The UK subscribes to the OECD's Common Reporting Standard (CRS) and has conducted Automatic Exchange of Information agreements with 150 jurisdictions, in combination with introducing country-by-country reporting.[75] Moreover, it took early action in the creation of a domestic public register of beneficial ownership of companies (launched in 2016, making it the first in the G20), has taken steps to do the same for properties in the UK controlled by foreign companies, and created in 2017 a non-public register of beneficial ownership of trusts, available to authorities and others with legitimate interests.[76]

Importantly, however, the UK government has increasingly been prepared to introduce more stringent measures that begin to call into question the business model of the tax havens under its rule. This was also a response to multilateral efforts, in this case the EU's Fourth and Fifth Anti-Money Laundering Directives in 2015 and 2018 respectively. The Overseas Territories and Crown Dependencies were encouraged to join the UK in creating company registers and signing agreements to exchange information about the beneficial ownership of companies with the UK, coming into effect in 2017.[77] Although these registers were initially allowed to be kept secret, the UK subsequently passed the Sanctions and Anti-Money Laundering Act (SAMLA) in 2018, which (following bipartisan parliamentary pressure) compelled Overseas Territories to

---

[74] 'PM Letter to the EU on Tax Evasion' (*GOV.UK*) <https://www.gov.uk/government/news/pm-letter-to-the-eu-on-tax-evasion> accessed 2 September 2020.

[75] HM Revenue & Customs and HM Treasury, *No Safe Havens 2019: HMRC's Strategy for Offshore Tax Compliance* (2019) 7–10.

[76] Federico Mor, *Registers of Beneficial Ownership* (2019) 6–12 <https://commonslibrary.parliament.uk/research-briefings/cbp-8259/> accessed 28 August 2020.

[77] ibid., 14–15.

establish public registers of company beneficial ownership by 2023.[78] Although the government successfully resisted calls to extend this requirement to the Crown Dependencies, they subsequently made a public commitment in 2019 to comply with the demands by 2023.[79] This demand for the publication of registers of beneficial ownership has been broadly successful, with even the notoriously secretive Cayman Islands agreeing to do so, although the British Virgin Islands remain resistant.[80]

Although SAMLA owes much to the need to comply with EU rules, the shift in Britain's treatment of the OTs and CDs can be traced back to Brexit. Although CDs and OTs are, by and large, self-governing, because they lack ultimate sovereignty, the Crown and the UK government (respectively) have responsibility for their international relations, defence and, importantly, good governance.[81] Indeed, the UK has intervened in OTs' domestic affairs and imposed direct rule in the past when good governance has been deemed to be under threat, as in Turks and Caicos in 2009.[82] Thus, the UK has a certain interest in promoting and safeguarding the wellbeing of these dependent territories. This was, after all, the motivation behind the FCO's approval of the tax haven legislation passed in several territories in the 1960s and 1970s. In the Brexit referendum, however, these territories' wellbeing was placed second to the interests of the UK. With the exception of Gibraltar, which is a part of the EU, the OTs (although not the CDs) had a special associate status with the EU as a direct result of the UK's membership, the benefits of which include financial aid for economic development.[83] The decision to leave the EU, a referendum decision in which the overseas territories were unable

[78] ibid., 16–17.

[79] ibid., 18.

[80] 'Resist or Reform? Assessing Progress towards Corporate Transparency in the UK's Overseas Territories and Crown Dependencies | Transparency International UK' <https://www.transparency.org.uk/corporate-secrecy-reform-overseas-territories-crown-dependencies-latest> accessed 21 July 2020.

[81] Maria Mut Bosque, 'The Sovereignty of the Crown Dependencies and the British Overseas Territories in the Brexit Era' (2020) 15 Island Studies Journal 151, 154–5.

[82] ibid., 155.

[83] ibid., 156–8.

to vote, has deprived them of this status. Some in the OTs have worried that this has set a precedent for the neglect of their interests in favour of those of the metropole.[84]

In light of this, SAMLA appears less of an isolated incident and more a part of a trend that has caused significant consternation in the OTs. Politicians in those OTs with the biggest offshore financial centres, such as the British Virgin Islands or the Cayman Islands, reacted strongly against the law, accusing the UK of overreaching on a purely financial matter that ought to remain devolved.[85] Indeed, even the Chief Minister of the more compliant Gibraltar labelled it an 'unacceptable act of modern day colonialism'.[86] This, then, is one of the central issues that explains Britain's policy towards tax evasion and tax havens. Britain's initial support was in part a result of the FCO's desire to provide OTs with a viable path to economic development; whereas a 2019 Foreign Affairs Select Committee report on Britain's relationship with the OTs came down strongly in favour of prioritising Britain's 'national security' over the objections of OT politicians.[87] The second half of the 2010s has seen Britain shift towards adopting and enforcing anti-evasion measures, including as they relate to the CDs and OTs. Though Britain must remain wary of overreaching and opening itself up to accusations of neo-colonialism in taking this harder line.

I.IV THE EU AND TAX EVASION

In order to understand the space available for new British approaches to tax evasion, it is important to understand exactly what the UK is 'leaving behind' following Brexit. The paper now turns to the measures that the European Union has implemented in the fight against tax evasion. In recent decades, increasing attention in the EU has been paid to the issue of tax

[84] ibid., 158–159.

[85] House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship*, 13–14.

[86] Hakeem O Yusuf and Tanzil Chowdhury, 'The Persistence of Colonial Constitutionalism in British Overseas Territories' (2019) 8 Global Constitutionalism 157, 158.

[87] House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship*, p 14.

evasion, partly in response to the public interest and outcry generated by events like the Panama Papers in 2016.[88] Two of the EU's actions are particularly noteworthy; the Savings Directive and the Blacklists.

i. The European Union Savings Directive (EUSD) (2003-16)

The Directive took effect in 2005, and aimed to combat tax evasion by obliging member states (and other signatories) to automatically exchange information on interest payments made to residents of another member state.[89] To maintain a level playing field between EU and non-EU financial centres, similar agreements were made between the EU and various other countries (including Liechtenstein and Switzerland), while bilateral treaties were signed between EU member states and their dependent territories (such as the Cayman Islands).[90] Three member states (Austria, Belgium and Luxembourg) instead levied a withholding tax during a transitional period.[91] This tax was generally at quite a low rate[92], with 75% of the revenue generated being paid to the state where the individual was resident.[93] Many of the other signatories to the EUSD, such as Switzerland, also took advantage of this option. The

---

[88] In the EU's most recent action plan on tax evasion, the fact that '74% of Europeans demand more action at EU level to fight tax evasion' is stated as one of the key arguments for intensifying the EU's work in this area (https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12233-Action-Plan-on-fight-against-tax-fraud

[89] 'European Union Savings Directive (EUSD): Exchange of Information and Withholding Tax' (UK Government Website, 4 June 2005), <**https://www.gov.uk/government/publications/european-union-savings-directive-eusd-exchange-of-information-and-witholding-tax/european-union-savings-directive-eusd-exchange-of-information-and-witholding-tax**> accessed 11 November 2020.

[90] 'The end of the EU Savings Directive as from 1 January 2016. Are there any residual effects?' (Deloitte, 16 November 2015) <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/tax/operationaltaxnews/lu_otn-end-of-eu-savings-directive_16112015.pdf.> accessed 11 November 2015.

[91] *'European Union Savings Directive (EUSD): exchange of information and withholding tax'*.

[92] Rolf Macjen, 'European Savings Directive: A challenge for the fund industry' (The Hedge Fund Journal), <https://thehedgefundjournal.com/european-savings-directive/7>, accessed 11 November 2020.

[93] 'Savings Taxation: frequently asked questions' (European Union website, 30 June 2005), <https://ec.europa.eu/commission/presscorner/detail/de/MEMO_05_228>, 11 November 2020.

scope of the EUSD had been expanding (for example, it was modified in 2014 so that AEI also applied to dividends)[94] but, in 2016, the legislation was finally repealed, so as to avoid duplication with the OECD's Common Reporting Standard (CRS). The CRS is a more comprehensive form of automatic information exchange: unlike the EUSD, the CRS also covers other sorts of income, such as sale proceeds. In addition, it applies not only to individuals but also to banks, investment funds, and other financial entities.[95]

ii. Blacklist (Since 2015)

Since 2015, the European Commission has published a list of 'non co-operative tax jurisdictions', i.e., a tax haven blacklist. Three criteria are used for deciding whether a country's fiscal regime makes it a tax haven:

- Tax transparency;
- Fair taxation;
- Commitment to implementing OECD measures which aim to prevent countries from taking each other's tax bases.[96]

Blacklisted countries face additional obstacles in accessing EU funding, while European companies which do business in those countries are required to take extra steps to ensure compliance with EU tax regulations. Some jurisdictions are placed on a 'grey list': this means that they are given time to introduce new laws against tax evasion; if these deadlines are not met, the country is moved onto the official blacklist.[97]

iii. Tax Package (2020)

---

[94] Ulrika Lomas, 'European Savings Tax Directive Repealed' (Tax-News, 15 November 2015), <https://www.tax-news.com/news/European_Savings_Tax_Directive_Repealed____69664.html>, accessed 11 November 2020.

[95] 'Repeal of the Savings Directive in Line with International and EU Developments' (European Union website), <https://ec.europa.eu/taxation_customs/individuals/personal-taxation/taxation-savings-income/repeal-savings-directive-line-with-international-eu-developments_en>, accessed 11 November 2020.

[96] Aija Rusina, 'Name and Shame? Evidence from the European Union Tax Haven Blacklist' [2006], International Tax and Public Finance, 6.

[97] 'EU Puts Cayman Islands on Tax Haven Blacklist' (BBC,18 Feb 2020), accessed 11 November 2020.

In July 2020, the European Commission adopted a new Tax Package, aiming to combat tax evasion but also to reduce administrative burdens for citizens and companies so that they might take full advantage of the EU's single market. The package contains a 'Tax Action Plan for Fair and Simple Taxation', whose own three aims are the following:

- Tackle tax fraud
- Make compliance easier
- Take advantage of the latest developments in technology and digitalisation[98]

On a concrete level, the Action Plan consists of 25 proposals to make taxation simpler, fairer, and more reliable. One of its key proposals is that an information exchange model should be replaced by a system in which tax data can be shared in real time[99]. Also important is the proposal to revise the directive on administrative co-operation (DAC7) so that EU tax transparency rules also extend to include digital platforms: information on the income of digital sellers will be automatically shared between the tax authorities of member states. Again, this is done not only with the aim of regularising tax revenues for EU states, but also because the platforms themselves will no longer be burdened with having to comply with different national reporting requirements.[100] Indeed, the roadmap for the Action Plan argued that multilateral action at the EU level is more effective than unilateral action, partly because 'tax authorities have limited expertise and scarce resources at [a] national level to exploit the massive amounts of new data collected through the new [financial transparency] measures'. [101]

[98] Tax fraud and Evasion - Action Plan on Fraud/Evasion and Simpler Taxation' (European Union website), <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12233-Action-Plan-on-fight-against-tax-fraud>, accessed 31st January 2021.

[99] Ibid.

[100] 'Package for Fair and Simple Taxation' (European Union website), <https://ec.europa.eu/taxation_customs/general-information-taxation/eu-tax-policy-strategy/package-fair-and-simple-taxation_en#heading_0>, accessed 31st January 2021.

[101] 'Tax fraud and evasion'.

iv. The Effectiveness of EU Measures

Lukas Hakelberg has argued that, '[i]n bargaining over cooperation against tax evasion, […] the EU has been unable to translate market size into power'. He suggests that this is because of the two problems of internal disunity and the legal and institutional structure of the European Union. Decisions on taxation, and any subsequent sanctions, must be taken in unanimity by the Council of Ministers.[102] Therefore, progress has often been slow within the union, because some countries benefit from having different (that is to say, less strict) financial regulation than other EU states. EU members such as Luxembourg and Austria, for example, effectively exercised a veto on EU tax reform by refusing to participate in intra-EU AEI (automatic exchange of information) on interest payments. This in turn allowed Switzerland to refuse to participate, as it could simply give the example of the non-involvement of EU member states themselves. Larger member states have not been able to coerce such countries by targeting the companies that shift their profits to other EU states, for common market legislation provides for both non-discrimination and the free movement of capital. As a result of this relative inaction by the EU on tax evasion, there is actually more tax competition in the EU than in the rest of the world.[103]

However, the problem of the EU's lack of competency over taxation may not be as great as it initially appears, for the EU can always 'reclassify' tax issues and thereby take action. The EU does, for example, have the power to rule on and regulate economic competition: Ireland's tax arrangements with Apple, for instance, were judged to be a case of illegal state aid (although

[102] 'EU Tax Policy: From National Veto to Qualified Majority Voting' (UK Parliament website), <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-liv/30107.htm>, accessed 11 November 2020 – OR: Document number: (40334), 5472/19, COM(19) 8.

[103] Lukas Hakelberg, 'Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power' [2016] 23(3), Review of International Political Economy, 516-17.

this ruling was recently quashed).[104] Indeed, the EU's increasing work and influence in the area of tax in general is partly the result of changing the people and the fora involved: from European Commission tax experts to European Parliament politicians who are critical of the current professional consensus on tax.[105]

With regard to specific EU tax policies, the fact that the Savings Directive was later repealed could be seen as evidence that it failed in its aim of combating tax evasion. The legislation was criticised for its limited scope (only applying to individuals, and mainly to interest on bank deposits), meaning that it became obsolete once the OECD's CRS was adopted. It was also criticised for the fact that, for several years, the countries where most bank deposits were based, namely Switzerland and Luxembourg, were instead able to levy a withholding tax and maintain their banking secrecy. At most, the policy can be credited with having laid the foundations for the more comprehensive, and therefore more effective, tax regulations of the OECD. In addition, the EUSD suffered from not being sufficiently multilateral. For deposits held by individuals, a shift was observed from countries falling within the remit of the EU's policy to third countries which did not. While this development took place before the Directive came into force, Thomas Hemmelgarn and Gaëtan Nicodème have suggested that this may have been in anticipation of the EU's measures.[106] Nonetheless, the EUSD can certainly be credited with having laid the foundations for the more comprehensive regulations of the OECD, particularly as regards the processes of information exchange. Indeed, it might even be considered as something of a 'trailblazer' in this respect.

The EU's blacklist has also been largely ineffective in curbing tax evasion. The Tax Justice Network has argued that it is 'toothless' as there is still no agreement on which sanctions will

---

[104] Daniel Boffey, 'Apple Does Not Need to Pay €13bn Irish Tax Bill, EU Court Rules' (Guardian, 15 July 2020), <https://www.theguardian.com/technology/2020/jul/15/apple-does-not-need-to-pay-13bn-irish-tax-bill-court-rules>, 11 November 2020.

[105] Rasmus Corlin Christensen, 'The Rise of the EU in International Tax Policy' [2018], *pre-print version* 6.

[106] Thomas Hemmelgarn and Gaëtan Nicodème , 'Tax Co-ordination in Europe: Assessing the First Years of the EU-Savings' [2009], <Taxation Directive' (http://piketty.pse.ens.fr/files/oldfichiers051211/enseig/pubecon/PubEcon_fichiers/Nicodeme2009.pdf>, accessed 11 November 2020, 19.

be applied in the case of non-action by blacklisted jurisdictions. There are, therefore, few real consequences for such countries. In addition, the organisation argues that the existence of a separate 'grey list' reduces the impact of the original blacklist.[107] However, the TJN's evaluation may ignore the indirect consequences of being blacklisted. Aija Rusina has conducted research that suggests that companies which shifted their profits to blacklisted countries later suffered a significant loss in share value on the list's publication; this effect was particularly marked for retail businesses, in which firms' reputations are particularly important. Rusina suggests that this was either because investors feared future sanctions or because they were concerned that countries might restructure their financial services industry in order to be removed from the blacklist, leading to decreased returns for businesses.[108] Similar effects have been observed by Jason Sharman in relation to the OECD's blacklist. He argues that the OECD's 'bark *is* its bite'.[109] Indeed, that actual sanctions were unnecessary was an argument made by Luxembourg and Malta prior to the list's creation.[110] It seems then that, regardless of the penalties imposed on individual countries, the issue of tax evasion may be effectively tackled (at least to a certain extent) through the EU's blacklist. It certainly seems to be the case that countries themselves do not want to be included in the blacklist. South Korea's foreign ministry, for example, expended considerable energy and resources on trying to have the state taken off the list.[111]Despite these considerations the strategy of blacklisting has not been wholly successful.

Moreover, accusations of hypocrisy have dogged the EU's work on tax evasion, and particularly its blacklist, which evaluates the fiscal regimes of 92 countries but not those of EU member states.[112] Various organisations have argued that tax havens within the EU should be added to

---

[107] George Turner, 'The EU Tax Haven Blacklist – a Toothless Whitewash' (Tax Justice Network, 8 December 2017), <https://www.taxjustice.net/2017/12/08/eu-tax-haven-blacklist-toothless-whitewash/>, accessed 11 November 2020.

[108] *Rusina*, 3.
[109] 'Jason Sharman, 'The Bark is the Bite: International Organizations and Blacklisting' [2009] 16(4), Review of International Political Economy, 580.
[110] *Rusin*,7.
[111] Ibid.

[112]Effective EU Tax Haven Blacklist Must Include at Least 35 Countries, Oxfam Analysis Finds' (Oxfam website, 27 November 2017), <https://www.oxfam.org/en/press-releases/effective-eu-tax-haven-blacklist-must-include-least-35-countries-oxfam-analysis>, accessed 11 November 2020.

the list. In the words of Oxfam, the EU 'should put its own house in order'.[113] The list has also been the subject of internal EU conflict, as states have disagreed over which jurisdictions should be included or, more precisely, have sought to have their own overseas territories excluded. In 2015, the EU's very first blacklist was heavily criticised by several member states, including the UK who declared the move to be 'deeply unhelpful' and who objected to the portrayal of British overseas territories as lacking tax transparency.[114] Such lobbying by EU countries themselves has resulted in a list that is quite limited in scope; in 2018, there were only 15 countries on the list, and now there are even fewer.[115] The restricted remit of the list may well have had an impact on its effectiveness, as individuals and firms are able to move their money to non-blacklisted jurisdictions – a move facilitated, to some extent, by EU 'hypocrisy'. Rusina's research indicates that businesses which had shifted profits to countries which were *not* placed on the blacklist (such as Luxembourg) actually experienced a small positive market reaction.[116]

v. Targeting British Jurisdictions after Brexit

One of the most recent additions to the EU's blacklist was the Cayman Islands, a British overseas territory, included after the UK lost its veto in 2019. Although it was later removed, some commentators nonetheless predicted that this might be a sign of the increasing pressure that will be placed on British territories, and the UK, after Brexit.[117] Indeed, in January 2021, MEPs voted to blacklist three further British territories and crown dependencies: the British Virgin Islands, Guernsey and Jersey. This move was explicitly justified by the UK's exit from

---

[113] *'EU puts Cayman Islands on tax haven blacklist'* https://www.bbc.com/news/business-51484393 accessed 11 November 2020

[114] Jennifer Rankin, Britain Under Pressure to End Opposition to Tax Haven Blacklist' (Guardian, 6 April 2016), <https://www.theguardian.com/news/2016/apr/06/britain-under-pressure-opposition-tax-haven-blacklist>, accessed 11 November 2020.

[115] *'EU puts Cayman Islands on tax haven blacklist'*.

[116] *Rusina*, 26.

[117] *'EU puts Cayman Islands on tax haven blacklist'*.

the European Union.[118] The UK was previously one of the countries insisting most on the maintenance of veto rights for member states on taxation matters. Following its exit from the bloc, it is therefore possible that there will be some progression towards Qualified Majority Voting (QMV) (provided for by Article 48 of the EU Treaty), including on tax legislation – which may lead to more radical action on the part of the EU (and thus support for its 2020 tax package, whose effectiveness cannot yet be evaluated). It should be stressed, however, that this is by no means guaranteed and that various countries remain opposed to such a change to voting procedures.[119]

Leaving the EU, which has been largely ineffective in combatting tax evasion, provides the opportunity for new British strategies on tax evasion. The paper first considers whether these ought to be pursued in a unilateral manner by analysing the US Foreign Account Tax Compliance Act (FATCA).

II. UNILATERAL SOLUTIONS

II.I FATCA

In 2010, the US congress passed the Foreign Account Tax Compliance Act (FATCA) as a part of the HIRE Act, to 'promote transparency in the global financial services sector'.[120] FATCA requires Foreign Financial Institutions (FFIs) and certain other non-financial foreign entities to identify companies and customers suspected of being US persons and to report on the foreign assets held by those US account holders. If they do not comply, US entities are required to

[118] Irene Tinagli and Paul Tang, 'Motion for a Resolution, Further to Questions for Oral Answer B9-0002/2021 and B9-0001/2021 pursuant to Rule 136(5) of the Rules of Procedure on reforming the EU list of tax havens' <https://www.europarl.europa.eu/doceo/document/B-9-2021-0052_EN.pdf> (13th January 2021), accessed 31st January 2021.

[119] EU tax policy: from national veto to Qualified Majority Voting https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-liv/30107.htm. Accessed 31st January 2021

[120] Will Kenton, 'Foreign Account Tax Compliance Act (FATCA)' (*Investopedia*, 30 June 2020) <https://www.investopedia.com/terms/f/foreign-account-tax-compliance-act-fatca.asp> accessed 10 September 2020

withhold 'tax equal to 30% of the amount' when making payments to these FFIs.[121] US citizens and companies are required to report their non-US assets to FinCEN (IRS) on a regular basis but in certain circumstances they fail to do so accurately. FATCA was created to limit this misreporting.

Several key countries in the international community embraced the US demands. In February 2012, the US, France, Germany, Italy, Spain and the UK released a joint statement pledging an intergovernmental approach (IGA) to 'improving international tax compliance and implementing FATCA'.[122] This was followed by a similar agreement between the UK and US in September 2012, and a joint statement issued by Jersey, Guernsey and the Isle of Man in December 2012. The Isle of Man announced that it would be adopting 'tax information sharing arrangements with the United Kingdom which will follow closely the FATCA intergovernmental agreement currently being negotiated with the United States'. [123]

Although FATCA was a considerable step forward, it has been difficult to implement. Form 1042-S and Form 1099 output have allowed QI banks, like UBS, to report on assets without determining if they qualify to be placed in the Chapter 4 US payee pool.[124] The difficulty of reconciling form 1042 and 1042-S has also led to under- or over-withholding. In addition, countries that do not have an IGA with the US, like Russia, can send their information directly to the IRS. This does not yield the transparency that the US has hoped for as, in doing this, the US has no way of knowing exactly what its people or corporations are doing in Russia. FATCA has also caused notable problems including capital flight, citizen renunciations, account closures and identity theft. All of these, however, are minor issues.[125]

[121] IRS, *Foreign Account Tax Compliance Act (FATCA)* <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca> accessed 30 August 2020.
[122] U.S. 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* (2012).
[123] Rob Bridson, 'FATCA, IGA's and information reporting' (*PWC*, March 2013). <https://www.pwc.com/jg/en/publications/pwc-ci-fatca-seminar-slides-march-2013.pdf > accessed 20 August 2020.
[124] Glen Lovelock, Olga Vasiliki Plousiou, 'QI or IQ reporting: What challenges do banks face with their US tax compliance?' (*Deloitte*, 28 March 2019) <https://blogs.deloitte.ch/tax/2019/03/qi-or-iq-reporting-what-challenges-do-banks-face-with-their-us-tax-compliance.html> accessed 22 August 2020.
[125] 'Scratched by the FATCA' (*The Economist*, 26 November 2011) <https://www.economist.com/finance-and-economics/2011/11/26/scratched-by-the-fatca> accessed 18 August 2020.

The two major problems with FATCA are the cost of its implementation and the US's lack of reciprocity. The United States Congress Joint Committee on Taxation (JCT) estimated that FATCA would yield approximately $8.7 billion in additional tax revenue over 11 years (average $792 million a year).[126] Although this figure was supported by the IRS, Texas A&M said that this was a gross overestimation, and estimated instead that it would reap less than $250 million a year (US $2.5 billion total).[127] The IRS has since collected $8 billion, yet nearly entirely from FBAR penalties, not actual tax collection.[128]

Jane Gravelle, a specialist in economic policy at the Congressional Research Service, says that the cost of international tax evasion per year to the US is $40 billion. [129] A 2008 report estimates that it's closer to $100 billion.[130] Although these numbers are significantly different, it highlights what a relatively small difference the implementation of FATCA makes. It was recently reported to the senate that there had been a calculated loss from US banks (due to customers taking business elsewhere as a result of FATCA), which nearly nullifies the reported revenue gain of $200-792 million per year from the strategy. [131] In addition, FATCA's implementation has come at a cost to businesses. The UK government estimated that the cost to British businesses would between £1.1 billion to £2 billion for the first five years, in order to locate

[126] Joint Committee on Taxation, *Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment to the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 2847, the Hiring Incentives to Restore Employment Act* (JCS-6-10).

[127] <https://en.wikipedia.org/wiki/Foreign_Account_Tax_Compliance_Act>; 'Is FATCA chasing a leprechaun and his pot of gold?' (*Offshore News Flash,* 19 August 2015) <http://www.compasscayman.com/cfr/2015/08/19/Is-FATCA-chasing-a-leprechaun-and-his-pot-of-gold-/> accessed 19 August 2020.

[128] William Byrnes, 'How Much Revenue has FATCA Raised and at What Offsetting Compliance Cost?'(*Law Professors*, 7 March 2017) < https://lawprofessors.typepad.com/intfinlaw/2017/03/how-much-revenue-has-fatca-raised-and-at-what-offsetting-compliance-costs.html> accessed 16 August 2020.

[129] Jane Gravelle, 'Tax Havens: International Tax Avoidance and Evasion' (*Congressional Research Service*, 15 January 2015) <https://fas.org/sgp/crs/misc/R40623.pdf> accessed 14 August 2020.

[130] US Senate Subcommittee on Investigations, *Tax Haven Banks and US Tax Compliance* (United States Senate, 17 July 2008) 5.

[131] David L Brumbaugh, 'Farm Legislation and Taxes in the 110th' (*Every CRS Report*, 22 January 2008) < https://www.everycrsreport.com/reports/RS22759.html> accessed 18 August 2020.

approximately just 177,185 U.S. citizens.[132] In addition, although most of the cost should fall on the FFIs, in 2018 the total IRS costs for the FATCA program were $380 million.[133] Despite the conflicting figures given by different organisations, the trend is clear. The numbers don't add up to make the difficulty of implementing such a scheme as FATCA worth it.

Turning to the lack of US reciprocity, FATCA demands an automatic exchange of information (AEI) from foreign banks. Yet it does not offer the same in return, as FATCA does not legally bind the US to reciprocate information reporting. In 2012, the US Treasury said that it acknowledged 'the need to achieve equivalent levels of reciprocal' AEI, yet has done little to rectify this.[134] The US's lack of reciprocity undermines FATCA's original aim of promoting transparency in the global financial services sector. This has understandable caused a strain on its international relations. In October 2014, 51 jurisdictions signed onto the OECD's AEI agreement, whilst the US government has yet to sign the multilateral treaty it agreed to or sign up to the Common Reporting Standard (CRS).[135]

The US is able to do this because of its large internal markets, making it less dependent on international trade and investment. By 'conditioning access to their markets on compliance', other countries have no choice but to fall in line.[136] FATCA, as a solution, is also considerably dependent on currency supremacy. The EU, despite also having currency supremacy, is unable to act as a great power in international tax policy because of its internal disunity in corporate taxation.[137] Now that the UK has left the European Union it is not constrained by the

[132] Herbert Smith Freehills LLP, 'The Cost of Complying with FATCA' (*Lexology*, 3 June 2013) <https://www.lexology.com/library/detail.aspx?g=a74e2969-7fe3-4931-999b-7caaf60c5588> accessed 20 August 2020.

[133] Michael Cohn, 'IRS Spent $380M on FATCA, but Still Can't Enforce It' (*Accounting Today*, 9 July. 2018) <https://www.accountingtoday.com/news/irs-spent-380m-on-implementing-fatca-but-cant-enforce-it> accessed 26 August 2020.

[134] Argument thread developed from, L. Hakelberg, 'Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power' (*Review of International Political Economy* 23), 511-541.
[135] 'Scratched by the FATCA' (*The Economist*, 26 November 2011) <https://www.economist.com/finance-and-economics/2011/11/26/scratched-by-the-fatca> accessed 18 August 2020.
[136] , L. Hakelberg, 'Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power' (*Review of International Political Economy* 23), 511-541
[137] Ibid

requirement of reaching a unanimous decision. The UK does have a large internal services market but is still heavily reliant on international trade and partially reliant on international investment. The UK does not currently have currency supremacy and, as a result, implementing a solution similar to FATCA, even if the government wanted to, would be too difficult. Furthermore, the US employs a worldwide tax scheme, whilst the UK employs a territorial tax scheme. FATCA, as a solution, would need to be significantly altered to suit the UK's variance.

Despite the US hypocrisy, its threats of withholding managed to achieve partial international cooperation in tax matters between all G7 countries. It is important to remember, however, that FATCA was a compromise. FATCA was initially proposed to congress as a bill in 2009, in an attempt to 'amend the Internal Revenue Code' of 1986, but it was rejected.[138] It was then attached to the later HIRE Act Bill in 2010, in a revised form, as subsection 501(a). In the US, tax regulation reformation is highly politicised. Even though both parties' opinions differ on tax regulation, it has been made clear that neither party thinks that FATCA works in its current state. In 2017, the Republican Party introduced several congressional bills in an attempt to repeal FATCA.[139] Before this, in 2013 and 2014, the Democrats tried to rectify the US's failure to reciprocate information and to sign up to the CRS.[140] Neither party was successful. The Democrats wanted to increase the US's international co-operation in order to avoid shifting the tax burden onto the working class and to foster some sort of redistributive co-operation.[141] The UK's current foreign and domestic policy objectives are similar to those of the Democrats in 2014.

The UK, then, must take the Democrats' attempted amendments under consideration and adopt a tax compliance scheme that is more comprehensive and reciprocal than FATCA.

[138] H. R. 3933, [2009].
[139] Senate Bill 869 [2017].
[140] Office of Management and Budget [2013]; US Treasury [2014b].
[141] , L. Hakelberg, 'Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power' (*Review of International Political Economy* 23), 511-541

Redistributive co-operation, which can only be achieved through considerable international co-operation, would help shoulder the implementation costs of such a scheme.

It appears that a strictly unilateral approach would be unfeasible. The paper now turns to examine multilateral cooperation on tax evasion. As section I.IV outlined, the EU Savings Directive was repealed and gave way to the efforts of the OECD. The paper therefore looks proceeds to evaluate the efforts of the OECD.

III. MULTILATERAL EFFORTS:

Due to the problems with FATCA as outlined above, it appears that a strictly unilateral approach would be unfeasible for the UK. The paper therefore turns to examine multilateral cooperation on tax evasion. As section I.IV outlined, the EU Savings Directive was repealed to make space for the OECD's Common Reporting Standard (CRS). The OECD is therefore the most important actor in global tax governance. The paper starts by analysing the OECD's early efforts at combatting tax havens, before analysing its current efforts. The section concludes by examining trends in tax evasion cooperation in developing countries, since any truly multilateral effort must take into account the changing dynamics of the global distribution of economic power.

III.I. THE EARLY EFFORTS OF THE OECD: 1998-2002

The Organisation for Economic Co-operation and Development has existed in its current form since 1961, when the Organisation for European Economic Cooperation expanded to include various non-European advanced democratic states and economies. The goal was to create a new organisation which would further global economic development through the use of scientific and technical expertise. It currently comprises 37 members. Given the conditions for membership, it is often considered to be a 'rich countries' club'.

In the first three decades after its conception, the OECD focused its attention mostly on preventing double taxation[142], with only limited consideration given to the issues of tax avoidance and evasion. During the 1990's, however, the organisation's Committee on Fiscal Affairs (CFA) became increasingly concerned by these phenomena, and the erosion of tax bases that was the result – not least because many governments were trying to reduce their deficits at the time. These concerns were based less on the actual state of the international economy (personal and corporate tax revenues had in fact increased in recent years[143]) than on the projections of recent economic theory. A source of particular worry was that individual tax evasion might go from being a practice of the 'super-rich' to also being done by the 'mass affluent'. Furthermore, there were fears that the tax system overall might eventually face a 'crisis of legitimacy' if the rich could evade tax and get away with it so easily.[144]

The OECD's early efforts against tax evasion consisted mainly of a 1998 report on harmful tax competition and its 2000 tax haven blacklist. Although the OECD lacks the legal authority to impose sanctions or take similar measures, this has not prevented it from having a certain degree of success, much of which rests on the organisation's reputation as a leader in global governance and multilateral action. However, the OECD's values − including its liberal economic ideology − weaken the organisation's ability to take steps on tax evasion, as tax havens, the transnational business community, and even OECD member states often mobilise normative arguments in order to accuse the group of hypocrisy and to dissuade it from taking more stringent action.

The OECD's first major action on tax evasion was its 1998 report 'Harmful Tax Competition: An Emerging Global Issue', drawing on the work carried out during the CFA 'special sessions' that had been established two years prior. These meetings were between senior officials from the finance ministries and tax agencies of various OECD countries. The report both defined

[142] Michael Webb 'Defining the boundaries of legitimate state practice: norms, transnational actors and the OECD's project on harmful tax competition' [2004] 11(4) Review of International Political Economy 795-96.
[143] *Webb* 795.
[144] Jason Sharman 'Seeing Like the OECD on Tax' [2012] 17(1) New Political Economy 20.

'fair' and 'harmful' tax competition (HTC) and gave recommendations as to ways that governments might mitigate the effects of HTC, both collectively and individually.[145]

Generally, the OECD endorsed tax competition. This was in line with liberal economic principles, and thus particularly reflected American and British views on the issue. However, the OECD's report also reflected the continental European perspective, by noting that some kinds of tax competition could be harmful. To be considered a 'harmful preferential tax regime' (HPTR), low tax rates would have to be accompanied by 'ring-fencing' of the tax preference, a lack of financial transparency, or a lack of information exchange with foreign tax authorities.[146] 'Tax havens', by contrast, were defined as countries that had low or no income taxes (therefore Switzerland and Luxembourg were not tax havens) and 'that offer themselves as places to be used by non-residents to escape tax in their country of residence'. Thus, one of the criteria used for identifying tax havens was that such states did not require firms and individuals receiving preferential tax treatment to carry out substantial business activity within the country itself.[147] The report made the point that, as it was a question of tax *competition*, any solution must be multilateral, not unilateral or bilateral.[148]

In terms of concrete actions, the report recommended that countries eliminate harmful preferential tax regimes by 2003.[149] Member states would report their own and others' HPTRs to the Forum on Harmful Tax Competition (also set up by the report), which would prepare a list of measures to be revoked or modified. This peer review process identified practices that had the *potential* to be harmful; no judgements were issued as to the real harm caused by such tax policies[150]. By 2004, the OECD had concluded that, of the 47 harmful tax practices listed in 2000, 18 had been abolished, 14 had been modified to remove any potentially harmful features, and the other 13 were found not to be damaging. None of the OECD countries were

[145] *Webb* 798.
[146] ibid. 801.
[147] ibid. 802.
[148] ibid. 799-800; Jason Sharman, 'Norms, Coercion and Contracting in the Struggle Against "Harmful" Tax Competition' [2006] 60(1), *Australian Journal of International Affairs*, 146.
[149] *Webb* 803-04.
[150] ibid. 806.

therefore found to be using HPTRs as they were defined in 1998[151], a fact which would later be used by target tax havens in their accusations against the OECD of hypocrisy.

With regard to tax havens, the OECD's key action was its 2000 blacklist of tax havens. The list, which entailed no sanctions, would later be incorporated into the national blacklists of a range of countries including Argentina, Australia, France, and the United States.

i. The accomplishments of the OECD

One of the key successes of the OECD's 1998 report on harmful tax competition, and of the organisation's early efforts against tax evasion more generally, was simply that the 1998 report marked a departure from previous non-intervention in matters of taxation. This seems to suggest that arguments for national sovereignty were no longer considered to be as strong as they previously were.[152] Coming from an organisation with the international influence of the OECD, this shift was highly significant. Nonetheless, the report's recommendations itself were still quite non-interventionist – hence the focus on 'potentially' harmful tax practices. Moreover, the report's guidelines were only voluntary.

The *Economist*'s commented that '[f]ew countries wish to end up on the OECD blacklist, but the group's bark might be much worse than its bite. It has no legal authority, and can only issue recommendations'.[153] This sums up what was expected of the OECD's tax havens blacklist. However, as stated earlier, Jason Sharman has argued that the OECD's bite *is* its bark[154]: the damage done to TNCs' reputations is enough to dissuade them from using tax havens. Sharman distinguishes between 'reactive compliance' (reacting to material economic losses) and 'pre-emptive compliance' (pre-empting such losses – particularly manifest when the firm

[151] ibid. 815.
[152] ibid. 804-05.
[153] Cited in Jason Sharman (n 90), 574.
[154] ibid. 580.

relies on its good public standing, e.g., in retail). Sharman finds one or both of these forms of compliance in 38 of the 41 cases that he studies.[155]

As is to be expected, TNCs' reluctance to use blacklisted jurisdictions also had an effect on tax havens' economies, and it was primarily this that led to the list's relative success in tackling tax evasion. In June 2000, six havens – including leading ones, like Bermuda and the Cayman Islands – signed 'Advance Commitment Letters' with the OECD, in which they agreed to remove the harmful features of their tax regimes if they were likewise removed from the organisation's blacklist. 'Cooperative' jurisdictions, like Bermuda, hoped that they would then be able to attract more valuable kinds of financial business, to offset the loss of revenue linked to illegal tax evasion. Tax havens that were reliant on their good reputations were particularly keen to sign up to the OECD's demands. For example, the Cayman Islands has marketed itself with the slogan 'Reputation is our most important asset'.[156]

Sharman also notes that Liechtenstein is the exception to the above trend: it was listed as an 'Uncooperative Tax Haven' after missing the 2002 deadline for committing to information exchange processes.[157] However, its blacklisting *has* caused real financial losses, it is simply that the government decided that the cost of implementing the necessary changes was greater than these losses themselves. As Sharman expresses it: 'it is not a case of blacklisting merely being empty rhetoric'.[158] Moreover, Sharman points out that even if, in the absence of sanctions, the results of blacklisting are *perceived*, rather than real (see the phenomenon of 'pre-emptive compliance' above), then this still means that the method of blacklisting has been effective.[159]

If countries which made commitments to the OECD were later removed from the OECD's blacklist, this was not always replicated in national blacklists. This shows the power – and

[155] ibid. 574-75.
[156] ibid. 581.
[157] ibid. 589-90.
[158] ibid. 575.
[159] ibid. 576.

therefore the efficacy – of the OECD's list[160]: 'The very process of having its principles adopted as 'the international standard' by other international institutions simultaneously strengthens and disguises the OECD's policy influence'.[161]

ii. Limits to the OECD Approach

In 2000 and early 2001, the OECD tried to persuade more tax havens to take the route, chosen by havens like Bermuda, of signing commitment letters so as to be taken off the organisation's blacklist. It did this by relaxing its demands: while the organisation still insisted upon information exchange and transparency, it now required only that the havens did not discriminate between onshore and offshore businesses, whereas before it had asked havens to get rid of measures intended to attract firms with no substantial domestic business activity in their jurisdiction.[162] By April 2002, when the OECD published its list of 'uncooperative tax havens', only seven of the jurisdictions originally identified as tax havens had not made commitments to increase the transparency of their tax systems and to exchange information with OECD countries' tax authorities. However, this was chiefly because the conditions for compliance were minimal.[163] There were various reasons for this relaxation of the OECD's demands, which point to the failures and problems of the organisation's early efforts to tackle tax evasion more broadly.

First, the OECD was the victim of its own liberal economic ideology and emphasis on multilateralism. In reaction to the OECD's measures, and lacking material might, smaller tax havens relied on normative arguments for not regulating certain tax practices. These countries argued that there was a double standard in applying regulations that OECD countries did not follow themselves; OFCs were simply seeking a level playing field – here they refer to the principle of non-discrimination, which is central to liberal economics. The tax havens' position has considerable legitimacy, for larger OECD tax havens have often not cooperated with the OECD. Luxembourg (see above) is a key example, as is Switzerland. Since the start of the

[160] ibid. 581.
[161] *Sharman* (n 115) 23.
[162] *Webb* 810.
[163] *Webb* 816.

OECD's anti-tax activities in 1998, Switzerland has openly refused to be bound by any of its provisions, notably the international exchange of tax information.[164] Such lack of compliance on the part of OECD countries themselves has been a source of great embarrassment for the organisation and, as will be shown, accusations of hypocrisy have had a real impact on its ability to tackle tax evasion.

The tax havens' case was disseminated across various media and forums, as national officials gathered the support of the international business press, specialist tax publications, and tax policy experts. They also created organisations like the ITIO (International Tax and Investment Organisation): a collection of Caribbean countries and Pacific islands, working with the Commonwealth, set up in order to protect their tax regimes.[165]

Their arguments were further supported by the transnational business community, another powerful actor. TNCs were not consulted at the time of the original 1998 report, but the OECD did increasingly engage with such business interests, leading to concessions such as that, mentioned above, regarding substantial business activity. It is important to stress, in this regard, that transnational banks and tax advisors from OECD countries have helped to develop offshore centres, so their interests often overlap with those of tax haven states. Moreover, these private financial firms have strong ties to the finance ministries and treasury departments of OECD countries, further increasing their influence in the OECD.[166] Webb argues that this influence can even be seen in an article co-authored by the OECD's key tax official and the key BIAC (Business and Industry Advisory Council) tax expert, published in 2001. He writes: '[t]he fact that the OECD felt a need to develop a joint statement with BIAC testifies to the remarkable importance accorded to business views by tax officials'.[167]

---

[164] *Sharman* (n 123) 591.
[165] *Sharman* (n 118) 147.
[166] *Webb* 797.
[167] ibid. 812.

However, these normative arguments gained considerable traction within the OECD not merely because of the power of the business lobby. As Webb writes: 'as an institution that achieves influence largely by promoting normative consensus and voluntary cooperation, the OECD may be particularly subject to pressures to behave appropriately'.[168]

It was this combination of international, OECD norms, and external material power, that also led to the great influence of the US, and specifically of the Bush administration, in watering down the OECD's efforts against tax evasion. Although the US also expressed sympathy for tax havens' arguments about fairness and similar issues, Webb points out that 'even the fact that all of the arguments were measured against liberal economic theory attests to the power of the advanced capitalist countries (and especially the US) in shaping the terms of international economic discourse'.[169]

The example of the OECD shows that the composition of an organisation and its international reputation can be highly significant in efforts to tackle tax evasion. If it was the OECD's standing in the world, both economic and diplomatic, that allowed it to be somewhat effective in the early years of its engagement with the issue, its normative basis also prevented it from taking stronger action when required. Nonetheless, the influence of the business lobby and of the US also shows that normative arguments only hold sway if they are supported by material and ideological might. In sum, then, a combination of internal and external factors led to the limited success of the OECD in combating tax evasion between 1998-2002.

III.II THE CONTEMPORARY EFFORTS OF THE OECD

Following the initial 'early efforts' of the OECD, there became a renewed focus to curb international tax evasion following the 2008 financial crisis. This included the USA's adoption

[168] ibid. 821.
[169] ibid. 809.

of FATCA and the OECD's automatic exchange of information standard, and the Common Reporting Standard ('CRS').

This section sets out the context for the introduction of the OECD's automatic exchange standard and the CRS, how they operate, whether they have been successful in curbing international tax evasion and the problems which are at the root of any failures.

i. Background

The global recession heightened public distrust in the 'super-rich' and financial institutions. This was followed by a series of incidents which exposed high net worth individuals hiding their money abroad.[170] The largest Swiss banks were revealed to have facilitated their wealthy clients offshore tax dodging.[171] Several academic accounts of the AEOI and CRS have pointed to these events as being the trigger for action in the USA.[172] There are two main reasons for action. First, addressing tax evasion would attack the 'fat cat' bankers who were gaming the system at a time soon after they were perceived to have destroyed it. Second, governments were very focused on the fact that the globalisation of capital had resulted in more wealth being hidden overseas, and, given it was undisclosed, finding and taxing it presented a major new revenue stream during times when public spending was being squeezed due to global recession.

Given this context, in 2010, the US Congress enacted a series of provisions aiming to stamp out international tax evasion called the Foreign Account Tax Compliance Act (FATCA)(see Section II.I.). It operated extraterritorially, establishing an automatic exchange of tax related information. FATCA changed the landscape of international tax evasion regulation. Tax authorities no longer had to undertake their own work independently. Instead they could get

---

[170] Guy Din More, *Italians Gripped by Leaks Naming Liechtenstein Account Holders*, Financial Times, 20 March 2008; Lynnley Browning, *Ex-UBS Banker Pleads Guilty to Tax Evasion*, New York Times, '(20 June 2008).
[171] Nick Mathiason, *Tax Scandal Leaves Swiss Giant Reeling*, The Guardian, (29 June 2008).
[172] Eschrat Rahimi-Laridjani and Erika Hauser, 'The New Global FATCA: An Overview of the OECD's Common Reporting Standard in Relation to FATCA' (2016) 13 Journal Tax and Financial Products 9; Oberson, X., 'Internaitonal Exchange of Information in Tax Matters: Towards Global Transparency' (2015).

information from other jurisdictions' authorities about their financial institutions and increase the effectiveness of their work.

The FATCA regime in the US created a desire for similar regimes around the globe. The G20 leaders declared that the 'era of bank secrecy' was over in April 2009.[173] In February 2012, France, Germany, Italy, Spain and the UK issued a statement supporting FATCA and undertaking to enter an agreement with the US to further their shared commitment to ending international tax evasion.

In April 2013, France, Germany, Italy, Spain and the UK (the countries that developed FATCA with the US) announced their intention to exchange information amongst themselves and with the US. This was followed, in June, by the G20 leaders fully endorsing the OECD's proposal for a new, single, global, standard of AEOI.[174] 'A Step Change in Tax Transparency' was published by the OECD and sets out the steps through which AOEI will be implemented globally.[175]

The OECD efforts, alongside FATCA, have cemented in the world a new era of 'tax transparency'. The global reach of the AEOI standard is large. Currently over 100 jurisdictions have committed to implementing the standard, with many of the first exchanges occurring in 2017 and 2018. The US is the only G20 nation that has not committed to the automatic exchange standard. On top of being truly global, the era of tax transparency has witnessed unprecedented levels of taxpayer information being shared between governments around the globe.[176] In fact, more information is transferred transnationally under the CRS than HMRC collects on its taxpayers domestically.

---

[173] Barker and Houlder, *Leaders See End to Banking Secrecy*, Financial Times, 2 April 2009.
[174] OECD, *Automatic Exchange of Financial Account Information Background Information Brief* (2016) available at http://www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Brief.pdf
[175] A Step Change in Tax Transparency, OECD Report for the G8 Summit (June 2013), accessible at https://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf accessed 21 December 2020
[176] Owens J. P, 'Tax Transparency: the "Full Monty"' (2014) 68 Bulletin for International Taxation 9, 512-14; Turina, A. 'Visible, Though Not Visible in Itself. Transparency at the Crossroads of International Financial Regulation and International Taxation' (2016) 8 World Tax Journal 3.

ii. Automatic Exchange of Information

The Automatic Exchange of Information (AEOI) standard is the new global benchmark created by the Global Forum on Transparency and Exchange of Information for Tax Purposes (also the Global Forum) replacing many on-request bilateral information request agreements. The Global Forum is comprised of 153 nations and aims to increase and implement global standards on tax transparency. The AEOI requires participants to exchange financial information of their non-resident account holders. It relies on the Common Reporting Standard (CRS) to standardise the information required and procedures followed by participants. The CRS was conceived by the OECD following endorsement by the G20 to curb international tax evasion. It requires participant authorities to collect information from financial institutions domiciled in their country and automatically share it with other member nations each year.

iii. Operation of the CRS

The OECD identified four main requirements for the implementation of a common standard for AEOI: (1) adopting the due diligence and reporting requirements in CRS, (2) setting up a legal basis for sharing information, (3) IT and administrative systems, and (4) privacy protections.[177] The administrative point (3) will be set aside for now as a practical issue and not one about the operation of the CRS system. The point about privacy (4) will also be set aside but discussed further below under ***vii. 'Failures of the CRS'.*** This leaves the due diligence and reporting requirements in the CRS and the legal basis for sharing information, which will be taken in turn.

iv. Due Diligence and Reporting Requirements in the CRS

The CRS is the common standard of reporting and due diligence with respect to financial accounts. First, the standard must be adopted into the domestic law of the participating country, including penalties for its enforcement. However, the due diligence requirements are not for

---

[177] Rahimi Laridjani and Hauser *Supra*

the government and instead are aimed at banks and other affected institutions upon which the obligations are imposed within participant states.[178]

The CRS is intended to allow authorities to collect information on 'Reportable Accounts' held at 'Reporting Financial Institutions'. Once an account qualifies as reportable, the institution in a participating state where the account is held must report the required information to the jurisdiction of residence or operation, to then be exchanged with the jurisdiction of each account holder resident in another participating jurisdiction. The information exchanged includes the address, taxpayer ID number, date and place of birth of the holder, the account number, ID number of the institutions, account balance or value, and information regarding income or proceeds.[179]

Whether or not an institution is a reporting institution turns on factors such as whether it is custodial or depository, investment, or one of a list of specified insurance entities. A 'Reportable Account' is one held by a person or controlling person that are 'Reportable Persons', and they are any individual resident in a participating country, excluding publicly traded companies, government entities, international organisations and central banks.[180]

v. Legal Basis for Sharing Information

Each participating jurisdiction must select a legal basis for the automatic exchange of information at the international level between states. This could be through either the Multilateral Convention on Mutual Administrative Assistance, the CRS Multilateral Competent Authority Agreement (MCAA) or a bilateral agreement.[181] The CRS MCAA is based on the Convention's Article 6.

---

[178] McGill, R., 'International – GATCA: The Globalisation of Anti-Tax Evasion Frameworks' (2016) 18(3) *Derivatives and Financial Instruments*.
[179] Eschrat Rahimi-Laridjani and Erika 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.
[180] Ibid.
[181] OECD website, *CRS Information*, accessible at https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/ Accessed 21 December 2020

It specifies the details of what information is to be exchanged, between whom, and when. It is the legal template laid down for participating countries to enable them to legal share information automatically. Therefore, unlike the CRS due diligence requirements (that are addressed to private financial institutions) the MCAA applies to the participant state government. The MCAA ensures that participants have a common legal framework (for a common standard) and the administrative capability to exchange information. The MCAA is largely multilateral with reciprocal information sharing. Alternatively, rather than a multilateral treaty setting the standard, participating states can enter into bilateral agreements such as a double tax treaty or a tax information exchange agreement. In addition, some CRS exchanges will also happen by virtue or relevant EU Directives.

The benefits of adopting a multilateral approach include: the fact that there is legal uniformity between participants – a single legal basis for multi-country co-operation; the flexibility offered where states can make reservations on certain issues; and the extensive co-operation on all tax information sharing.[182]

vi. Successes of the CRS

Prior efforts to tackle global tax evasion were based on a series of largely ineffective bilateral information-on-request treaties that granted access to information about suspected tax evaders. Empirical studies show that information-on-request agreements had only a small effect and were easy to bypass.[183] There were two main problems that faced the international effort to tackle tax evasion before the CRS. First, the number of compliant tax havens was too small and this left gaps in information. Second, the request system relied on reasonable suspicion of evasion to request the information – a standard that is often elusive in the business of tax evasion.[184]

[182] OECD website, *Convention on Mutual Administrative Assistance in Tax Matters*, accessible at https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm Accessed 14 October 2020
[183] Johannesen, N. and Zucman, G., 2014. The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown. American Economic Journal: Economic Policy, 6 (1), 65–91.
[184] Leo Ahrens and Fabio Bothner, 'The Big Bang: Tax Evasion After Automatic Exchange of Information Under FATCA and CRS' (2019) New Political Economy, 3.

Given these drawbacks, the CRS has made considerable ground in overcoming these problems directly. One of the first and key advantages of the CRS is its scale. Unlike its on-request predecessor, it takes a multilateral approach and has extensive country coverage. Over 100 countries have signed up to the CRS. This marks it as 'substantially different from any other initiative in the field of information exchange launched so far'.[185] Previous examples, such as TIEAs and FATCA, were bilateral in nature and that comes with the added burden of negotiating the treaties country-by-country. In the case of CRS, a single MCAA is signed by every participant, a contributory factor to its expedient adoption. This wide reach is coupled with the fact that the information is automatically exchanged. Again, previous attempts at international action, such as TIEAs an FATCA (for information on foreign deposits in the USA), were information sharing agreements based on request. This always runs the risk that vital account information will not be uncovered and it also carries with it additional administrative burdens.

The effect of the CRS is hard to determine, and much of the empirical data relies on estimations, but there does appear to be the suggestion that the CRS has impacted the levels of wealth held in tax havens and increased the movement of global capital. There have been several studies into its efficacy. Hakelberg and Schaub found, in 2018, that there was a decrease in cross-border assets in tax havens.[186] However, Ahrens and Bothner note that most of this study was before the CRS had made a substantial impact, and it makes no assessment of whether the assets were moved to merely circumvent the treaty. Instead, they accounted for these two issues and found that FATCA and the CRS are 'successful in decreasing cross-border tax evasion' and that assets in tax havens 'decreased by an estimated 67%' with no evidence of treaty circumvention through shell companies, or asset shifting to non-compliant jurisdictions.[187] Casi et al. found in their 2019 survey of the data available on offshore jurisdictions that there was a short-term decrease of $45 billion USD in cross-border deposits

[185] Elisa Casi, Christoph Spengel, Barbara Stag, 'Cross-border tax evasion after the common reporting standard: Game over?' (2020) 190 *Journal of Public Economics* 2.
[186] Hackelberg and Schaub, 'The Redistributive Impact of Hypocrisy in International Taxation' (2018) 12(3) Regulation & governance 353.
[187] Leo Ahrens and Fabio Bothner, 'The Big Band: Tax Evasion After Automatic Exchange of Information under FATCA and CRS', (2019) New Political Economy 2.

held in tax havens.[188] This is concurrent with other studies such as Deutsche Bank and Oliver Wyman in 2017 which suggested that $1.1 billion USD had been moved out of offshore accounts as a reaction to the introduction of the CRS.[189]

This data on capital movement is concurrent with analyses of tax data on portfolio capital, taxes on which have been rising again after decades of decreasing rates – and it is likely that automatic exchange has contributed to this trend.[190]

vii. Failures of the CRS

USA Non-Participation

Despite the data in the previous section showing a significant positive trend away from wealthy individuals holding assets in tax havens, coupled with an increase in portfolio tax collected domestically – suggesting a shift away from tax evasion – the academic findings have not been uniform on these points, and many point to the US as the main culprit. It has been noted that the US believes that FATCA does the same job as AEOI, and therefore the US does not need to engage with it.[191] However, the reality is that the US receives information about their national tax evaders, but does not give the same information to foreign authorities.[192]

Brinson notes that a possible partial solution to the non-reciprocity of FATCA would be 'Intergovernmental Agreements' between the US and other countries in return for FATCA cooperation. However, these agreements are limited in what information will be shared, and that some nations do not care to receive the information – especially as most of this information

[188] Elisa Casi, Christoph Spengel, Barbara Stag, 'Cross-Border Tax Evasion After the Common Reporting Standard: Game over?' (2020) 190 *Journal of Public Economics* 2.
[189] Deutsche Bank and Oliver Wyman, 'Special Report: Time to Advance and Defend' (2017), accessible at https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2017/jun/Global-Wealth-Management-OW.PDF, accessed 24 August 2020.
[190] Ahrens et al., 'New Room to Maneuver: National Tax Policy Under the Automatic Exchange of Information' (2018) COFFERS Working Paper.
[191] Craig Rose, *The Biggest Tax Haven of Them All? The US., FATCA and the CRS*, Bloomberg Law International Tax Blog (29 March 2016), accessible at https://www.bna.com/biggest-tax-haven-b57982069147 accesseed?
[192] Peter A. Cotorceanu, 'Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting Under Both FATCA and GATCA' (2015) 1 *Trusts and Trustees* 2.

is not currently reported to the IRS by US financial institutions.[193] The result of this is information asymmetry, whereby the US government receives information fully from other jurisdictions but does not exchange fully in return. The Tax Transparency Document published by OECD emphasised that global cooperation is essential to curb tax evasion ('The global implementation of AEOI is an essential step for stimulating the development of a global level playing field') but the US's reliance on FATCA and non-participation removes the level playing field intended through international cooperation.

The US is therefore the ideal relocation destination for the movement of global capital after the introduction of the CRS. Not only does it have a high degree of bank secrecy[194], but this is coupled with advantageous tax-free arrangements for non-residents and the fact that it is the only major financial institution that is not a part of the CRS.[195] The consequence of this, as Cari et al. found, is that US cross-border cash deposits were 10% higher than those in non-havens and that this increase was 'immediate and persistent' following the introduction of the CRS.[196] There is no indication that the US is going to change its position on the CRS, instead it has reinforced its commitment to work within the boundaries of FATCA. Until the US moves towards adopting the CRS, as such a large global market, the effectiveness of this strategy is largely undermined. As Richard Hay posits: 'can the OECD visions for CRS succeed while there is a hole in the system that vents into the largest financial services market in the world?'.[197]

Privacy

The CRS, particularly in EU countries, has increasingly been subject to heightened scrutiny on privacy grounds. As noted in **Section iv.,** a 'reportable person' is any person that is not a public company, government or international organisation. Therefore, most private persons with assets abroad held in bank accounts or as investments will qualify for the due diligence requirement under the CRS – a very large number.

---

[193] Rachel E 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 Become a Tax Haven' (2019) 23 NC Banking Inst 231, 240.
[194] Peter A. Cotorceanu, 'Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting Under Both FATCA and GATCA' (2015) 1 *Trusts and Trustees* 2.
[195] Elisa Casi, Christoph Spengel, Barbara Stag, 'Cross-border tax evasion after the common reporting standard: Game over?' (2020) 190 *Jounral of Public Economics* 2, 2.
[196] Ibid.
[197] Richard Hay, 'Tax Data Transparency: UK', 23(1) *Trusts and Trustees* 139.

The consequence of this is that considerable amounts of data is being transferred between states both per capita and in total, and that has raised a number of criticisms. Hay has noted that the amount of private information shared between states under CRS is greater than the amount that states are currently collecting on their own citizens domestically: 'most systems require disclosure and taxation of taxpayer assets only once: at death. FATCA and CRS require disclosure of financial net worth, annually updated… remarkably… countries will receive more information on their taxpayer's foreign financial assets than they collect at home'.[198]

The more information that is shared under the CRS, the greater the risk that there will be a breach of confidentiality, privacy or abuse.[199] Data losses are common in modern governments. Noseda notes cases like the Canadian tax authorities that lost a DVD containing encrypted taxpayer information of roughly 28,000 people, and that nine years after this incident the UK lost two CDs containing the personal details of 25 million people, yet tax authorities are still transferring data the same way.[200] Noseda also notes that 'trusting' EU governments with data is unwise given rising levels of rule of law breaches and corruption in EU member states like Poland and Romania.

In addition, many have critiqued the current CRS, and further reporting standards being introduced via the EU's Anti-Money Laundering Directives, as being entirely disproportionate. The problem arises because every person's data is transferred irrespective of whether they have a history of evasion, suspicious activity, or even a reasonable suspicion that they could be holding property offshore to evade tax. There are many legitimate reasons (unrelated to any desire to evade tax) to have assets held in countries other than the owner's country of residence.

It is noteworthy that the European Data Protection Supervisor has criticised public trust registers in France as completely disproportionate.[201] In a report to the Commission they noted

---

[198] Ibid.
[199] Oberson, X., 'International Exchange of Information in Tax Matters: Towards Global Transparency' (2015).
[200] Filippo Noseda, 'CRS and Benfifical Ownership Registers: A Call to Action' (2017) 23(5) *Trusts and Trustees* 496.
[201] Filippo Noseda, 'CRS and Benfifical Ownership Registers: A Call to Action' (2017) 23(5) *Trusts and Trustees* 496.

that 'any interference with an individual's right to privacy has to comply with the same requirements of legality, legitimate interest, and proportionality'.[202]

However, the EU Data Protection Supervisor's statement is made in the context of EU caselaw on privacy, and the ECHR. The UK finds itself in a unique position post-Brexit. Most of the criticism of the CRS from lawyers interested in the right to privacy either relies on constitutional rights to privacy, such as in Liechtenstein[203] or France[204], or on the ECHR. However, the UK has no common law nor constitutional right to privacy – and if the right to privacy enshrined in the ECHR is replaced by a British Bill of Rights, then there is a risk that those whose data is abused through the CRS will be left without recourse.

Given the OECD's importance in global tax governance, a UK multilateral approach must necessarily engage with the OECD's CRS. The UK ought to contribute to its development, for instance by pushing for the US to participate. However, there are serious concerns about privacy that the UK ought to raise.

III.III TAX EVASION AND THE RISE OF THE DEVELOPING WORLD

Given the before-mentioned common narrative about the OECD, as being a 'rich countries' club', it is imperative for any multilateral strategy to consider developing countries. The section concludes with an analysis of the major trends in combatting tax evasion in the developing world.

---

[202] Filippo Noseda, 'Common Reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection' (2017) 23(4) *Trusts and Trustees* 409.
[203] Hannes Arnold and Sophie Herdina, 'Implications of the Common Reporting Standard for Liechtenstein Foundations and Trusts' (2019) 25(6) *Trusts and Trustees* 682.
[204] Arnaud Talifer and Stephanie Auferil, 'Register of Trusts and Privacy: French Case Law in Perspective' 24(1) *Trusts and Trustees* 968.

The increasing wealth of non-western developing countries over the last two decades has led some academics to question whether efforts to crack down on tax havens, which have, until now, been led by developed countries under the aegis of the OECD, will lose their effectiveness in the coming years. As developing countries become richer, the proportion of tax haven business that comes from these nations is increasing, limiting the extent to which developed countries can combat the existence of tax havens. Much of the leverage that the latter used in their efforts to curb these tax havens' tax evading activities derived from the threat of withholding access to their markets if tax havens refused to cooperate. This loss of market share, therefore, has the potential to undermine international efforts to combat tax evasion. However, there is room for optimism in the actions of the largest of these developing nations to tackle tax evasion. India and China have taken measures in recent years to curb tax evasion, both on an individual level and on a company basis. They have also fully committed to international efforts to tackle the problem. The international community is now increasingly united in its desire to find a solution. The time is right, therefore, for Britain to take a harder line against tax evasion, and the approach taken by certain developing countries may be worth replicating.

Although the last decade has seen an increased emphasis on tackling tax havens, some scholars believe that global economic trends are making these efforts less effective and they will only continue to do so.[205] The growth of developing economies means that there are increasing numbers of households and individuals with sufficient wealth to be interested in the services that tax havens offer. By 2007, 55% of the shell companies registered in the British Virgin Islands, for example, were established for Chinese clients, and by 2009 four-fifths of all Chinese Foreign Direct Investment (FDI) went through tax havens.[206] In the years since the Great Financial Crisis (GFC), this demand has only increased. The proportion of global offshore wealth held in Asian tax havens increased from 12.7% in 2004 to 33.5% in 2015, and as the

[205] JC Sharman, 'Canaries in the Coal Mine: Tax Havens, the Decline of the West and the Rise of the Rest' (2012) 17 New Political Economy 493.

[206] ibid., 503–4.

business of tax havens tends to be strongly influenced by geography, this is suggestive of a rising demand for tax haven services in countries such as India and China.[207]

Historically, these nations have struggled to ensure tax compliance among their citizens and have fared poorly on transparency measures.[208] China, for example, was considered to have a weak legal framework for beneficial ownership transparency in a 2015 Transparency International report on the G20's promises to make progress on that front[209] - unsurprisingly, considering that the previous year China had obstructed the G20's efforts to adopt these principles before ultimately relenting.[210] Therefore, the increasing market share of customers in developing countries in place of that from developed countries puts international efforts to curb tax evasion in a difficult position. These efforts tend to be led by wealthier nations, sometimes under the aegis of the OECD, and, like the US's FATCA, rely on the implicit or explicit threat of punishing non-compliance by excluding tax havens from western domestic markets.[211] The rise of non-western economies both undermines the leverage of western powers by giving tax havens a viable alternative source of business and increases the influence of powers that might be less keen on tackling the problem of tax evasion.

i. Reasons for Optimism

However, promising developments in the largest of these developing countries suggest these fears may not come to pass. China and India, in particular, have both taken action against tax evasion on individual, unilateral and multilateral levels.

---

[207] Annette Alstadsæter, Niels Johannesen and Gabriel Zucman, 'Who Owns the Wealth in Tax Havens? Macro Evidence and Implications for Global Inequality' (2018) 162 Journal of Public Economics 89, 90–93.

[208] William Gamble, 'The Middle Kingdom Runs Dry: Tax Evasion in China' (2000) 79 Foreign Affairs 16.

[209] Transparency International, Maira Martini and Maggie Murphy, *Just for Show? Reviewing G20 Promises on Beneficial Ownership* (2015).

[210] Jamie Smyth and George Parker, 'G20 Leaders Back Drive to Unmask Shell Companies' (16 November 2014) <https://www.ft.com/content/25ae632e-6d60-11e4-8f96-00144feabdc0> accessed 21 September 2020.

[211] Sharman (n 1) 498.

In the early years of Xi Jinping's premiership of the Chinese Communist Party, China saw a crackdown on corruption and tax evasion among leading Communist Party officials and, subsequently, members of the entertainment industry. As the 2014 China Leaks show, leading party officials, including the family of former premier Wen Jiabao, frequently made use of the British Virgin Islands to hide the true extent of their wealth.[212] In response, between 2012 and 2015, 100 members of China's political elite were investigated along with thousands of members of provincial administrations.[213] Moreover, in 2016, the tax authority began to publish blacklists of individuals guilty of evading tax, applying penalties such as a ban on leaving the country.[214] More recently, attention has turned to the entertainment industry. A task force was established in 2018, in order to investigate the use of 'yin-yang contracts', which consist of a fake copy for the tax administration and a private copy reflecting the true amount the actors would be paid, following the revelation that Fan Bingbing, at the time the highest-earning actress in China, had made use of them.[215] India, meanwhile, amended the definition of non-resident Indian (NRI) status in 2019 in order to make it more difficult to exploit for the purposes of evading tax.[216] This followed a 2016 tax amnesty which allowed those that had evaded tax

---

[212] 'Leaked Records Reveal Offshore Holdings of China's Elite' (*ICIJ*) <https://www.icij.org/investigations/offshore/leaked-records-reveal-offshore-holdings-of-chinas-elite/> accessed 23 September 2020.

[213] Jaqueline May Ives, 'The Relevance of Tax Havens for China' 40.

[214] 'Understanding China's Tax Offenders Blacklist System' (*China Briefing News*, 16 December 2016) <https://www.china-briefing.com/news/understanding-chinas-tax-offenders-blacklist-system/> accessed 23 September 2020.

[215] 'China Cracks Down on Tax Dodges by Nation's Highest-Paid Celebrities' (*South China Morning Post*, 13 August 2018) <https://www.scmp.com/business/china-business/article/2159456/chinese-authorities-crack-down-tax-dodges-illegal-capital> accessed 23 September 2020.

[216] 'NRI Tax in Budget 2020: NRI Definition Changed to Stop Tax Avoidance | India Business News - Times of India' (*The Times of India*) <https://timesofindia.indiatimes.com/business/india-business/nri-definition-changed-to-stop-tax-avoidance/articleshow/73860186.cms> accessed 24 September 2020.

to avoid prosecution by declaring their assets, on which a 45% tax was levied. This action brought in $9.8bn.[217]

These nations have also taken steps to bring themselves into line with multilateral efforts to address the problem of tax evasion, with both nations signing up to the Common Reporting Standard (CRS). India supported its introduction in 2014, signing the Multilateral Competent Authority Agreement (MCAA) in 2015, which came into effect in May 2016.[218] It also committed to the Automatic Exchange of Information in line with the CRS by 2017, having agreements in place with 96 countries, along with an Inter-Governmental Agreement with the US signed in 2015.[219] China similarly had the MCAA come into force in 2016 before adopting the CRS in 2017, following the issuing of the SAT's Announcement 14.[220]

Perhaps the most interesting attempts to tackle the problem on the part of these developing nations, however, have been unilateral. In both the Chinese and the Indian cases, these revolve around the implementation and development of General Anti-Avoidance Rules (GAARs). China's Enterprise Income Tax Law (EITL), the first Chinese law to impose an income tax on all companies, came into effect in 2008, including within it a GAAR.[221] Rather unusually, the GAAR was extended in 2009, when China's State Administration of Taxation (SAT) issued Circular 698, subjecting equity transactions between foreign companies involving an interest

[217] Simon Mundy, 'India Tax Amnesty Draws $9.8bn in Asset Declarations' (2 October 2016) <https://www.ft.com/content/a511f14e-8875-11e6-8cb7-e7ada1d123b1> accessed 24 September 2020.

[218] OECD, 'Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports' 1; Income Tax Department, Government of India, 'Automatic Exchange of Information (AEI)' <https://www.incometaxindia.gov.in/Pages/eoi/automatic-exchange-of-information.aspx> accessed 25 September 2020.

[219] Income Tax Department, Government of India (n 14).

[220] 'A Brave New World in Tax Transparency: CRS in China, Hong Kong and Taiwan' (*International Tax Review*) <https://www.internationaltaxreview.com/article/b1f7nb1x4zv1sc/a-brave-new-world-in-tax-transparency-crs-in-china-hong-kong-and-taiwan> accessed 25 September 2020; OECD (n 14).

[221] Sidney CM Leung, Grantley Taylor and Grant Richardson, 'The Effect of the General Anti-Avoidance Rule on Corporate Tax Avoidance in China' (2019) 15 Journal of Contemporary Accounting and Economics 105, 116.

in an enterprise that is resident in China to corporation tax.[222] This includes cases where that interest is in an offshore holding company that owns an enterprise in China if that holding company is deemed an abuse of the corporate form purely intended for tax planning purposes, without any reasonable business purpose.[223] Circular 698 is significant because it effectively extends the SAT's jurisdiction to transactions that take place between two non-resident companies, granting it extensive extraterritorial authority, and also because it allows the SAT to pierce the corporate veil and ignore the existence of shell companies in tax havens when taxing MNEs.[224]

The legal principle on which this GAAR operates, is that any corporate structure that lacks a 'reasonable commercial purpose' yet produces tax benefits, be they in the form of reduction of the tax burden or deferral to a later date, should be considered incompatible with the spirit of the law.[225] Even though an arrangement might be compliant in form with Chinese tax law, it may still be rejected if it lacks economic substance.[226] China's SAT would therefore have the authority to adjust the amount of tax owed by the enterprise. Unlike most tax authorities, which tend to use the GAAR as a last resort to tackle particularly extreme cases of abuse, China's SAT has tended to be fairly aggressive in its implementation, taking advantage of the broad scope of action allowed by the principles on which it is based to use it as a tool to enforce the spirit of the tax code.[227] These principles bear a striking resemblance to those that motivated the Indian tax authority's efforts to tax a 2007 transaction between the HTI and Vodafone's Dutch subsidiary involving a holding company registered in the Cayman Islands, named CGP,

---

[222] PwC, *Competing Forces for Tax Reform - Challenges for Today's Tax Professionals* (2015) 16; Wei Shen and Casey Watters, 'Is China Creating A New Business Order? Rationalizing China's Extraterritorial Attempt to Expand the Veil-Piercing Doctrine' [2015] International Law 89, 472.

[223] Shen and Watters (n 17) 476; Dongmei Qiu, 'Qiu, Collecting Unpaid Tax Offshore- Caribbean Tax Havens and FDI in China.Pdf' (2014) 12 Bulletin of International Taxation 648, 651.

[224] Shen and Watters (n 17) 474; 488; 501.

[225] Yan Xu, 'China's General Antiavoidance Rule And Its Commitment to the Exchange of Information' (2018) 91 Tax Notes International 345, 348.

[226] ibid., 349.

[227] ibid., 351–2; 354–5.

that (through 8 shell companies registered in Mauritius) owned shares in the Indian telecom company HEL.[228]

China and India's moves have not been uncontroversial. A number of potential shortcomings have been identified in China's GAAR that could render it ineffective, from a potential lack of legitimacy due to overreach into areas typically reserved for company law, to a lack of clarity leading to difficulties enforcing it in an equitable manner.[229] Indeed, the Indian tax authority's initial case against Vodafone proved unsuccessful, with the country's supreme court ruling in favour of the defendant in 2012.[230] However, in subsequent years these measures have become entrenched in both India and China. Although China's enforcement of Circular 698 has also been taken to court, in general the SAT has been successful in these cases, securing tax on the sale of a joint venture in Jiangdu by a US fund through a holding company in Hong Kong in 2010, for example.[231] As a result, there is some empirical evidence that suggests that the introduction of the GAAR was responsible for a reduction in corporate tax avoidance between 2006 and 2010. [232] Moreover, China has addressed some of the concerns regarding the lack of clarity in its GAAR that makes it open to overuse by the authorities. In 2015, the SAT issued Public Notice 7, which clarified some of the ambiguities that had previously existed between the GAAR's use of 'reasonable commercial purpose' and economic substance as tests for the legitimacy of an economic transfer.[233] Public Notice 7 therefore made the requirements for a transaction to be viewed as valid more explicit and reduced tax uncertainty for non-resident enterprises.[234] However, this by no means represented a step backwards in the aggressive employment of the GAAR. On the contrary, Public Notice 7 also extended the remit of Circular 698 to include indirect transfers of all China Taxable Properties, rather than just

---

[228] ibid., 513–4; Dr Patricia Lampreave, 'Anti-Tax Avoidance Measures in China and India: An Evaluation of Specific Court Decisions' (2013) 67 Bulletin for International Taxation 12, 56–9.

[229] Shen and Watters (n 17) 496; 506–9.

[230] ibid 513–5; Lampreave (n 20) 58.

[231] Lampreave (n 20) 55–6.

[232] Leung, Taylor and Richardson (n 215) 106.
[233] Xu (n 219) 355.
[234] ibid., 356.

equity in Chinese enterprises, a very significant extension in scope.[235] This suggests that Chinese authorities have been pleased with the results of their aggressive use of the GAAR and unorthodox application of it to include equity and asset transfers. Indeed, the SAT has gone further in its campaign against tax avoidance and evasion among MNEs by issuing Public Notice 6 in 2017, which intensifies the monitoring of company profit levels, expands the types of enterprise liable for tax audits and sets out the information companies are obliged to provide auditors, as well as the penalties for failing to comply.[236] Together with China's participation in international information exchange agreements, this improves the SAT's ability to distinguish between legitimate transfers and those that aim to abuse loopholes in the tax code.[237] India, meanwhile, introduced a retrospective GAAR into its tax code after the Supreme Court's verdict in 2012, which came into force in 2013.[238] This allowed it to retry the Vodafone case, which was ultimately resolved in favour of the tax administration in 2019.[239]

Thus, in spite of concerns about the efficacy and enforceability of these measures, they have proven reliable and entrenched themselves as a tool for cracking down on tax evasion and avoidance by MNEs, paving the way for increasing demands for company transparency on tax matters. Although these developing countries are not unique in having implemented GAARs, their aggressive approach in using it to ensure that foreign enterprises comply with their tax codes is notable. Furthermore, they are unique in their extension of the GAAR to indirect transactions of equity in resident enterprises in a way that simply ignores the corporate status of shell companies registered in tax havens which exist for the primary purpose of avoiding tax. If taken up more broadly, this has the potential to undermine MNEs' rationale for creating subsidiaries in low-tax jurisdictions as it would potentially expose them to double taxation, rather than allowing them to evade tax in the jurisdictions where the substance of their

---

[235] PwC, *Competing Forces for Tax Reform - Challenges for Today's Tax Professionals* (2015) 16; Xu (n 219) 353.

[236] PwC, *China's SAT Issues New Measures for Special Tax Investigation Adjustments and Mutual Agreement Procedures* (2017); PwC, *China Sets Priorities for Its Anti-Tax Avoidance Initiatives* (2018).

[237] Xu (n 219) 356–7.

[238] Lampreave (n 20) 52; 56; Deloitte, *General Anti-Avoidance Rules (GAAR): India and International Experience* (2017) 30.

[239] Shen and Watters (n 17) 513; Stephanie Findlay and Nic Fildes, 'Vodafone's India Venture under Threat after Court Ruling' (28 October 2019) <https://www.ft.com/content/9c3130ce-f732-11e9-a79c-bc9acae3b654> accessed 25 September 2020.

economic activity takes place. In doing so, it would undermine the position of tax haven administrations and facilitate further measures to curb the problem. The UK, then, would be wise to heed both the intention and methods of developing countries on the issue of tax evasion.

IV. UK DOMESTIC MEASURES

On top of being involved in international efforts, such as being a leader in the OECD's adoption of the AEOI standard and CRS, the UK has also attempted to introduce domestic measures to curb tax evasion. Given Britain's unique position in global tax evasion as documented in **Section I.III.**, any strategy to combat international tax evasion must be accompanied by a series of domestic reform. This section sets out the context for the shift in domestic action, highlights the key measures adopted, and then evaluates some inherent problems that these measures have faced.

Reducing the tax gap, particularly through tackling tax evasion and avoidance, has been a high priority of the governments since 2010. The measures introduced since 2010 include tougher criminal and civil sanctions, a new disclosure programme for taxpayers to declare any liabilities for assets held offshore, arrangements for serial tax avoiders, harder measures to tackle promoters (marketers) of tax avoidance schemes, and special measures for large businesses and multinational corporations with a history for aggressive tax planning or non-cooperation with HMRC.[240]

The efforts of the 2015 Conservative government were intensified by the publication of the 'Panama papers' in April 2011. After this, David Cameron announced a new criminal offence that would create liability on the part of those high up in corporates if employees facilitate tax

[240] Anthony Seely, 'Tax Avoidance and Tax Evasion', (April 2020) *Commons Library Briefing Paper Number 7948*, p72-80.

evasion, and a new investigative regime led by HMRC and the National Crime Agency.[241] The trend continued till the 2018 budget, when the government announced a further 21 measures to tackle avoidance, evasion and other non-compliance, forecasted to raise an additional £2.1 billion by 2023-24. The total measures introduced since 2010 reach 100.[242] The result of these efforts is a total of £2.9 billion recovered from offshore non-compliance since 2010.[243]

Measures Adopted Since 2010

There are different unliteral measures targeted at both tax evasion and tax avoidance that have been adopted since 2010.[244] They fall into three rough categories: (1) there are measures that act as a deterrent upon the individual evading tax; (2) there are measures deterring others from assisting those who evade tax (marketers, obligations on financial institutions); (3) there are measures that aim to increase the level of information available to the government to investigate tax law breaches (these include disclosure measures and beneficial ownership registers).

Each category will be taken in turn.

i. Individual Deterrents

The measures that place a deterrent on the individual include both civil and criminal sanction. There is a new and simplified criminal offence for those that evade tax, and increased civil penalties for offshore noncompliance, contained in the Finance Acts of 2015 and 2016. Only 26 individuals were prosecuted between 2012 and 2018 under the older offence, which is why

---

[241] Press Release, 'PM: Companies to be liable for employees who facilitate tax cheating', April 2016, accessible at https://www.gov.uk/government/news/pm-companies-to-be-liable-for-employees-who-facilitate-tax-cheating; and HMRC news story, 'UK launches cross-government taskforce on the 'Panama Papers'', April 2016, accessible at https://www.gov.uk/government/news/uk-launches-cross-government-taskforce-on-the-panama-papers accessed date?
[242] HMRC and HM Treasury 'Tackling tax avoidance, evasion and other forms of non-compliance' (March 2019), 2, accessible at 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

[243] HMRC and HM Treasury, 'No Safe Havens' (2019) *HMRC's Strategy for Offshore Tax Compliance*, p4, accessible at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802253/No_safe_havens_report_2019.pdf
[244] For instance, the government has introduced a Diverted Profits Tax to address profit shifting, however this measure, among others, is more related to tax avoidance and is not the subject of this section.

the simplified strict liability offence was introduced.[245] Given the offence is strict liability, no dishonesty on the part of the defendant needs to be proven – making prosecutions far easier.

As well as personal sanctions for future evasion, the 'Requirement To Correct' places a penalty starting at 200% of the owed tax on historic offshore tax non-compliance (Finance (No. 2) Act 2017). Since September 2016, there have been 18,000 such notifications for past corrections.[246]

There were also disclosure deadlines, beyond which a 'super penalty' of 100-200% could be imposed if non-disclosure was discovered. The penalty is not tied to the underlying conduct, therefore, innocent mistakes are treated the same as fraud – incentivising everyone to be particularly stringent in assessing their affairs and making the prosecution of fraudulent cases easier. This super penalty for non-disclosure was imposed in addition to an asset-based penalty from April 2017, which is for the most serious cases of evasion starting at 10% of the value of the asset or 10 times the potential lost revenue related to the asset.[247]

ii. Facilitator Deterrents

There are deterrents in the Finance Act 2016 that introduce penalties for those who deliberately help others evade tax offshore.[248] Similarly, there are measures that prevent the marketing of tax avoidance or evasion schemes. For example, there are increased penalties for those who devise, enable or use such schemes – removing any economic incentive and removing any profit for those charged. There are also harsher penalties for repeat offenders and tough penalties to 'deter enablers'.[249] In addition, the Criminal Finances Act 2017 introduced a Corporate Criminal Offence for corporate bodies that fail to prevent their employees from facilitating tax evasion. This places the responsibility on the company to ensure it does not become complicit in tax evasion and providing an incentive for private bodies to curb tax evasion.

iii. Increasing Transparency

[245] Chartered Institute of Taxation, 'Latest on the fight against tax evasion and avoidance' (2018) available at https://www.tax.org.uk/media-centre/blog/media-and-politics/latest-fight-against-tax-evasion-and-avoidance
[246] HMRC and HM Treasury 'Tackling tax avoidance, evasion and other forms of non-compliance' (March 2019), 15.
[247] Chartered Institute of Taxation, 'Latest on the fight against tax evasion and avoidance' (2018) available at https://www.tax.org.uk/media-centre/blog/media-and-politics/latest-fight-against-tax-evasion-and-avoidance
[248] HMRC and HM Treasury 'Tackling tax avoidance, evasion and other forms of non-compliance' (March 2019), 15.
[249] Ibid., 12.

The main driver towards increasing tax transparency has been the multinational standards advocated for by the Global Forum on Tax Transparency and Exchange of Information and the OECD, such as the adoption of the automatic exchange of information standard and CRS (discussed in section III.III).

However, the UK has been a world leader in the bid to collect information on beneficial ownership of companies and trusts, even though this information forms part of the CRS. The UK was 'one of the first countries to introduce a public register of company beneficial ownership'.[250] The UK unilaterally led the way on this front and has recognised this plays a 'central role' in curbing evasion.[251]

There are two ways that transparency is achieved in the UK. First, UK companies and LLPs have to provide annual information about 'persons with significant control' over them. Second, following the Money Laundering, Terrorist Financing and Transfer of Funds Regulations (2017) there was established a Trust Registration Service. Trustees of UK trusts, and of non-UK trusts with some form of UK tax liability, will have to hold written, accurate and up-to-date records of their beneficial owners and present these to authorities upon request.[252] These are important steps given that trusts are common vehicles to evade tax, providing anonymity and distance from the perpetrator.

In addition, registration is being extended to property purchased by non-UK entities, to be introduced by 2021.[253] This register will be for people with significant control over non-UK companies owning UK real estate, with the intention being that HMRC will be able to work closely with other authorities to investigate owners of high value property to establish where

[250] HMRC, *The Taxation of Trusts: a review*, Consultation Document (November 2018), 9.
[251] HMRC and HM Treasury, 'No Safe Havens' (2019) *HMRC's Strategy for Offshore Tax Compliance*, 9, accessible at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/802253/No_safe_havens_report_2019.pdf
[252] HMRC, *The Taxation of Trusts: a review*, Consultation Document (November 2018), 9.
[253] Ibid.

the money came from to purchase the asset. Those that cannot give this explanation will be liable to have their property confiscated under an 'unexplained wealth order'.[254]

IV.I Limits of UK domestic Measures

i. Crown Dependencies and Overseas Territories

As noted in **Section I.III.**, the UK has a complicated relationship with its Crown Dependencies (CDs) and Overseas Territories (OTs) when it comes to regulating tax evasion. There has been cooperation between the UK and the CDs in the past on the issue of tax evasion. In 2013, the CDs and OTs agreed bilateral arrangements with the UK on the automatic exchange of information.[255] This led them to adopt the Common Reporting Standard following the UK's adoption of it.[256] However, the influence that the UK can wield is limited as each of the territories are separate jurisdictions that have independent supervisory authorities responsible for ensuring that regulatory standards are met.

One area that has been of particular difficulty, is that which deals with persuading CDs and OTs to adopt registers of beneficial ownership. The government of the UK introduced provisions for such registers first in 2015.[257] In 2014, the Prime Minister tried to persuade CDs and OTs to follow the UK's example. The message was that they were 'welcome' to join the UK to increase the transparency of ownership of companies.[258] Bilateral agreements for the

[254] Chartered Institute of Taxation, 'Latest on the fight against tax evasion and avoidance' (2018) available at https://www.tax.org.uk/media-centre/blog/media-and-politics/latest-fight-against-tax-evasion-and-avoidance
[255] HMRC Statutory Guidance, 'Automatic Exchange of Information Agreements: other UK Agreements' (updated 11 June 2020), accessed July 2020, available at https://www.gov.uk/government/publications/automatic-exchange-of-information-agreements-other-uk-agreements/automatic-exchange-of-information-agreements-other-uk-agreements
[256] Question for HM Treasury, British Overseas Territories, tabled on 9 February 2015 by Lord Luce, available at https://questions-statements.parliament.uk/written-questions/detail/2015-02-09/HL4852
[257] Anthony Seely, 'Tax Avoidance and Tax Evasion', (April 2020) *Commons Library Briefing Paper Number 7948*, 82.
[258] Prime Minister's Letter to the Overseas Territories on beneficial ownership (April 2014) accessible at https://www.gov.uk/government/publications/prime-ministers-letter-on-beneficial-ownership/prime-ministers-letter-to-the-overseas-territories-on-beneficial-ownership

exchange of registers of beneficial company ownership were agreed with CDs and OTs in 2016. This highlights that the UK is able to wield some influence in dealing with the CDs and OTs.

The same issue has been confronted in relation to the efforts to introduce a public registration of trust ownership. Dame Margaret Hodge and Andrew Mitchell tabled an amendment to the Financial Services Bill in March 2019, to call for a draft Order in Council requiring overseas territories to introduce similar registers of beneficial ownership by December 2020. However, the vote was pulled after it became clear that the government faced a defeat.[259] This approach was rebuffed by Jersey which had warned that such a move would create a 'constitutional crisis' given that dependencies are self-governing. They were also worried that this would do little to curb the use of tax havens, as any business currently in Jersey would move to Delaware or somewhere similar.[260]

The issue of the Crown Dependencies and Overseas Territories is incredibly complex. First, there is the question of efficacy. Will action to increase transparency in the UK's CDs and OTs reduce overall evasion? Or will evaders move to other havens as Jersey's government recently suggested? Second, the constitutional issues, and the influence the UK has over these territories, means that action must be delicate and sensitive.

ii. Privacy

The EU has been the driving force in areas of transparency. The Money Laundering, Terrorist Financing and Transfer of Funds Regulations (2017), noted above, were introduced in compliance with the 4th EU Anti-Money Laundering Directive (AMLD). The 5th Directive was adopted at EU level in July 2017 and the implementation deadlines were January 2020 and March 2020 for member states. If the 5th Directive is not implemented into UK law, which, post-Brexit, the UK is under no obligation to do, then there are serious questions about privacy to be raised

[259] Mark D'Arcy, *Tax Haven Retreat Underlines Government's Weakness in Commons*, BBC News, 4 March 2019.
[260] Henry Mance and Madison Marriage, *Crown Dependencies Face Crackdown on Secret Companies*, Financial Times, 1 March 2019.

In a review of the taxation of trusts, published by HMRC, they set out the argument that trusts are an intrinsic part of the UK legal system, and that they are a useful tool to hold assets for beneficiaries.[261] However, one of the key principles driving the reform is transparency and it has been argued that the proposals to have an open register is "deeply worrying".[262] This is because, just as many would not wish that other members of the public could see into their bank accounts, many would not wish that any assets they are the beneficial owner of, under a trust, would be public knowledge. It has been reported that trusts are falling out of favour in the public, and that privacy is the key concern driving the decline in their use.[263]

Oats and Tuck have argued that transparency is not a goal in itself and that transparency should be tied to both effective reduction in tax fraud and the respect of privacy.[264] They note, for instance, some NGOs use the issue of transparency to promote other agendas.[265] It is also notable that there have been questions raised, including within this paper, with regards to the effectiveness of the CRS and about whether there is empirical evidence that greater transparency will reduce the overall global levels of tax evasion.[266] Two separate issues are often conflated, first, the content of disclosure and, second, the audience for that disclosure. In relation to the publication of tax strategy statements by companies, it could be argued successfully that disclosure of information is no longer being used as a means of identifying wrongdoing.[267] Instead, disclosure is being seen as an end in itself, detached from the goals of identifying tax fraud.

[261] HMRC, *The Taxation of Trusts: a review*, Consultation Document (November 2018).
[262] Sophie Mazzier, 'A Close Look at: The Taxation of Trusts: A Review' published by HMRC in November 2018', informaconnect.com, 14 June 2019, available at: https://informaconnect.com/a-close-look-at-the-taxation-of-trusts-a-review-published-by-hmrc-in-november-2018/
[263] Emma Agyemang, *Could New Regulation Spell the Death of Trusts*, Financial Times, 17 January 2020; and Emma Agyemang, *Trusts remain out of Favour with Wealthy Families*, Financial Times, 15 February 2019.
[264] Lynne Oats and Penelope Tuck, 'Corporate Tax Avoidance: Is Tax Transparency the Solution?' (2019) *Accounting and Business Research*, 49:5.
[265] Oats, L. and Morris, G., 'Tax Avoidance, Power and Politics'. In: N. Hashimzade and Y. Epifantseva, eds. (2018) *The Routledge Companion to Tax Avoidance Research*. Routledge, 458–470.
[266] Christians, A., 'Tax Activists and the Global Movement for Development Through Transparency' In: M. Steward and Y. Brauner, eds. (2012) *Tax Law and Development*., 316–344.
[267] Lynne Oats and Penelope Tuck, 'Corporate Tax Avoidance: Is Tax Transparency the Solution?' (2019) 45(9) *Accounting and Business Research*, 578.

Similarly, with regard to the issue of the audience to which the disclosure is available, the 5th EU AMLD has been critiqued. It has been noted in section III.II that the EU Data Supervisor was critical of EU measures being introduced to curb tax fraud and money laundering, that citizens' rights to privacy were being disregarded as measures were disproportionate and no longer attached to any suspicion of wrongdoing – instead applying it blanketed across the board – which increases the risk of data breaches and abuse. This critique has also been applied to the 5th AMLD, which the UK will implement, because it will open up the register to those with a 'legitimate interest' and this could include NGOs such as the Tax Justice Network or journalists. It is also criticised because there is no mention in the Directive that those who obtain this confidential information are themselves obliged to maintain confidentiality.[268] This is because the Directive states that access should be 'at least' given to those who 'demonstrated previous *relevant* activities *related* to the fight against money laundering and terrorist financing' [emphasis added]. There is a risk that transparency is being pursued for transparency's sake, and that the rights to privacy are being disproportionately affected, in the noble pursuit of reducing tax fraud. But any measure aimed at a good end must still be proportionate and effective, and this is not the case with the EU 5th AMLD.

The UK, as noted above, has been a leader in the field of tax transparency domestically, and has pushed for it throughout its CDs and OTs. It must ensure further measures, particularly post-Brexit, remain effective and proportionate.

V. RECOMMENDATIONS

On the basis of the above analysis, the following recommendations are made for a British strategy to combat tax evasion. The paper first justified why any strategy ought to be multilateral by highlighting the limits of FATCA. It now lays out a series of recommendations for both multilateral and domestic strategies for the UK government to pursue. The

[268] David Russell and Toby Graham, 'Maintaining the Rage: the EU's Attack on Trusts at Home and Abroad' (2017) 23(2) *Trusts and Trustees* 145.

recommendations amount to a strategy based on multilateralism, reciprocity, transparency and privacy, as well as attention to the historical role played by Britain in the development of offshore.

V.I UNILATERAL RECOMMENDATIONS

i. A British FACTA?

As already suggested, FATCA has been a significant development in the recent history of policy interventions to curb tax evasion. Since its legal inception in 2010, the Foreign Account Tax Compliance Act has had some success in reducing tax evasive practices by US companies and individuals: in many ways, the price of implementing its onerous reporting standards has become the 'cost of doing business' with the US.

Should the UK pursue its own 'British FATCA' as a way to curb tax evasion by domestic taxpayers and companies? Our previous analysis suggests that it should not. From a purely economic perspective, the withholding tax penalty on US-based income for non-compliance has successfully incentivised foreign firms to bear the large costs of FATCA implementation.[269] However, the benefits of access to UK-based income is not as great as access to the much larger US market. Indeed, demand for access to the UK has – and is likely be to further - lessened by Britain's exit from the EU.

It could be argued that implementation costs will not be as great for a British FATCA, since foreign firms have already created the necessary infrastructure to comply with the US FATCA.

[269] David L Brumbaugh, 'Farm Legislation and Taxes in the 110th' (*Every CRS Report*, 22 January 2008) www.everycrsreport.com/reports/RS22759.html accessed 18 August 2020; Herbert Smith Freehills LLP, 'The Cost of Complying with FATCA' (*Lexology*, 3 June 2013) www.lexology.com/library/detail.aspx?g=a74e2969-7fe3-4931-999b-7caaf60c5588 accessed 20 August 2020.

Hence, FFIs and individuals will be more willing to comply for the lesser benefits of UK access. Moreover, the UK could provide an additional incentive for compliance by foreign governments in the form of reciprocity – a feature notably lacking from the US's legislation.[270] This proposal could, however, distract from the larger goal of achieving a more comprehensive solution to the problem of tax evasion.

There are other reasons why FATCA provides a poor model for a UK scheme to curb offshore tax evasion. First, once the Brexit transition period ends, the UK will be a regulatory competitor to the EU; this makes it less likely that either party will wish to cooperate on tax rules unless there is a good chance of mutual benefits. Second, the viability of a more reciprocal agreement depends on the final relationship reached between the UK and EU, which at present, is still highly uncertain. More broadly, UK foreign policy is currently in a transformational phase as Britain reimagines the role it should play in global affairs. It may be some time before the country is sure that a venture like FATCA, and all the implications for foreign relations that it would involve, satisfies its new foreign policy aims.

Taking these considerations into account, we cannot recommend, at present, that the UK pursues a FATCA-style venture to curb offshore tax evasion. As a piece of legislation which does provide a proven practical template however, policymakers should keep an open mind on whether a 'British FATCA' would be appropriate in the years to come. At present, the UK would be better off pursuing, at the international level, a tax compliance scheme that is more comprehensive and reciprocal than FATCA. We therefore recommend that British efforts are more effective if targeted at the multilateral and international level.

V.II MULTILATERAL RECOMMENDATIONS

i. Pressure on the US to Reciprocate Automatic Exchange of Information

[270] L. Hakelberg, 'Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power' *Review of International Political Economy* 23, 511-541.

It was argued earlier in the paper that the adoption of a global standard on the automatic exchange of information is a step in the right direction to curb tax evasion. By encouraging multilateral exchanges of information – collected by placing due diligence requirements on financial institutions that hold bank accounts, investments or manage trusts – authorities across borders are able to better identify breaches of the law.

Such multilateral exchange of information has led to considerable success and studies noted in section III.II.iv emphasised a decrease in the number of assets held in offshore havens worldwide. However, the paper raised questions about whether this data was reliable. For instance, the US was not included in the definition of 'offshore haven' in those studies that saw huge capital flight away from havens after the introduction of the CRS. This is coupled with data from Cari et al. (noted in that same section) that US cross-border deposits were higher than those in non-havens and that this increase was 'immediate and persistent' after the CRS was introduced. This suggests that the US has been replaced as the destination for those who wish to remain anonymous and benefit from financial secrecy offered in many US states, This seriously undermines the effectiveness of the global standard.

Therefore, the UK must put more pressure on the US to sign up to the global standard of automatic exchange and the due diligence requirements contained in the CRS. This will not be easy, and it has been noted that many in the US believe that FATCA is a like-for-like replacement for the CRS,[271] and therefore the country does not recognise the need to join global efforts. However, the case must be made that efforts are undermined significantly unless the US adopts the standards that many jurisdictions currently have.

i. Addressing privacy in the CRS

[271] Craig Rose, *The Biggest Tax Haven of Them All? The US., FATCA and the CRS*, Bloomberg Law International Tax Blog (29 March 2016), accessible at https://www.bna.com/biggest-tax-haven-b57982069147

The issue of privacy has been raised in relation to the sharing of information between authorities as part of the CRS and the collecting of that information (e.g., through public registers of trust ownership) in section IV.

The main argument, warning against increased transparency, relates to the expansive scope of the information collection and the disproportionate nature (through blanket collection) it has taken on. Future efforts to increase transparency in tax matters must be wary and take into account the right to privacy, particularly with the implementation of the 5th Anti-Money Laundering Directive. The fact that journalists or NGOs could have access to the beneficial ownership information collected under the Directive, of mainly law-abiding citizens is too far reaching. This has already been challenged successfully in French caselaw.[272]

The UK can balance continuing to be a world leader pushing for cross-border transparency with the private rights of its citizens. Leaving the EU presents an opportunity in this regard. The UK will no longer have to implement Directives, and instead it can pursue a reasonable, proportionate and effective regime of transparency. Limiting those who can access the information to the authorities and ensuring proper data security to avoid the risk of breaches discussed in this paper with regard to privacy and the CRS. Proportionality is key when governments enact measures that conflict with the private rights of their citizens. Going forward this should be the key operating principle for new UK policies.

ii. Increasing representation in multilateral for a

Efforts to combat tax evasion have frequently been undermined by accusations of illegitimacy, levelled against the international organisations that seek to regulate international taxation. The successful tax haven campaign against the OECD is a key example of this. It is the claim that the OECD and similar bodies do not have the authority, moral nor legal, to develop and enforce taxation policy that has led to proposals for alternative organisations and fora that

[272] Arnaud Tailfer and Stephanie Auferil, 'Register of Trusts and Privacy: French Case Law in Perspective with the fifth Anti-Money Laundering Directive register' (2018) 24(1) *Trusts and Trustees* 968.

might fulfil this function. Of particular note is the G77's suggestion that a UN tax body be created.

While the creation of new, more inclusive multilateral bodies would, in theory, prevent tax policy from being rejected purely on an 'illegitimacy' basis, this view may disregard the ways that such organisations tend to work in practice. Given that they are often dominated by larger, more powerful countries, it should not be assumed that a new body would be as representative as it may at first seem. Indeed, it is worth remembering that, as in the case of the tax haven campaign against the OECD's tax reforms, where the US's intervention was an important factor in the havens' success, the charge of 'illegitimacy' often only has force when weaker states receive the backing of stronger ones. In other words, arguments about legitimacy are always linked to the question of material power.

It is the importance of material power which means that some of the most effective tax policy of recent years has been designed and implemented by the most 'illegitimate' of organisations – the OECD's blacklist, or the non-reciprocal US FATCA, for example. Nonetheless, notably in the case of the OECD's action, these measures and their effectiveness have been limited by the criticisms made of the fora that have promoted them. It is thus desirable, in the event that no new body is created, that current bodies become more representative, by expanding the range of people and groups involved in decision-making processes. The case of the EU, whose influence in matters of tax policy has increased in the last ten years precisely through doing this, shows that this would be a first step towards legitimising the work of other existing international organisations, and thereby rendering their tax policies more effective.

Christensen writes:

> 'The United Nations […] remains an obvious alternative to the OECD, as a globally institutionalised setting where matters of economic policy, including taxation, are

continually discussed. Moreover, it has a truly global scope, as opposed to the OECD, which has been criticised for being a "rich country's club"'[273].

The idea that the UN might play a greater role in regulating international taxation has been floated at least since 2011, when the UN Secretary-General of the time asked countries for submissions regarding a possible strengthening and upgrading of the UN **Committee of Experts on International Cooperation in Tax Matters.**[274] The G77 signalled its support for the change, with various countries separately confirming their agreement – including such tax havens as the Bahamas.[275] In 2011, the arguments advanced included the fact that, with more resources, developing countries might be better able and more willing to get involved in decision-making processes[276], immediately making the committee more representative and authoritative. An increase in funding would also lead to an increase in the committee's technical expertise[277], so that it might add to or even challenge OECD expert-led discourse.

This proposal became more concrete, and more radical, in 2017: in a joint statement, the **G77 and China called for the UN Tax Committee to be upgraded to an intergovernmental UN Global Tax Body.**[278] The Group, and China specifically, expressed the wish that all countries, and particularly less developed ones, be represented among the body's experts: the committee should be transformed 'from experts acting in their own capacity, to an inter-governmental subsidiary body of the Economic and Social Council (ECOSOC), with experts representing their respective governments. This upgrading is necessary and important to allow all Member States to participate in a mechanism that is inclusive and participatory'.[279] In 2017, the G77, under the leadership of Ecuador, also

[273] Rasmus Corlin Christensen (n 86), 5.
[274] Hamwarit Abebe and others, 'The United Nations' Role in International Tax Policy: A Research and Policy Brief for the Use of the NGO Committee on Financing for Development' [2012] 8.
[275] ibid.
[276] ibid. 17.
[277] ibid. 10.
[278] 'G77 and China say: Establish a UN Global Tax Body' (Global Alliance for Tax Justice, 4 October 2017) <https://www.globaltaxjustice.org/en/latest/4-g77-and-china-say-establish-un-global-tax-body> accessed 11 November 2020.

[279] 'Statement on behalf of the Group of 77 And China by Carola Iniguez, Undersecretary of International Organizations of Ecuador, at the Ecosoc Special Meeting on International Cooperation in Tax Matters' (G77) <http://www.g77.org/statement/getstatement.php?id=170407b> accessed 11 November 2020.

suggested that a new UN tax body be created, composed not of experts but of member states, for 'it's the states which have the real mandate to regulate this'.[280] In this way, the second suggestion not only targeted the 'moral' authority of the OECD and similar organisations (because such entities do not represent all countries and because they can be seen to exert coercive pressure on weaker states), but also its lack of authority on a legal level.

In a UK context, the Commonwealth might also serve as a forum for uniting more developed and less developed countries in the common goal of combating tax evasion. It is worth recalling, in this regard, the links between the UK and various tax havens, many of which were former British colonies (see section I.III). While this idea has never been formally proposed, it would necessitate a radical change of direction on the part of many Commonwealth states, which have previously joined forces to fight against further regulation of international taxation. A shift of focus that might even leave the association open to criticisms of hypocrisy, just as the OECD has been criticised for applying standards to other countries that member states do not follow themselves.

If the above ideas have numerous advantages and advocates, a serious disadvantage is that they would not necessarily gain the support of the most powerful countries. The prospect of a new UN tax body was, in fact, also raised during the G77 meeting on finance for development in Addis Ababa in 2015.[281] However, the US and some European countries were quick to make clear that they were not in agreement with this proposal; these countries argued for continued OECD governance.[282] Likewise, in 2011, no OECD country declared itself in favour of upgrading the UN Tax Committee.[283] If this opposition from larger, more powerful states might first prevent a new tax body from being set up, it is also the case that even more moderate opposition might severely impact the UN's capacity to act in international taxation. For

---

[280] Sophie Edwards, 'The G77 Will Push for "Tax Justice" Through a UN Tax Body, says Ecuador's Foreign Affairs Minister' (Devex, 13 January 2017) <https://www.devex.com/news/the-g77-will-push-for-tax-justice-through-a-un-tax-body-says-ecuador-s-foreign-affairs-minister-89442> accessed 11 November 2020.

[281] ibid.

[282] ibid.

[283] *Abebe and others* 10.

instance, in the 1970s, the OECD resisted the UN's efforts to improve corporate tax transparency.[284]

It therefore seems that creating a new international body to regulate taxation might encounter various practical problems, of a political nature. Nonetheless, given the impact of criticisms of 'illegitimacy' on the effectiveness of tax policy, it might yet be advisable for current existing bodies to broaden the range of people and organisations that it consults when debating and drawing up such policies, so as to have wider public representation, support, and legitimacy. The EU's recent work on tax evasion represents an example of this. Christensen writes that the Union's influence has increased recently as a result of changes to the people involved in its anti-tax evasion activities: 'EU tax networks have moved from an embryonic, narrow expert context to a highly heterogeneous, contested, politicized and unstable setting, with broad public, political and interest group involvement'.[285] In terms of institutions, this includes a move from European Commission tax experts to European Parliament politicians[286] – similar to what the G77 was advocating in 2017.

In conclusion, calls for a new or upgraded tax body should be considered in the knowledge that even organisations that are theoretically more representative, and therefore have more legitimacy, may still be subject to the material might of powerful countries. This being the case, it may be more realistic and effective to maintain the institutions which currently regulate international taxation (e.g., the OECD and the EU), but in an altered form. In particular, these institutions should seek to engage a wider range of people and groups when drawing up tax policy. In this way, the current existing international organisations might continue to act in the field of international taxation, using their material power to ensure compliance. However, they may do so more effectively, given that its measures might have more 'legitimacy' and therefore encounter less opposition.

iii. A Global Asset Registry

[284] *Christensen* 5-6.
[285] ibid. 2.
[286] ibid. 6.

A Central Depository System (CDS) is an electronic system used to record and maintain securities and to register the transfer of securities. A Global Asset Registry (GAR) would be a worldwide register of securities that would function like a central depository. A GAR would record the beneficial owners of the world's financial and real assets, making it possible not only to reduce tax evasion, but also curb money laundering, monitor international capital flows and fight kleptocracy.[287] A GAR would also allow wealth inequality to be properly measured and understood, ultimately facilitating more effective tax schemes.

A GAR is not too utopian an idea[288]. The majority of the framework already exists in the form of CDSs that have been created by companies like Euroclear and Clearstream. These systems, however, are currently not for public use and frequently decline to share their information with governments. These CDSs, if made public, could gradually be unified into one Global Asset Register. The growing international trend towards tax transparency has resulted in the creation of AEI, Beneficial Ownership and country-by-country reporting. A GAR is a 'feasible and sensible extension of current transparency approaches'.[289] If combined with 'consistent legal entity and taxpayer identifier numbers', this alone would already provide a large enough framework to start combatting tax evasion effectively.[290]

As a GAR has never previously existed, there are two key issues that would need to be addressed. First, whether or not the register would be public or confidential. In order to prove that the person recorded is the beneficial owner, not the legal owner, personal data would have to be given to the register. It is likely that a system would have to be put in place that protected the data of normal citizens but published the data of PEPs. Second, what incentives and penalties would the GAR issue.

A GAR also requires large-scale international co-operation. The US's introduction of FATCA indicated that countries, not just companies, were interested in CDSs. FATCA was an attempt to create an Asset Registry, but not on a global scale. FATCA has not been so successful because

[287] ICRICT, 'A Roadmap for a global asset registry' (*ICRICT*, March 2019) <https://static1.squarespace.com/static/5a0c602bf43b5594845abb81/t/5c988368eef1a1538c2ae7eb/1553498989927/GAR.pdf> accessed 18 August 2020.
[288] Gabriel Zucman, *The Hidden Wealth of Nations: The Scourge of Tax Havens* (The University of Chicago Press, 2015). The structure of the argument is sampled from Zucman's book.
[289] ICRICT, 'A Roadmap for a global asset registry'.
[290] ICRICT, 'A Roadmap for a global asset registry'.

of its considerable implementation cost but international co-operation would reduce individual country cost. If Britain were to attempt to create its own unilateral solution similar to FATCA, the implementation cost would not make it worth it. To access the GAR, countries would have to pay a registration tax and would have to give information freely. The US's refusal to take part in AEI complicates this. The US's participation is political and depends on which party holds the house and senate majority. US congress has repeatedly denied bills in support of AEI, due to a Republican majority. The politicisation of tax regulation is largely due to multinational corporations being able to influence political decisions in the country. FATCA, however, has cost US corporations billions of dollars. A GAR would mean that the government, rather than corporations, would shoulder the cost of its implementation. Although some post-financial crash countries are more willing to make multinationals pay, this shift in financial burden might prove key to getting the US to co-operate. Furthermore, many key international countries, including the UK, agreed to co-operate with FATCA, suggesting the potential for a larger scale international agreement. FATCA cost British businesses around £2 billion in the first 5 years to accurately record the securities of 177,185 US citizens.[291] A GAR would cause less financial loss for more reward.

Britain is now in a position to act autonomously in the international sphere when it comes to tax regulation. A GAR requires countries levying sanctions proportional to the costs that tax havens impose on other countries to force them to relinquish their opacity. The UK has the weight, and now the independence, to levy those sanctions, especially as it has a relatively large internal market, but more crucially an important financial sector.

A GAR has the potential to benefit Britain greatly. Britain created something similar to a GAR 200 years ago. The land registry functioned as a rough prototype for a CDS, noting down which citizen owned which piece of land. The land registry not only benefited the economy greatly, but it also transformed the political, legal and social sphere for better.[292] A GAR would reduce national inequality and re-solidify Britain's place on the global stage once more. Furthermore, a GAR is specifically tailored to work for countries with territorial tax schemes,

[291] Herbert Smith Freehills LLP, 'The Cost of Complying with FATCA' (*Lexology*, 3 June 2013) <https://www.lexology.com/library/detail.aspx?g=a74e2969-7fe3-4931-999b-7caaf60c5588> accessed 20 August 2020.
[292] Gabriel Zucman, *The Hidden Wealth of Nations: The Scourge of Tax Havens*

like Britain. Patrick Canon estimated that the UK's loss of revenue due to tax evasion is around £70 billion, with only £2 billion having been recovered this decade.[293] It is clear that Britain needs to consider a more drastic and tailored method to combat tax evasion. A GAR would be highly effective if created correctly. A multilateral solution like a GAR also means that the cost for individual countries is significantly diminished.

iv. Learning from the Wider World: Modifying the UK's GAAR

As we have seen earlier, China and India's more aggressive use of their broad GAARs has had considerable success. Britain introduced its own GAAR in 2013, to clarify the principles the courts should adopt in trying tax avoidance cases following confusion over the status and consistent application of the existing Ramsay principle and Arrowtown test.[294] This has been criticised for containing features that effectively undermine the stated purpose of a General Anti-Avoidance Rule.[295] Much of this stems from the fact that the UK's GAAR is in fact a General Anti-Abuse Rule, explicitly drawing a distinction between tax abuse, the most extreme and unusual instances of tax avoidance to which the GAAR applies, and other avoidance arrangements that produce a tax advantage, which are deemed to lie outside the scope of the GAAR.[296] As a result, the UK's GAAR is far more limited than others from around the world, not only those of China and India but also some developed nations like New Zealand, and it tends to give the benefit of the doubt to taxpayers, operating with a relatively light touch.[297] Some improvements have been made since, however, most notably the 2016 decision to introduce penalties of up to 60% of the total value of the tax avoided.[298] At the same time, the UK government appears reluctant to make drastic changes of the sort that have been demanded by campaigners on the grounds that it would produce tax uncertainty and diminish investor confidence.[299]

---

[293] Patrick Canon, 'UK Tax Evasion Statistics 2018' (*PatrickCanon.com*, 2018) <https://www.patrickcannon.net/insights/uk-tax-evasion-statistics/> accessed 15 August 2020.
[294] Judith Freedman, 'The UK General Anti-Avoidance Rule: Transplants and Lessons' 73 Bulletin for International Taxation 332, 333.
[295] TUC, *The Deficiencies in the General Anti-Abuse Rule* (2014).
[296] HM Revenue and Customs (HMRC), *General Anti-Abuse Rule (GAAR) Guidance* (2020) 6.
[297] ibid., 6; 9–10.
[298] House of Commons Library and Antony Seely, *Tax Avoidance: A General Anti-Abuse Rule* (2020) 53.
[299] ibid., 50.

We believe that this is fundamentally misguided. GAARs are *general* rules, intended to supplement existing tax legislation that is unable to prevent tax avoidance because companies and wealthy individuals are able to subvert specific requirements. Though some criticise GAARs for letting parliamentarians get away with poor law-making and allowing courts to act arbitrarily outside the rule of law, the state of international tax avoidance is such that, in the words of Judith Freedman, 'GAARs have become a necessary weapon in the armoury against tax avoidance'.[300] The UK tax gap is an estimated £31bn a year. This is the product of moves by MNEs and the wealthy to push the boundaries of acceptable tax avoidance, frequently straying into legally dubious territory. As a senior accountant for a Big Four accounting firm told the House of Commons Public Accounts Committee in 2013, these companies offer tax structures to their corporate clients that, by their estimation, only have a 25% chance of standing up in court, and they count on the fact that HMRC tends to be too overstretched and under-funded to catch all of them by auditing the companies' finances.[301] This blurs the line between legal avoidance and illegal evasion. The fact that the practice is commonplace suggests that the benefit of the doubt already lies too far in favour of MNEs, who tend to abuse this ambiguity. If it is to be an effective tool, the UK's GAAR must shift the balance and allow HMRC to pursue MNEs more aggressively. As the Supreme Court of New Zealand noted in *Glenbarrow*, 'There will also inevitably be uncertainty […] It is simply not possible to meet the objectives of the general anti-avoidance provision by the use, for example, of precise definitions'.[302] GAARs exist to increase the flexibility of tax administrations and improve their ability to respond to a range of tax avoidance schemes by sacrificing a degree of certainty. Too great an attachment to legal certainty fundamentally undermines their stated purpose. Whereas China's GAAR once raised concerns that its ambiguous phrasing allowed the SAT to employ it overzealously, the UK's GAAR has the opposite problem: it too features ambiguous phrasing, but in a form that allows far too many instances of tax avoidance to slip through the net.

---

[300] Alexis Brassey, '"Tax Avoidance: An Oxymoron" by Dr. Alexis Brassey' (*Cambridge Tax Discussion Group*, 16 January 2017) <https://cambridge.tax/2017/01/16/tax-avoidance-an-oxymoron-by-dr-alexis-brassey/> accessed 22 January 2021; Freedman (n 290) 338.

[301] Nicholas Shaxson, 'No, Corporate Tax Avoidance Is Not Legal' (*Financial Times*) <http://ftalphaville.ft.com/2019/05/16/1557994769000/No--corporate-tax-avoidance-is-not-legal/> accessed 16 October 2020.

[302] Craig Elliffe, 'Policy Forum: New Zealand's General Anti-Avoidance Rule—A Triumph of Flexibility over Certainty' (2014) 62 *Canadian Tax Journal* 147, 163.

To make it fit for purpose, modifications should be made based on lessons learned from other countries' experiences. Before introducing the GAAR, the UK had issues with its anti-avoidance rule being ineffective and inconsistently applied. As with Australia, however, it seems the implementation of a GAAR has led courts to accept a narrower interpretation of unacceptable tax avoidance than the judicial rule that preceded it.[303] This need not be the case, however. New Zealand's experience shows that it is possible for courts to successfully apply a robust GAAR, in conversation with the tax administration, in a consistent and even-handed manner.[304] Although New Zealand's GAAR relies much more heavily on a judicial rule than that of the UK, it should nevertheless be possible to achieve similar results by amending the statutory GAAR to incorporate successful elements of the tougher GAARs of China and India.

Our recommended modifications would fundamentally redefine the scope of the British GAAR. At present, the UK's General Anti-Abuse Rule applies to tax abuse rather than tax avoidance more generally. The chosen name, therefore, signals that the GAAR is intended to be limited in its aims - that it applies only to those instances of tax avoidance so extreme that they can be described as abusive.[305] We believe that the GAAR should be brought into line with the avoidance rules of other nations, including a 2012 recommendation from the EU Commission for its member states, by expanding its scope and turning it into a General Anti-Avoidance Rule.[306]

The most important change to this effect would be to amend the definition of the arrangements to which the GAAR applies. At present, the definition of tax abuse in the GAAR rests on whether a scheme can 'reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions'.[307] This so-called 'double reasonableness test' has rightly been labelled 'tortious' and 'perverse'.[308] It judges tax arrangements not based on their substance, but on whether it would be reasonable for an outside observer to find the arrangement

---

[303] Michael Lang and others, *GAARs - A Key Element of Tax Systems in the Post-BEPS World*, vol 3 (IBFD 2016) 3.
[304] John Tretola, 'Comparing the New Zealand and Australian GAAR' (2017) 25 Revenue Law Journal 1, 26.
[305] Freedman (n 290) 332.
[306] TUC (n 291) 9.
[307] HM Revenue and Customs (HMRC) (n 292) 16.
[308] TUC (n 291) 3; 6; HM Revenue and Customs (HMRC) (n 292) 10.

reasonable. This means that it is an inherently subjective test, and this causes the government's legally binding guidance document to run into the absurd position of defining which political stances can be deemed 'reasonable for the purposes of the GAAR'.[309] Moreover, the double reasonableness test is sufficiently limited in its applicability that an All-Party Parliamentary Group on Anti-Corruption and Responsible Tax considers it better suited to being a test of dishonesty for criminal prosecutions in tax avoidance cases.[310] This definition is therefore not fit for purpose. The UK government should replace it with a considerably more objective and more widely applicable test, such as the Chinese GAAR's 'reasonable commercial purpose' test, as clarified by Public Notice 7. This would base the test on objective factors such as the economic substance of the tax arrangement in trying to ascertain whether an arrangement had tax benefits as its main or one of its main purposes, as recommended by the EU Commission's proposal of 2012.[311]

Adopting the Chinese test would have the added benefit of allowing the UK to address some of the more egregious methods of avoiding tax. Above all it would address the use of holding companies in low tax jurisdictions, by piercing the corporate veil and treating such arrangements on their economic substance and ignoring the existence of the holding company for the purpose of apportioning tax. This would represent a major improvement on the UK's GAAR because, at present, it does not apply to such cases. Indeed, the GAAR's legally relevant guidance explicitly prevents the it from being used in such cases, stating that just because a company takes advantage of international tax arbitrage possibilities, it does not mean that the arrangement is abusive.[312] It goes so far as to suggest that 'many cases of the sort which generated a great deal of media and Parliamentary debate [...] cannot be dealt with by the GAAR', inherently handicapping the UK's ability to use the GAAR to make a serious dent in corporate tax dodging.[313] The contrast between the UK's GAAR, which explicitly withholds itself from tackling the most egregious or newsworthy instances of corporate tax avoidance, and that of India, which was passed, in part, to allow the government to successfully retry the (newsworthy) Vodafone case, is stark. To be sure, India's decision to retrospectively apply the

---

[309] HM Revenue and Customs (HMRC) (n 292) 21.
[310] All Party Parliamentary Group on Anti-Corruption and Responsible Tax, *Ineffective Tax Avoidance: Targeting the Enablers* 6.
[311] TUC (n 291) 9–10.
[312] HM Revenue and Customs (HMRC) (n 292) 7.
[313] ibid.

provisions of the GAAR to Vodafone's tax avoidance arrangement after it had lost the initial case goes against the rule of law and should not be imitated. Nevertheless, the case shows that it is possible to construct a GAAR that can be used to tackle multinational tax structures that, until now, have been able to get away with straddling the blurred line between tax avoidance and tax evasion. This provision and similar statements to that effect should therefore be removed, and the document should instead adopt the 'reasonable commercial purpose' test with its economic substance stipulations that allow for a degree of corporate veil piercing and extraterritoriality in tax enforcement.

Other changes are required to provisions in the guidance document that inherently undermine the GAAR's aims. First, the GAAR establishes an independent advisory panel that requires its members to possess tax expertise, but bars them from being members of HMRC and does not require them to have judicial experience.[314] The result, campaigners fear, is that its membership will be dominated by members of the Big Four accountancy firms who thrive on the demand for tax avoidance schemes and therefore have a very different understanding of what constitutes unacceptable tax practice. They may also have an interest in the continued existence of a tax avoidance industry.[315] Putting vested interests on a panel advising HMRC on how and when the GAAR should be applied has the potential to undermine its effectiveness and legitimacy, and the government should reconsider the membership requirements of the advisory panel.

Second, the GAAR places the burden of proof on the HMRC, rather than the taxpayer.[316] This is the opposite of established practice in most UK tax appeals cases, and goes against international practice, demonstrated by China's GAAR.[317] No justification is given beyond that of safeguarding the interests of the taxpayer. Given that the benefit of the doubt is already so far in the direction of the taxpayer that HMRC loses tens of billions in tax revenue each year, we believe that this degree of caution is counterproductive.[318] Companies should have to prove

[314] TUC (n 291) 6.
[315] ibid., 6–7.
[316] HM Revenue and Customs (HMRC) (n 262) 10.
[317] TUC (n 261) 7; 'EY Tax Insights | China Tax Administration Aims to Clarify GAAR' <https://taxinsights.ey.com/archive/archive-articles/china-tax-administration-aims-to-clarify-gaar.aspx> accessed 29 September 2020.
[318] HM Revenue and Customs (HMRC) (n 262) 9–10; TUC (n 261) 7.

that the HMRC's application of the GAAR to their tax arrangements is invalid, rather than the other way around.

As a final point, and perhaps most egregiously, the provision that the GAAR cannot be applied to tax arrangements that have become 'established practice' must be removed.[319] GAARs fundamentally exist because tax avoidance has become rife among MNEs. A GAAR that refuses to tackle the most popular forms of tax avoidance precisely because they are popular cannot be fit for purpose. It allows all manner of traditional avoidance schemes, most notably transfer mispricing and the use of offshore holding companies, to continue to exist.

Without serious modification, then, the UK GAAR will do nothing to curb the problem of tax avoidance because its effectiveness has repeatedly been undermined by provisions within the legally-binding guidance document that give the benefit of the doubt to taxpayers while tying HMRC's hands. The UK must apply lessons learned from international experience, from the EU's recommendations, the success of China and India, and the experiences of Australia and New Zealand, in order to make it an effective tool against tax avoidance. This, in turn, would allow the UK to undermine the leverage of tax havens and make it easier to tackle tax evasion.

V.III DOMESTIC REFORMS

Due to Britain's historically complicated relationship to tax evasion and its current relations to various offshore financial centres, the paper argues that the recommended multilateral recommendations must be accompanied with the following domestic reforms.

i. Reform of the City of London

Often described as forming a 'web' of international finance connections, the City of London is connected to other British jurisdictions through shared legal and political ties. From Guernsey, Jersey and the Isle of Man, to recent former colonies such as Hong Kong and Singapore the

[319] HM Revenue and Customs (HMRC) (n 262) 17; 22–23.

'web' is held together by long-held business relationships that help direct funds to banks in London[320]. The network also less directly includes other tax haven countries like Switzerland and Luxembourg.

The scale of this network is considerable. If you consider the UK alongside British jurisdictions as one entity, then roughly one-third of all international deposits and investments flow through these jurisdictions. Adding recent former colonies, like Singapore, increases this number to 40%. This compares to a mere 10% figure for the US.[321]

It is worth noting why this system of serving offshore accounts from London has survived for so long, despite its scale. First, the disparate composition of the UK and its jurisdictions obscures the true scale of the tax evasion it facilitates (see I.I). Second, the quasi-independent status of Crown dependencies has allowed the UK to claim there is little they can do to curb secrecy or tax laws in those jurisdictions. As documented in Section I.III., there are extensive historical links between London and tax havens, so these entities are inherently intertwined.

There has been little academic study of the City of London Corporation, or of the City of London more broadly, and its relation to tax evasion.[322] Yet financial activity in London has undoubtedly contributed both to offshore tax evasive practices and to broader costs to the public purse. A recent report by Transparency International, a UK-based anti-corruption organisation, outlined the wider costs of corruption from businesses based in the UK and its offshore financial centres (£325bn in economic damage in recent decades). This figure covers

[320] Adam Ramsey, 'Britain's Empire of Tax Evasion' *Foreign Policy* (Washington DC, 4 April 2016) www.foreignpolicy.com/2016/04/04/britains-empire-of-tax-evasion-panama-papers-mossack-fonseca/ accessed 17 October 2020.

[321] Nicholas Shaxson, 'Tax Havens: Britain's Second Empire', (*Tax Justice Network*, 29 September 2019) www.taxjustice.net/2019/09/29/tax-havens-britains-second-empire/ accessed 17 October 2020.

[322] Nicholas Shaxson, 'The tax haven in the heart of Britain' *New Statesman* (London, 24 February 2011) www.newstatesman.com/economy/2011/02/london-corporation-city accessed 17 October 2020.

money laundering in addition to tax evasion practices, but City institutions are deeply involved in facilitating these activities.[323]

The primary question for policymakers is thus whether reform of the financial services sector in the UK could reduce international offshore tax evasion. The answer depends partly on whether tax havens which have traditionally relied on London could find suitable alternative intermediaries elsewhere. It seems plausible that Crown Dependencies and Overseas Territories may be more dependent on London than more distant havens. As previously discussed, these territories share significant legal commonalities with the UK, so may find substitution of intermediaries more difficult. Yet, it's unclear from the literature whether the flow of funds to these havens could be significantly reduced by heavier regulation of UK finance.

It may also be the case that there are simply no other countries with a sufficiently large and sophisticated financial services sector to handle the redirected 'traffic' from London. However, with Britain's exit from the EU, there have already been confirmed reports of financial firms relocating abroad[324]; this would suggest that regulating UK financial intermediaries may simply push activity elsewhere.

More indirectly, reform of the City would signal a change in British attitudes to tax havens; this would likely mean the UK was less willing to defend tax haven British jurisdictions. Since these dependencies and territories rely on the UK to represent their interests at the international level, reform of the UK could perhaps indirectly curb evasion in OTs and CDs by limiting the UK's ability to defend the tax practices of these jurisdictions.

---

[323] Transparency International UK, *At Your Service* (2009) www.transparency.org.uk/uk-businesses-helping-worlds-corrupt-embed-themselves-british-establishment/ accessed 17 October 2020.

[324] Lucy McNulty, 'UK Banks Under Pressure to Move Staff to EU Brexit Hubs 'Now'' *Financial News* (London, 26 August 2020) www.fnlondon.com/articles/uk-banks-under-pressure-to-move-staff-to-eu-brexit-hubs-now-20200826 accessed 17 October 2020.

It is difficult to identify policies which could significantly curb all tax evasive practices facilitated by participants in the City of London. This is partly because the City's financial services sector facilitates offshore tax evasion for a variety of havens using a myriad of legal instruments.[325]

However, there are several specific measures which, if implemented and enforced properly, could create significant disincentives against facilitating offshore tax evasion in the City.

In the UK and many other countries, Corporate Service Providers (CSPs) – law practices, accountancy firms and bespoke administrative firms that create shell companies to facilitate financial crime, including offshore tax evasion– are required to know and verify the identity of beneficial owners in the shell companies they create. Crucially, CSPs have an incentive to verify this information if, as in the UK, they are at risk of penalties, such as revoking their license, in the event that they fail to do so.[326]

However, there is strong evidence that HMRC, the UK's designated body to oversee CSP identity verification of their clients, is not fulfilling its role.[327] A basic recommendation would be to provide HMRC with the resources and the incentive to actually ensure that CSPs in the City of London know who their clients are.

The information gathered by regulators and financial crime law enforcement from CSPs could greatly aid the creation of mechanisms to discourage facilitation of offshore tax evasion. For one thing, accountancy firms and lawyers who facilitate this activity could actually be prosecuted for their role. These measures may not be capable of eliminating all tax evasion

[325] Jeremy Green, 'Anglo-American Development, the Euromarkets, and the Deeper Origins of Neoliberal Deregulation' (2015) 42(3) RIS doi.org/10.1017/S0260210515000480 accessed 17 October 2020.

[326] Jason Sharman, 'Solving the Beneficial Ownership Conundrum: Central Registries and Licensed Intermediaries', n.d., Jersey Finance report, https://www.jerseyfinance.je/media/PDF-Marketing/Jason%20Sharman%20Report%20-%20Solving%20the%20Beneficial%20Ownership%20Conundrum.pdf accessed 3 February 2021.

[327] Findley, M.G., Nielson, D.L. and Sharman, J.C., 2014. *Global shell games: Experiments in transnational relations, crime, and terrorism* (No. 128). Cambridge University Press.

practices within the City of London, but they would go some way to creating a disincentive against diverse actors facilitating it and other forms of financial crime.

ii. Rethinking the Relationship with British Overseas Territories and Crown Dependencies

In recommending a change to the relationship between the UK and its CDs and OTs it is important not to go too far and overstep the bounds of Britain's established constitutional relationship with these islands. These territories and dependencies are not represented in the British legislature and are, for the most part, self-governing.[328] Although the UK retains sovereignty and the government theoretically has 'unlimited power to legislate for the territories', by convention it has chosen to do so only in a limited way, respecting the wishes of their democratic institutions. The UK is therefore primarily responsible for the OTs' security and good governance but should not take to governing them without their consent.[329] The UK's responsibilities are even more limited in the CDs. Primary legislation does not typically apply to the CDs and must be extended by the use of an Order in Council with the prior agreement of the government of the islands.[330] Moreover, whereas the UK government is responsible for the good governance of the OTs, because of their nature, the Crown is not responsible for that of the CDs. The government's responsibility is primarily for defence and international relations.[331]

We believe that this outline is broadly correct. The UK government has the responsibility to ensure these territories' safety, and in some cases their good governance, but should not take to

[328] Maria Mut Bosque, 'The Sovereignty of the Crown Dependencies and the British Overseas Territories in the Brexit Era' (2020) 15 Island Studies Journal 151, 151; House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship*, p 3; House of Commons Library and David Torrance, *The Crown Dependencies* (2019) 4; 14.

[329] Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (2012) 13–14.

[330] House of Commons Library and Torrance (n 1) 14.

[331] ibid 3; 4; 15–16; Mut Bosque (n 1) 155.

governing them without their consent. It would be counterproductive to the aim of tackling tax evasion to adopt the recommendations of some campaigning groups such as the Tax Justice Network, take an unprecedentedly harsh line and in doing so raise concerns about neo-colonialism.[332] The case of the OECD's failed efforts to combat tax havens in the early 2000s highlight how such normative accusations can carry great weight in attempts to regulate tax evasion. Given the unhappiness that Brexit has caused in the OTs, it would not be wise to risk inflaming their anger through dramatic provocations movements as the UK is better able to exert its influence over these OTs while they remain under its jurisdiction.[333]

Nonetheless, the UK must fulfil its responsibilities and achieve its stated aims in relation to the OTs, including by exercising its right to legislate for them where necessary. For example, as the British government is responsible for security, we endorse the use of Orders in Council to extend legislation pertaining to tax evasion and money laundering passed by Parliament to the OTs, as was the case with SAMLA (2018).[334] Such measures are necessary not only to prevent financial crime but also to undermine organised crime. Indeed, with the rise of competition between the West and so-called kleptocratic regimes, they have an increasingly important role in geopolitical security by limiting the ability of corrupt elites, supportive of authoritarian regimes, to accumulate illicit wealth.[335]

Moreover, the UK government should take drastic measures to intervene where these significant flows of illicit funds threaten to undermine the good governance of the OTs, in line with its stated aim to 'strengthen good governance arrangements, public financial management

[332] John Christensen, 'When Will the British Government Impose Public Registries on Its Tax Havens?' <https://www.taxjustice.net/2019/03/04/when-will-the-british-government-impose-public-registries-on-its-tax-havens/, https://www.taxjustice.net/2019/03/04/when-will-the-british-government-impose-public-registries-on-its-tax-havens/> accessed 25 September 2020.

[333] House of Commons Foreign Affairs Committee (n 1) 14.

[334] House of Commons Foreign Affairs Committee (n 1) 13–15.

[335] Nate Sibley, Ben Judah, and Hudson Institute, *Countering Global Kleptocracy: A New US Strategy for Fighting Authoritarian Corruption* (2021) 9–12.

and economic planning'.[336] There is precedent for this, as the government imposed direct rule in the Turks and Caicos islands in 2009, after an investigation revealed systemic corruption among ministers.[337] In this light, the decision of the UK Government and the Governor of the British Virgin Islands to open an inquiry into corruption, misallocation of public funds, political interference in the judiciary and ties to organised crime in the British Virgin Islands is to be commended.[338] Similar allegations of corruption in other OTs should be met with measures of similar severity.

Although we welcome the voluntary commitment of the CDs to publishing registers of beneficial company ownership by 2023, we would suggest that the UK should aim to secure agreement with the CDs on extending SAMLA (2018) to them through Orders in Council rather than being satisfied with a verbal declaration on their parts. The use of Orders in Council to extend legislation with prior agreement of the Crown Dependencies has precedent and, given that they have committed to the proposal verbally, acquiring their consent to a legally binding measure seems feasible. This would represent an important precedent on the issue of anti-tax evasion legislation going forward.[339]

Finally, the present constitutional arrangement, where the OTs are the responsibility of the FCO alone, is considered inadequate by both parties. Representatives of the OTs are concerned that this prevents them making their concerns known to the government as they must go through a department that is not typically responsible for domestic administration and so lacks the relevant institutional expertise.[340] This also inhibits select committees with relevant interests in the OTs such as International Development, Justice and the Treasury, from

[336] Foreign and Commonwealth Office (n 2) 16.

[337] ibid., 119.

[338] Dominic Raab, 'Update on Overseas Territories' <https://questions-statements.parliament.uk/written-statements/detail/2021-01-18/hcws716> accessed 4 February 2021.

[339] House of Commons Library and Torrance (n 1) 11–13.

[340] House of Commons Foreign Affairs Committee (n 1) 7–9.

properly scrutinising their affairs.[341] A change to this arrangement should include transferring the responsibility for the OTs to the Cabinet Office and allowing their affairs to be subject to any parliamentary select committees that have an interest.[342] Assigning them to the Cabinet Office may make their administration a matter of domestic concern and increase the frequency of extension of UK legislation to the OTs. In addition, allowing other select committees to scrutinise their affairs may raise the profile of issues of tax evasion and money laundering in the national consciousness.

VI. CONCLUSION

This paper has addressed the problem of tax evasion for the British government, analysed various efforts to combat it and proposed a series of recommendations that amount to an ambitious multilateral strategy. Brexit marks a particularly crucial juncture in British politics for considering new strategies on tax evasion, as it will no longer be tied to the EU's unanimous decision-making process. The paper has argued that a British strategy on tax evasion must be based on multilateralism, reciprocity, transparency and privacy, as well as pay attention to the historical role played by Britain in the development of offshore.

Britain's history shows that it has to be careful in overstepping boundaries with its OTs and CDs. Yet, it has to take seriously the problem of tax evasion in its geographic vicinity. It is therefore imperative that it aims to secure agreement with the CDs on extending SAMLA (2018) to them through Orders in Council. However, Britain's history also offers opportunities. The paper has recommended considering the commonwealth as a forum to engage with taxation matters. It is crucial to ensure representation of smaller states, as the case of the early efforts of the OECD highlights.

[341] ibid., 17.

[342] House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship*, 10–11.

The main problem in combatting taxation is lack of US reciprocity on AEI agreements. First, it is unclear how beneficial FATCA has been(see section II.I). Second, FATCA has led the US to refuse signing onto the CRS. Not only must the UK refrain from pursuing similar unilateral approaches, it is imperative that it draws on its special relationship with the US to push for US reciprocity. In this sense, the paper argues that Britain could take the lead in pushing for more multilateral cooperation on taxation matters in the form of a Global Asset Registry. However, such measures must consider concerns about privacy. It is imperative that the UK continues to raise this issue of privacy in OECD multilateral cooperation on taxation.

Tax evasion is a complicated and multi-faceted issue. It is, however, not beyond the reach of governments. There is a serious and ambitious strategy available. Brexit has made it possible for the British government to pursue it. It is up to the government to seize this opportunity.

V.II BIBLIOGRAPHY

'2019 Results' <https://corporatetaxhavenindex.org/en/introduction/cthi-2019-results> accessed 28 August 2020.

Abebe, H. et al., 'The United Nations' Role in International Tax Policy: A Research and Policy Brief for the Use of the NGO Committee on Financing for Development' (2012).

'A Brave New World in Tax Transparency: CRS in China, Hong Kong and Taiwan' (*International Tax Review*) <https://www.internationaltaxreview.com/article/b1f7nb1x4zv1sc/a-brave-new-world-in-tax-transparency-crs-in-china-hong-kong-and-taiwan> accessed 25 September 2020

Agyemang, E., 'Could New Regulation Spell the Death of Trusts' *Financial Times,* (17 January 2020).

Agyemang, E., 'Trusts remain out of Favour with Wealthy Families' *Financial Times*, (15 February 2019).

Ahrens, L. and Bothner, F., 'The Big Bang: Tax Evasion After Automatic Exchange of Information Under FATCA and CRS' (2019) New Political Economy, p3.

Ahrens et al., 'New room to manoeuvre: national tax policy under the automatic exchange of information' (2018) COFFERS Working Paper.

Alstadsæter A, Johannesen N and Zucman G, 'Who Owns the Wealth in Tax Havens? Macro Evidence and Implications for Global Inequality' (2018) 162 Journal of Public Economics 89.

Armstrong, Ashley, 'Amazon pays just £220m tax on British revenue of £10.9bn' *The Times* (London, 4 September 2019) www.thetimes.co.uk/article/amazon-pays-just-220m-tax-on-british-earnings-of-10-9bn-vv9fwxx52 accessed 17 October 2020.

Arnold H., and Herdina, S., 'Implications of the Common Reporting Standard for Liechtenstein foundations and trusts' (2019) 25(6) *Trusts and Trustees* 682.

Barker and Houlder, 'Leaders see end to banking secrecy', *Financial Times* (2 April 2009).

BBC, 'EU puts Cayman Islands on tax haven blacklist' (BBC,18 Feb 2020), accessed 11 Novemebr 2020

Ben Cowdock, 'Resist or Reform? Assessing Progress towards Corporate Transparency in the UK's Overseas Territories and Crown Dependencies | Transparency International UK' <https://www.transparency.org.uk/corporate-secrecy-reform-overseas-territories-crown-dependencies-latest> accessed 21 July 2020

Boffey, D., 'Apple does not need to pay €13bn Irish tax bill, EU court rules' (Guardian, 15 July 2020), <https://www.theguardian.com/technology/2020/jul/15/apple-does-not-need-to-pay-13bn-irish-tax-bill-court-rules>, accessed 11 November 2020

Boffey, D., 'In wake of Brexit, EU to put Cayman Islands on tax haven blacklist' (Guardian, 13 February 2020), <https://www.theguardian.com/us-news/2020/feb/13/eu-to-put-cayman-islands-on-tax-haven-blacklist>, accessed 11 November 2020

Brinson, R. E., 'Is the United States Becoming the New Switzerland: Why the United States' Failure to Adopt the OECD's Common Reporting Standard Is Helping It Become a Tax Haven' (2019) 23 NC Banking Inst 231.

Browning, L. 'Ex-UBS Banker Pleads Guilty to Tax Evasion', *New York Times*, (20 June 2008).

Brumbaugh, David. L 'Farm Legislation and Taxes in the 110th' (*Every CRS Report*, 22 January 2008) www.everycrsreport.com/reports/RS22759.html accessed 18 August 2020

Burn G, 'The State, the City and the Euromarkets' (1999) 6 Review of International Political Economy 225

Cannon, Patrick 'What Are The Penalties For Tax Evasion (UK)?', (*Patrick Cannon: Barrister at law*) www.patrickcannon.net/news/tax-evasion-penalties-uk/ accessed 17 October 2020

Casi, E., Spengel, C., and Stag, B., 'Cross-border tax evasion after the common reporting standard: Game over?' (2020) 190 *Jounral of Public Economics* 2.

Chartered Institute of Taxation, 'Latest on the fight against tax evasion and avoidance' (2018) <https://www.tax.org.uk/media-centre/blog/media-and-politics/latest-fight-against-tax-evasion-and-avoidance>

'China Cracks down on Tax Dodges by Nation's Highest-Paid Celebrities' (*South China Morning Post*, 13 August 2018) <https://www.scmp.com/business/china-

business/article/2159456/chinese-authorities-crack-down-tax-dodges-illegal-capital> accessed 23 September 2020

Christensen J, 'When Will the British Government Impose Public Registries on Its Tax Havens?' <https://www.taxjustice.net/2019/03/04/when-will-the-british-government-impose-public-registries-on-its-tax-havens/,

Christensen, R. C., 'The Rise of the EU in International Tax Policy' [2018], *pre-print version*

Christians, A., 'Tax activists and the global movement for development through transparency' In: M. Steward and Y. Brauner, eds. (2012) *Tax Law and Development.*, 316–344.

Cotorceanu, P. A., 'Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting Under Both FATCA and GATCA' (2015) 1 *Trusts and Trustees* 2.

D'Arcy, M., 'Tax Haven Retreat Underlines Government's Weakness in Commons', *BBC News* (4 March 2019)

Deloitte, *General Anti-Avoidance Rules (GAAR): India and International Experience* (2017)

Deloitte, 'The end of the EU Savings Directive as from 1 January 2016. Are there any residual effects?' (Deloitte, 16 November 2015) <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/tax/operationaltaxnews/lu_otn-end-of-eu-savings-directive_16112015.pdf.> accessed 11 November 2015

Deutsche Bank and Oliver Wyman, 'Special Report: Time to Advance and Defend' (2017) <https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2017/jun/Global-Wealth-Management-OW.PDF>

Drysdale, Donald, 'The UK tax gap: A variety of views', (*ICAS*, 15 August 2019) www.icas.com/professional-resources/tax/tax-resources/the-uk-tax-gap-a-variety-of-views accessed 17 October 2020

Edwards, S., 'The G77 will push for "tax justice"through a UN tax body, says Ecuador's foreign affairs minister' (Devex, 13 January 2017) <https://www.devex.com/news/the-g77-will-push-for-tax-justice-through-a-un-tax-body-says-ecuador-s-foreign-affairs-minister-89442> accessed 11 October 2020

European Union, 'Repeal of the Savings Directive in line with international and EU developments' (European Union website), <https://ec.europa.eu/taxation_customs/individuals/personal-taxation/taxation-savings-income/repeal-savings-directive-line-with-international-eu-developments_en>, accessed 11 November 2020

European Union, 'Tax fraud and evasion - action plan on fraud/evasion and simpler taxation' (European Union website), <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12233-Action-Plan-on-fight-against-tax-fraud> accessed 11 November 2020

'EY Tax Insights | China Tax Administration Aims to Clarify GAAR' <https://taxinsights.ey.com/archive/archive-articles/china-tax-administration-aims-to-clarify-gaar.aspx> accessed 16 October 2020

Findlay S and Fildes N, 'Vodafone's India Venture under Threat after Court Ruling' (28 October 2019) <https://www.ft.com/content/9c3130ce-f732-11e9-a79c-bc9acae3b654> accessed 25 September 2020

Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (2012)

G77, 'Statement on behalf of the Group of 77 And China by Carola Iniguez, Undersecretary of International Organizations of Ecuador, at the Ecosoc Special Meeting on International Cooperation in Tax Matters' (G77) <http://www.g77.org/statement/getstatement.php?id=170407b> accessed 11 November 2020

Gamble W, 'The Middle Kingdom Runs Dry: Tax Evasion in China' (2000) 79 Foreign Affairs 16

Global Alliance for Tax Justice, 'G77 and China say: Establish a UN Global Tax Body' (Global Alliance for Tax Justice, 4 October 2017) <https://www.globaltaxjustice.org/en/latest/4-g77-and-china-say-establish-un-global-tax-body> accessed 11 November 2020.

Green, Jeremy 'Anglo-American development, the Euromarkets, and the deeper origins of neoliberal deregulation' (2015) 42(3) RIS doi.org/10.1017/S0260210515000480 accessed 17 October 2020

Hackelberg and Schaub, 'The redistributive impact of hypocrisy in international taxation' (2018) 12(3) Regulation & governance 353.

Hakelberg, Lukas 'Coercion in international tax cooperation: identifying the prerequisites for sanction threats by a great power' (*Review of International Political Economy* 23), pp. 511-541.

Hay, R., 'Tax Data Transparency: UK', 23(1) *Trusts and Trustees* 139.

Hemmelgarn, T. and Nicodème G., 'Tax Co-ordination in Europe: Assessing the First Years of the EU-Savings' [2009], <Taxation Directive' (http://piketty.pse.ens.fr/files/oldfichiers051211/enseig/pubecon/PubEcon_fichiers/Nicodeme2009.pdf>, accessed 11 November 2020

Herbert Smith Freehills LLP, 'The Cost of Complying with FATCA' (*Lexology*, 3 June 2013) www.lexology.com/library/detail.aspx?g=a74e2969-7fe3-4931-999b-7caaf60c5588 accessed 20 August 2020.

HMRC, 'Automatic Exchange of Information Agreements: other UK Agreements' (updated 11 June 2020), accessed July 2020, , https://www.gov.uk/government/publications/automatic-exchange-of-information-agreements-other-uk-agreements/automatic-exchange-of-information-agreements-other-uk-agreements>

HM Revenue and Customs (HMRC), *General Anti-Abuse Rule (GAAR) Guidance* (2020)

HM Revenue & Customs, *Measuring tax gaps 2020 edition: Tax gap estimates for 2018 to 2019* (30 July 2020) www.gov.uk/government/statistics/measuring-tax-gaps accessed 17 October 2020

HM Revenue & Customs & HM Treasury, *No safe havens 2019: HMRC's strategy for offshore tax compliance*, (13 March 2019) www.gov.uk/government/publications/no-safe-havens-2019 accessed 17 October 2020

HMRC and HM Treasury, '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>

HMRC, *The Taxation of Trusts: a review*, Consultation Document (November 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754210/The_Taxation_of_Trusts_A_Review.pdf>

HMRC 'UK launches cross-government taskforce on the 'Panama Papers'', Press Release (April 2016)

Home Office, *Review of Financial Regulation in the Crown Dependencies* (1998)

House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship*

House of Commons Library (Antony Seely), *Tax avoidance and tax evasion*, House of Commons Library (Briefing Paper, Cm 7948, 18th April 2020)

House of Commons Library and Torrance D, *The Crown Dependencies* (2019)

Income Tax Department, Government of India, 'Automatic Exchange of Information (AEI)' <https://www.incometaxindia.gov.in/Pages/eoi/automatic-exchange-of-information.aspx> accessed 25 September 2020

Jaqueline May Ives, 'The Relevance of Tax Havens for China'

Johannesen, N. and Zucman, G., 2014. The end of bank secrecy? An evaluation of the G20 tax haven crackdown. American economic journal: economic policy, 6 (1), 65–91.

Lampreave DP, 'Anti-Tax Avoidance Measures in China and India: An Evaluation of Specific Court Decisions' (2013) 67 Bulletin for International Taxation 12

'Leaked Records Reveal Offshore Holdings of China's Elite' (*ICIJ*) <https://www.icij.org/investigations/offshore/leaked-records-reveal-offshore-holdings-of-chinas-elite/> accessed 23 September 2020

Leung SCM, Taylor G and Richardson G, 'The Effect of the General Anti-Avoidance Rule on Corporate Tax Avoidance in China' (2019) 15 Journal of Contemporary Accounting and Economics 105

Lomas, Ulrika, 'European Savings Tax Directive Repealed' (Tax-News, 15 November 2015), <https://www.tax-news.com/news/European_Savings_Tax_Directive_Repealed____69664.html>, accessed 11 November 2020

Macjen, R., 'European Savings Directive: A challenge for the fund industry' (The Hedge Fund Journal), <https://thehedgefundjournal.com/european-savings-directive/7>, accessed 11 November 2020

Mance, H., and Marriage, M., 'Crown Dependencies Face Crackdown on Secret Companies' *Financial Times*, (1 March 2019).

Mathiason, N., 'Tax Scandal Leaves Swiss Giant Reeling', *The Guardian*, (29 June 2008).

Mazzier, S., 'A Close Look at: The Taxation of Trusts: A Review' published by HMRC in November 2018', *informaconnect.com* (14 June 2019).

McNulty, Lucy 'UK banks under pressure to move staff to EU Brexit hubs 'now'' *Financial News* (London, 26 August 2020) www.fnlondon.com/articles/uk-banks-under-pressure-to-move-staff-to-eu-brexit-hubs-now-20200826 accessed 17 October 2020

McGill, R., 'International – GATCA: The Globalisation of Anti-Tax Evasion Frameworks' (2016) 18(3) *Derivatives and Financial Instruments*.

More, G. D., 'Italians Gripped by Leaks Naming Liechtenstein Account Holders' *Financial Times* (20 March 2008).

Mundy S, 'India Tax Amnesty Draws $9.8bn in Asset Declarations' (2 October 2016) <https://www.ft.com/content/a511f14e-8875-11e6-8cb7-e7ada1d123b1> accessed 24 September 2020

Murphy Richard, 'The UK tax gap is £90 billion a year', (*Tax Research UK*, 19 June 2019) www.taxresearch.org.uk/Blog/2019/06/19/the-uk-tax-gap-is-90-billion-a-year/ accessed 17 October 2020

Mut Bosque M, 'The Sovereignty of the Crown Dependencies and the British Overseas Territories in the Brexit Era' (2020) 15 Island Studies Journal 151

Noseda, F., 'CRS and Benfifical Ownership Registers: A Call to Action' (2017) 23(5) *Trusts and Trustees* 496.

Noseda, F., 'Common Reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection' (2017) 23(4) *Trusts and Trustees* 409.

'NRI Tax in Budget 2020: NRI Definition Changed to Stop Tax Avoidance | India Business News - Times of India' (*The Times of India*) <https://timesofindia.indiatimes.com/business/india-business/nri-definition-changed-to-stop-tax-avoidance/articleshow/73860186.cms> accessed 24 September 2020

Oats, L. and Morris, G., 'Tax avoidance, power and politics'. In: N. Hashimzade and Y. Epifantseva, eds. (2018) *The Routledge Companion to Tax Avoidance Research*. Routledge, 458–470

Oats L., and Tuck, P., 'Corporate tax avoidance: is tax transparency the solution?' (2019) 49(5) *Accounting and Business Research*.

Oberson, X., 'International Exchange of Information in Tax Matters: Towards Global Transparency' (2015).

OECD, A Step Change in Tax Transparency, OECD Report for the G8 Summit (June 2013), accessible at <https://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf>

OECD, *Automatic Exchange of Financial Account Information Background Information Brief* (2016) <http://www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Brief.pdf>

OECD, *Countering Offshore Tax Evasion: Some Questions and Answers on the Project*, (*OECD*, 28 September 2009) www.oecd.org/ctp/harmful/42469606.pdf accessed 17 October 2020

OECD, 'Glossary of Tax Terms', (*OECD*) www.oecd.org/ctp/glossaryoftaxterms.htm accessed 17 October 2020

OECD, 'Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports' 1

Ogle V, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 The American Historical Review 1431

Oxfam, 'Effective EU tax haven blacklist must include at least 35 countries, Oxfam analysis finds' (Oxfam website, 27 November 2017), <https://www.oxfam.org/en/press-releases/effective-eu-tax-haven-blacklist-must-include-least-35-countries-oxfam-analysis>, accessed 11 November 2020

Owens J. P, 'Tax Transparency: the 'Full Monty'' (2014) 68 Bulletin for International Taxation 9.

'Package for fair and simple taxation' (European Union website), <https://ec.europa.eu/taxation_customs/general-information-taxation/eu-tax-policy-strategy/package-fair-and-simple-taxation_en#heading_0>, accessed 31st January 2021.

Palan R, 'International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics' (2010) 11 Theoretical Inquiries in Law 149

Palan R, 'The Second British Empire: The British Empire and the Re-Emergence of Global Finance' in S Halperin and R Palan (eds), *Legacies of Empire Imperial Roots of the Contemporary Global Order* (Cambridge University Press 2015) <https://openaccess.city.ac.uk/id/eprint/12698/> accessed 28 August 2020

Palan R, Murphy R and Chavagneux C, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010)

Partington R., 'MEPS vote to add Channel and British Virgin Islands to tax haven blacklist' (Guardian, 22nd January 2021), <https://www.theguardian.com/world/2021/jan/22/meps-vote-to-add-channel-and-british-virgin-islands-to-tax-haven-blacklist>, accessed 31st January 2021.

'PM Letter to the EU on Tax Evasion' (*GOV.UK*) <https://www.gov.uk/government/news/pm-letter-to-the-eu-on-tax-evasion> accessed 2 September 2020

PM Letter to the Overseas Territories on beneficial ownership (April 2014) <https://www.gov.uk/government/publications/prime-ministers-letter-on-beneficial-ownership/prime-ministers-letter-to-the-overseas-territories-on-beneficial-ownership>

'Premier, Honourable Andrew A. Fahie: Framework for Publicly Accessible Registers | Government of the Virgin Islands' <https://bvi.gov.vg/media-centre/premier-honourable-andrew-fahie-framework-publicly-accessible-registers> accessed 25 September 2020

PwC, *Competing Forces for Tax Reform - Challenges for Today's Tax Professionals* (2015)

——, *China's SAT Issues New Measures for Special Tax Investigation Adjustments and Mutual Agreement Procedures* (2017)

——, *China Sets Priorities for Its Anti-Tax Avoidance Initiatives* (2018)

Raab, Dominic 'Update on Overseas Territories' <https://questions-statements.parliament.uk/written-statements/detail/2021-01-18/hcws716> accessed 4 February 2021

Rankin, J., 'Britain under pressure to end opposition to tax haven blacklist' (Guardian, 6 April 2016), <https://www.theguardian.com/news/2016/apr/06/britain-under-pressure-opposition-tax-haven-blacklist>, accessed 11 November 2020

Rahimi-Laridjani, E and Hauser E, 'The New Global FATCA: An Overview of the OECD's Common Reporting Standard in Relation to FATCA' (2016) 13 Journal Tax and Financial Products 9.

Ramsey, Adam, 'Britain's Empire of Tax Evasion' *Foreign Policy* (Washington DC, 4 April 2016) www.foreignpolicy.com/2016/04/04/britains-empire-of-tax-evasion-panama-papers-mossack-fonseca/ accessed 17 October 2020

Rose, C., 'The Biggest Tax Haven of Them All? The US., FATCA and the CRS', *Bloomberg Law International Tax Blog* (29 March 2016).

Rusina, A., 'Name and shame? Evidence from the European Union tax haven blacklist' [2006], International Tax and Public Finance

Russell, D., and Graham, T., 'Maintaining the Rage: the EU's Attack on Trusts at Home and Abroad' (2017) 23(2) *Trusts and Trustees* 145.

Seely, A., 'Tax Avoidance and Tax Evasion', (April 2020) *Commons Library Briefing Paper Number 7948*.

Sharman, J., 'Norms, coercion and contracting in the struggle against "harmful" tax competition' [2006] 60(1), Australian Journal of International Affairs, 143-69

Sharman, J., 'Seeing Like the OECD on Tax' [2012] 17(1) New Political Economy, 17-33

Sharman, J., 'The bark is the bite: International organizations and blacklisting' [2009] 16(4), Review of International Political Economy, 573-96

Sharman JC, 'Canaries in the Coal Mine: Tax Havens, the Decline of the West and the Rise of the Rest' (2012) 17 New Political Economy 493

Shaxson N, 'No, Corporate Tax Avoidance Is Not Legal' (*Financial Times*) <http://ftalphaville.ft.com/2019/05/16/1557994769000/No--corporate-tax-avoidance-is-not-legal/> accessed 16 October 2020

—— 'Tax Havens: Britain's Second Empire', (*Tax Justice Network*, 29 September 2019) www.taxjustice.net/2019/09/29/tax-havens-britains-second-empire/ accessed 17 October 2020
—— ' 'The tax haven in the heart of Britain' *New Statesman* (London, 24 February 2011) www.newstatesman.com/economy/2011/02/london-corporation-city accessed 17 October 2020
——Treasure islands: tax havens and the men who stole the world. Bodley Head, London.2011

Shen W and Watters C, 'Is China Creating A New Business Order? Rationalizing China's Extraterritorial Attempt to Expand the Veil-Piercing Doctrine' [2015] International Law 89

Sibley N, Judah B, and Hudson Institute, *Countering Global Kleptocracy: A New US Strategy for Fighting Authoritarian Corruption* (2021)

Smyth J and Parker G, 'G20 Leaders Back Drive to Unmask Shell Companies' (16 November 2014) <https://www.ft.com/content/25ae632e-6d60-11e4-8f96-00144feabdc0> accessed 21 September 2020

Talifer, A., and Auferil, S., 'Register of trusts and Privacy: French Case Law in Perspective' 24(1) *Trusts and Trustees* 968.

'Tax fraud and evasion - action plan on fraud/evasion and simpler taxation' (European Union website), <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12233-Action-Plan-on-fight-against-tax-fraud>, accessed 31st January 2021.

Tax Justice Network, 'Tax Havens', (*Tax Justice Network*) www.taxjustice.net/faq/tax-havens/ accessed 17 October 2020

Tinagli, A. and Tang, P., 'Motion for a Resolution, further to Questions for Oral Answer B9-0002/2021 and B9-0001/2021 pursuant to Rule 136(5) of the Rules of Procedure on reforming the EU list of tax havens' <https://www.europarl.europa.eu/doceo/document/B-9-2021-0052_EN.pdf> (13th January 2021), accessed 31st January 2021

Transparency International UK, *At Your Service* (2009) www.transparency.org.uk/uk-businesses-helping-worlds-corrupt-embed-themselves-british-establishment/ accessed 17 October 2020

Transparency International, Maira Martini and Maggie Murphy, *Just for Show? Reviewing G20 Promises on Beneficial Ownership* (2015)

TUC, *The Deficiencies in the General Anti-Abuse Rule* (2014)

Turina, A. 'Visible, Though Not Visible in Itself. Transparency at the Crossroads of International Financial Regulation and International Taxation.' (2016) 8 World Tax Journal 3.

Turner, G., 'The EU Tax Haven Blacklist – a toothless whitewash' (Tax Justice Network, 8 December 2017), <https://www.taxjustice.net/2017/12/08/eu-tax-haven-blacklist-toothless-whitewash/>, accessed 11 November 2020

UK Government 'European Union Savings Directive (EUSD): exchange of information and withholding tax' (UK government website, 4 June 2005), <https://www.gov.uk/government/publications/european-union-savings-directive-eusd-exchange-of-information-and-witholding-tax/european-union-savings-directive-eusd-exchange-of-informatio n-and-witholding-tax> accessed 11 November 2020

UK Parliament, 'EU tax policy: from national veto to Qualified Majority Voting' (UK Parliament website), <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-liv/30107.htm>, accessed 11 November 2020 – OR: Document number: (40334), 5472/19, COM(19) 8

'Understanding China's Tax Offenders Blacklist System' (*China Briefing News*, 16 December 2016) <https://www.china-briefing.com/news/understanding-chinas-tax-offenders-blacklist-system/> accessed 23 September 2020

Vanessa Ogle, '"Funk Money": The End of Empires, The Expansion of Tax Havens, and Decolonization as an Economic and Financial Event' [2020] Past & Present gtaa001

Webb, M., 'Defining the boundaries of legitimate state practice: norms, transnational actors and the OECD's project on harmful tax competition' [2004] 11(4) Review of International Political Economy, 787-827

'View 2020 Results' <https://fsi.taxjustice.net/en/introduction/fsi-results> accessed 28 August 2020

Xu Y, 'China's General Antiavoidance Rule And Its Commitment to the Exchange of Information' (2018) 91 Tax Notes International 345

Yusuf HO and Chowdhury T, 'The Persistence of Colonial Constitutionalism in British Overseas Territories' (2019) 8 Global Constitutionalism 157

V.III APPENDIX

Table 1.7: Description of behaviours

Behaviours	Description
Criminal attacks	Organised criminal groups undertake co-ordinated and systematic attacks on the tax system. This includes smuggling goods such as alcohol or tobacco, VAT repayment fraud and VAT Missing Trader Intra-Community (MTIC) fraud.
Evasion	Tax evasion is an illegal activity, where registered individuals or businesses deliberately omit, conceal or misrepresent information in order to reduce their tax liabilities.
Hidden economy	Undeclared economic activity that involves what we call 'ghosts' – whose entire income is unknown to HMRC, and 'moonlighters' – who are known to us in relation to part of their income but have other sources of income that HMRC does not know about. There is a difference between the hidden economy and tax evasion: • hidden economy – where an entire source of income is not declared • tax evasion – where a declared source of income is deliberately understated
Avoidance	Avoidance is exploiting the tax rules to gain a tax advantage that Parliament never intended. It often involves contrived, artificial transactions that serve little or no commercial purpose other than to produce a tax advantage. It involves operating within the letter but not the spirit of the law. Some forms of base erosion and profit shifting (BEPS) are included in the tax gap where they represent tax loss that we can address under UK law. As new measures introduced in accordance with recommendations made in the BEPS project by the G20 group of world-leading economic nations and the Organisation for Economic Co-operation and Development (OECD) take effect, our ability to address BEPS under our domestic law will be greatly strengthened. The tax gap does not include BEPS arrangements that cannot be addressed under UK law and that will be tackled multilaterally through the OECD. The OECD defines BEPS as 'tax planning strategies that exploit gaps and mismatches in tax rules to make profits disappear for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low resulting in little or no overall corporate tax being paid'. Tax avoidance is not the same as tax planning. Tax planning involves using tax reliefs for the purpose for which they were intended. For example, claiming tax relief on capital investment, saving in a tax-exempt ISA or saving for retirement by making contributions to a pension scheme are all forms of tax planning.
Legal interpretation	Legal interpretation losses arise where the customer's and HMRC's interpretation of the law and how it applies to the facts in a particular case result in a different tax outcome, and there is no avoidance. Specifically, this includes the interpretation of legislation, case-law, or guidelines relating to the application of legislation or case-law. Examples include categorisation such as an asset for allowances or VAT liability of a supply, the accounting treatment of a transaction, or the methodology used to calculate the amount of tax due as in transfer pricing, or VAT partial exemption.
Non-payment	For direct taxes, non-payment refers to tax debts that are written off by HMRC and result in a permanent loss of tax – mainly as a result of insolvency. It does not include debts that are eventually paid. VAT non-payment differs as it is based on the difference between new debts arising and debt payments (see Chapter 2).
Failure to take reasonable care	Failure to take reasonable care results from a customer's carelessness and/or negligence in adequately recording their transactions and/or in preparing their tax returns. Judgments of 'reasonable care' should consider and reflect a customer's knowledge, abilities and circumstances.
Error	Errors result from mistakes made in preparing tax calculations, completing returns or in supplying other relevant information, despite the customer taking reasonable care.