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Tax Crimes and Illicit Money Flows in the EUs

Comparison and Key Findings

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2.1 Introduction

Tax crimes and Illicit Money Flows (IMFs)[1] are serious threats to society. It is reported that tax crimes, money laundering, and international bribery form the greater chunk of IMFs.[2] Looking at tax crimes in the context of IMFs is significant because tax offences do constitute a greater share of IMFs causing concern globally, denying governments of their needed revenue.[3] They also undermine the integrity and trust in governance, promote unfair resource distribution, and inspire other financial crimes,[4] and threaten the financial stability of the EU.[5]

These effects account for why IMFs and tax crimes remain at the forefront of the priorities of the EU and other jurisdictions globally.[6] Governments across the world are collaborating through institutions such as the OECD,[7]

[1] IMFs is synonymous with illicit financial flows (IFFs). These IMFs are of varied formulations including tax abuse, trade misinvoicing, capital flight, tax evasion, tax fraud, cross-border corruption, money laundering, and other transnational financial crimes.

[2] OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (2014) 11 <www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf> accessed 5 July 2021.

[3] Alex Cobham and Petr Janský, *Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies, and Findings* (OUP 2020); Umut Turksen, *Countering Tax Crime in the European Union: Benchmarking the OECD's Ten Global Principles* (Hart Publishing 2021).

[4] ibid *and FACTI, 'Financial Integrity for Sustainable Development' (Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda, United Nations, February 2021)* <https://uploads-ssl.webflow.com/5e0bd9edab846816e263d633/602e91032a209d0601ed4a2c_FACTI_Panel_Report.pdf> accessed 12 July 2021.

[5] Fabricio M Perez, Josef C Brada, and Zdenek Drabek, 'Illicit Money Flows as Motives for FDI' (2012) 40(1) Journal of Comparative Economics 108.

[6] European Commission, 'A Huge Problem' <https://ec.europa.eu/taxation_customs/huge-problem_en> accessed 12 July 2021.

[7] Organisation for Economic Cooperation and Development.

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IMF,[8] United Nations, and EU and World Bank to formulate and operationalize measures against these criminal actions.[9] Target 16.4 of the Sustainable Development Goals (SDGs)[10] prioritizes the need to mitigate IMFs so as to achieve a better world in which there will be lasting peace, justice for all, and robust institutions by 2030, and where IMFs will be significantly reduced and all forms of organized crime will be combatted.[11]

These measures including information exchange mechanisms, cooperation,[12] capacity development, transparency improvement, and harmonization of systems have not caught up with the scale of the problem presented by tax crimes and IMFs.[13] For instance, in spite of the efforts of the EU to unify measures against these crimes in its Member States, the national legal frameworks still generally give different approaches to combating tax crimes.[14]

This chapter explores the wide scope of methods and complex contexts in which tax crimes and IMFs occurring in European States are investigated and prosecuted in the different frameworks of national jurisdictions. It is based on findings from a number of national case studies[15] conducted by PROTAX. In these case studies we looked at national legal frameworks, institutional competences, drawing on available legal documents, and information collected from stakeholders involved in the investigation and prosecution of tax crimes. Wherever possible we chose a prominent case of tax crime to reconstructively analyse the variety of legal responses to tax-related criminal offences across Europe. The preliminary results of this analysis provided the input for a series of national focus groups with experts and practitioners who were asked to give their views on our findings, provide their expert opinion, and share practical experience from their national contexts.

[8] International Monetary Fund.

[9] OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (2014) <www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf> accessed 5 July 2021.

[10] United Nations, 'Goals' <https://sdgs.un.org/goals/goal16> accessed 23 July 2021.

[11] UNCTAD and UNODC, 'Conceptual Framework for the Statistical Measurement of Illicit Financial Flows' (October 2020) 7 <www.unodc.org/documents/data-and-analysis/statistics/IFF/IFF_Conceptual_Framework_for_publication_15Oct.pdf> accessed 2 July 2021.

[12] Geert Bouckaert, B Guy Peters, and Koen Verhoest, *Coordination of Public Sector Organizations* (Palgrave Macmillan 2016).

[13] Umut Turksen, *Countering Tax Crime in the European Union: Benchmarking the OECD's Ten Global Principles* (Hart Publishing 2021).

[14] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018); Fanou Rasmouki and others, 'Approaches to Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D2.3, October 2019).

[15] See Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018); PROTAX, 'Case Studies of Tax Crimes in the EU' <https://protaxwebtoolkit.eu/index.php/2021/04/23/case-studies-of-tax-crimes-in-the-eu/> accessed 24 July 2021.

We present some typical examples from these focus group discussions as 'voices of stakeholders' in section 2.6 of this chapter, which articulates the key findings from the focus group discussions.

Using case studies in eleven European jurisdictions[16] the objective of this chapter is to examine the dimensions of tax crimes and IMFs, the contextual factors influencing tax crimes, and various countermeasures collectively and individually taken by these states to tackle IMFs and tax crimes. To this end, the chapter provides the following sections: Research design, which brings into focus the common approaches utilized by the PROTAX consortium partners in conducting the national cases studies; tax crimes as IMFs, which examines the contextual understanding of tax offences as part of the ecosystem of IMFs; comparative case studies which consider thematic areas that form the basis of comparison between eleven case studies; key findings from the case studies, presents some of the salient results of the case studies; approaches to tax crimes, which summarizes the main issues and propositions from the focus group discussions; and conclusion which offers brief impressions on the key perspectives of this chapter.

2.2 Research Design

Case studies, focusing on the specificity of individual constellations, allow for an in-depth understanding of locally productive factors shaping social processes. They can be used to demonstrate how things are done—similar or differently—how problems are defined, perceived, and solved within the different settings under investigation. In our approach we use the unit of the case at two different levels: first, each of the investigated eleven national jurisdictions constitutes a case for our analysis; secondly, we look at selected court cases and offences as a case and investigate how this case was handled within the given parameters of the national ecosystem involved in the investigation and prosecution of tax crimes. Comparing these individual cases not only reveals the huge variety of tax crimes, but also helps to identify common problems and obstacles in the handling of such crimes, as they emerge in different national legal and administrative systems within Europe.

A shared guideline was used for all of the eleven case studies. This guideline defined the parameters for the selection of a specific (criminal) case in each

[16] Austria, Estonia, France, Germany, Ireland, Italy, Portugal, Spain, Switzerland/Luxemburg, and United Kingdom.

country and also contained a list of questions that laid out the type of information to be collected for each (national, country) case. Stakeholders from the PROTAX consortium used this guidance to provide their input for the individual country reports. As can be seen in the sections describing the involved countries, the level of detail varies between the individual countries. In some cases, we could collect detailed information at both levels—national legal environment and selected criminal cases—whereas in others we missed out on an exemplary case for in-depth analysis, since none met the criteria set out in the guideline.

For the comparative analysis using the unit of national jurisdiction as a case, stakeholders were asked to provide information about their overall legal, political, and administrative national environment relevant for the prosecution of tax-related crimes in their country and answer questions such as:

- What is the legal framework of tax? (Is it consolidated (as in Ireland) or more fractured (as in the UK)? Or, is it scheduler?
- Does the legal framework allow for a resolution of the issue without resorting to prosecution or court action (e.g., deferred prosecution agreements as is the case in the UK)? Are pre-trial guilty pleas applied and are they common for tax crimes?
- What is considered as tax crime, where and how is it defined in national law? What type of tax crime/s are involved in the case examined?
- What are the dominant types of tax crimes involving the corporate sector and which kinds of market transactions or activities are susceptible to corporate tax crime?
- Does the legal concept of corporate liability exist in your jurisdiction, is it applicable for tax crimes?
- What type of prosecution (civil or criminal) process was followed?
- What prosecution techniques have been proven to be the most effective?
- Do courts want to see tax crimes treated like any other crime, with no 'sweetheart' deals?
- What kind of legal provisions are primarily used for prosecuting tax crimes?
- What is the range for sentencing (min/max) for the most prolific types of tax crimes?
- Who is in charge of enforcement and prosecuting tax crimes? How are LEAs engaged in the case (via FIU communication, whistleblower disclosure, LEA investigation)?

- How is cooperation between different operational units organised and regulated?
- What are the legally defined thresholds for launching preliminary investigations of suspected tax crimes?
- Are statistical data for your jurisdiction and quantifying information measuring the performance of the different branches of LEA (conviction rates, number of cases, etc.) systematically collected and published?
- What are the main challenges in the prosecution of tax crimes?
- What is the role of professional enablers in tax crimes?
- What is the role of whistleblowing and intelligence provided 'from inside'? How are whistleblowers treated across different jurisdictions in the EU?
- If available, include information on assets recovered once the case is concluded.[17]

This information was used to compare different national jurisdictions in our case study and at the same time it provided important context and background information for the analysis of individual exemplary criminal cases to be selected for each country. These cases should meet the following criteria:[18]

- corporate involvement;
- significant damage (> €500,000 case);
- decided by courts, and information accessible;
- transnational, cross-border dimension;
- involvement of wide variety of actors (professional enablers); and
- attracting public and media attention.

The types of taxes found in the case studies included: Corporate income tax, VAT, Income tax, Property tax, Capital Gains Taxes, Inheritance/Estate Taxes, and Excise taxes. Thus, cases on both direct and indirect taxes were expected in the case studies. At the same time, the *modi operandi* of the following fraudulent activities to commit tax crimes were explored in detail: Failing to file a tax return, deliberately under-reporting or omitting income, claiming false deductions, hiding or transferring assets or income, overstating the amount of deductions, making false entries in records, failing to report income earned in the stock exchange, maintaining two sets of books, misusing trusts, abusing

[17] ibid.

[18] Reinhard Kreissl and others, 'The Case Study Design: Guideline and Template for Case Studies on Tax Crimes in Europe' (787098 PROTAX EU H2020 Project D1.1, 2018).

charitable deductions, and moving assets into secrecy jurisdictions.[19] These criminal behaviours were chosen because, based on literature on tax evasion and tax fraud, they form the prominent elements that characterize the defining limits of tax crimes across the European States.

Having decided on an exemplary criminal case in each country for a more in-depth reconstructive investigation we asked stakeholders to provide detailed information about the forensic empirical facts, the criminal investigation, and the court proceedings detailing the selected case and then encouraged them to take the position of an outside observer and conduct a critical assessment of the case and identify gaps, shortcomings, or deficits in the legal handling.[20]

The case study guideline listed the types of information that should go into the narratives of the criminal cases.

Facts of the case:

In establishing the facts of each case, the following requirements were considered:

- A brief and concise synopsis of the case;
- The *modus operandi* of the tax crime/scheme;
- Presumed damage (Can the damage caused by the case be determined, are any types collateral damages to be considered, were assets recovered, accounts frozen in national, oversea, and offshore banks?);
- The laws/legal instruments and provisions applied in the investigations and prosecutions;
- Any third parties involved (such as role of enablers, whistle blowing, or anonymous informants contribute, and/or suspicious activity reporting); and
- Any transnational/international dimensions.

Criminal investigations and court proceedings:

The following elements were identified in each case study:

- Evidence presented;
- Duration and outcome of court case;
- Policy involvement (description of if and how single steps and activities of law enforcement, during legal investigations and prosecution of the case,

[19] ibid.
[20] ibid.

were embedded in the national political context, including the role of any involved ministries such as justice, finance, interior, or trade/economy);
- Public discourse (Did the case attract the attention of the media, how was it presented and discussed in media, was the case scandalised, did controversial positions emerge, describe the relation between media and law enforcement as regards e.g. flow of information towards journalists, how did representatives of the political react to public discourse?);
- Ground level operations (analyse the whole array of operational tasks and activities by staff from involved branches like e.g. customs, tax authorities, police, etc., proceed along the consecutive phases beginning from early stages of forming an initial suspicion motivating the opening of a preliminary investigation to collect evidence, preparing the case, locating suspects and bringing them before the court).[21]

Critical analysis and assessment:
Under this category, each individual case study addressed the following elements:

- Critical legal analysis of the case (describing any problems to establish under applicable law the presumably illegal nature of actions and events based on the evidence collected in the investigation: when did the evidence meet legally defined criteria for initial suspicion to make the case watertight; did prosecutors ask for additional evidence while preparing the case, how did burden of proof and/or thresholds for reasonable suspicion facilitate or hinder prosecution?);
- What makes the case a typical tax crime in the country in which it took place (Locate the case in the overall social, political and cultural context of your country, considering the spread and frequency of tax crimes, legal and institutional capabilities for their prosecution, public attitudes towards these crimes and the prevailing corporate and business culture, use examples and evidence from your professional experience and/or public media); and
- Is it possible to assess the detrimental economic effects of the case at national and EU levels (such as e.g., effects on competitiveness, employment, GDP, national infrastructures)?[22]

[21] ibid.
[22] ibid.

Using a case study design helps to better understand how legal regulations are closely linked to complex networks of cross-references, that are connected to national and transnational legal provisions which govern the identification, prosecution, and sanctioning of tax crimes. While a doctrinal analysis of black letter law can identify regulatory gaps and ill-defined concepts, a socio-legal case study adds important insights as it turns the focus to observable and important variations at 'the level of law enforcement in the daily work of police, tax authorities, prosecutors and judges, cooperating also across borders to identify incidents and bring them as cases to court'.[23] The analysis of practical or ground-level problems that haunt LEAs 'can reveal deficits of law enforcement that escape doctrinal analysis of black letter law'. The remedies for law enforcement deficits 'can start on both ends: changing the law and/or improving coordination and capabilities for enforcing the law and/or bringing both into a better alignment'.

2.3 Tax Crimes as IMFs

The literature on IMFs suggests no single definition of IMFs that is agreeable across board.[24] This is partly due to the broad nature of the concept, its hidden nature, complex dimensions involved, and measurement difficulties. The conceptualization generally ranges from money laundering schemes, international bribery, corruption, tax evasion, and trade mispricing. However, the elements given above are limited since they usually fail to indicate the source or origin of the illicit flows. In the context of this book, we adopt the term IMFs to mean 'illegal' money transactions and activities that are closely linked to prohibited criminal acts. IMFs, practically involve a wide range of elements such as 'a private individual transfer of funds into private accounts abroad without having paid taxes, to highly complex schemes involving criminal networks that set up multi-layered multi-jurisdictional structures to hide ownership'.[25] Illustrative examples of IMFs include the following:

[23] ibid.

[24] Maya Forstater, 'Illicit Financial Flows, Trade Misinvoicing, and Multinational Tax Avoidance: The Same or Different?' (CGD Policy Paper 123, March 2018) 28 <https://www.cgdev.org/sites/default/files/illicit-financial-flows-trade-misinvoicing-and-multinational-tax-avoidance.pdf> accessed 15 January 2022.

[25] OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (2014) <www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf> accessed 23 July 2021.

- When an importer uses 'trade mis-invoicing to evade customs duties, value-added tax, or income taxes';
- When a drug cartel uses techniques of trade-based money laundering, to mix legal money from the sale of used cars with illegal money from drug sales;
- When a corrupt public official uses an anonymous shell company to transfer dirty money to a bank account in a given country, say Germany;
- When a human trafficker [or a money mule] carries a briefcase containing cash across the border and making a deposit of it in a bank abroad; or
- When a terrorist wires money from one region to an operative in another region.[26]

The United Nations General Assembly adopted the indicator framework of July 2017 that monitors progress to achieve the SDGs. The indicator 16.4.1[27] is used to measure progress to achieve target 16.4 of the SDGs. This indicator reflects the complexity of defining the contours of IMFs. As a result, the indicator provides 'two custodians: UNODC, leading the work on crime-related IFFs, and UNCTAD, leading the development of methods to measure IFFs related to taxes and trade'.[28] These custodians have been at the forefront of developing the conceptual framework for IMFs. They have established main types, conceptualization, and measurement of IMFs in light of the System of National Accounts and the balance of payments.[29]

The proposed framework for defining IMFs by the International Classification of Crime for Statistical Purposes (ICCS) establishes definitions of illegal activities and four main types of these activities that generate IMFs. These types are:

1. tax and commercial activities;
2. corruption;
3. illegal markets; and
4. exploitation-type activities and financing of crime and terrorism.[30]

[26] ibid.
[27] This indicator measures the 'total value of inward and outward illicit financial flows'.
[28] UNCTAD and UNODC, 'Conceptual Framework for the Statistical Measurement of Illicit Financial Flows' (October 2020) 7 <www.unodc.org/documents/data-and-analysis/statistics/IFF/IFF_Conceptual_Framework_for_publication_15Oct.pdf> accessed 2 July 2021.
[29] ibid.
[30] ibid.

The above construction is similar to the classification by Baker.[31] An assessment by Baker established a proposition that IMFs have three aspects: tax crimes, money laundering, and grand corruption. While tax crimes were assessed to be the largest of the three, achieved through manipulating trade prices. Tax crimes account for two thirds of the problem of IMFs. This finding was also confirmed by the OECD.[32] While grand corruption accounted for a marginal percent of IMFs, laundering proceeds of crime fell between a quarter and a third of the IMFs. This classification is focused more on the criminalization approach of the phenomenon. The contribution of Cobham to extend the scope of this classification to cover the zemiological perspective is a welcome development.[33]

From the classification by the ICCS and Baker, IMFs can refer to the illegal movement of proceeds from criminal or illegal activities including that of wrongful conduct associated with tax and commercial practices, which are used for illegal activity or even legal activity within or usually out of the country of origin in which these criminal acts were committed.[34] In this regard, IMFs are thus understood as illegally earned monies in one jurisdiction that are transferred and applied in different jurisdiction(s) against the relevant laws of these jurisdictions. As a pivotal instrument for denying governments the needed revenue, IMFs help in diverting essential resources into private pockets at the expense of sustainable development, human rights protection, and poverty reduction.[35]

In general, IMFs can emerge at two different stages in each of the four types of activities: Illicit income generation, and illicit income management.

- Illicit income generation does characterise 'the set of cross-border transactions that are either performed in the context of the production of illicit goods and services or generate illicit income for an actor during a non-productive illicit activity'.[36]

[31] Raymond W Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-market System* (John Wiley & Sons 2005).

[32] OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (2014).

[33] Alex Cobham, 'Benefits and Costs of the IFF Targets for the Post-2015 Development Agenda' (*Copenhagen Consensus Center*, 4 August 2014) <www.copenhagenconsensus.com/sites/default/files/iff_assessment_-_cobham_0.pdf> accessed 2 July 2021.

[34] Fabricio M Perez, Josef C Brada, and Zdenek Drabek, 'Illicit Money Flows as Motives for FDI' (2012) 40(1) Journal of Comparative Economics 108; UNCTAD and UNODC, 'Conceptual Framework for the Statistical Measurement of Illicit Financial Flows' (October 2020) 7.

[35] Cephas Lumina and Mulesa Lumina, 'Illicit Financial Flows, Sovereign Debt, and Human Rights' in Ilias Bantekas and Cephas Lumina (eds), *Sovereign Dept and Human Rights* (OUP 2018).

[36] UNCTAD and UNODC, 'Conceptual Framework for the Statistical Measurement of Illicit Financial Flows' (October, 2020) 7.

- Illicit income management denotes cross-border transactions in the nature of financial and non-financial investments or consumption of goods and services using illicit income.[37]

IMFs thus encompass various kinds of activities. These include flows that originate 'from illicit activities, illicit transactions to transfer funds that have a licit origin and flows stemming from licit activity being used in an illicit way'.[38] There are some IMFs that do not stem from any illegal activity. An instance is that, the indicator for measuring progress towards achieving target 16.4 of the SDGs adds aggressive tax avoidance to those associated with IMFs. This is because, although these are usually lawful activities, they are seen to have damaging effects on sustainable development.[39]

The reclassification of the methodological proposal by the tenth session of the Inter-agency and Expert Group on Sustainable Development Goals Indicators (IAEG-SDGs) of 2019 from Tier III to Tier II, is a positive development since the indicator has been made conceptually clearer as internationally established standard.[40]

The use of zemiological approach,[41] in which the focus is in the harm that is caused by the actions of IMFs, appears more appealing to find the common basis for defining IMFs. This is particularly so because the approach has the prospects of providing 'a more consistent basis' in defining the concept. This approach, for instance, would include multinational profit shifting and other avoidance practices which are not necessarily illegal but cause harm. An interesting illustration provided by Cobham is that, the probability of a low-income economy to uncover or successfully contest commercial tax evasion in law courts is lower than a high-income economy. This is because administrative capacity in lower-income economies is limited compared to that of high-income economies, which have resourced administrative and other authorities.

To ensure that a legal definition reflects these dynamics, it is imperative that such a definition includes as many variables as possible and as accommodating as practicable. A legal definition is necessary to provide the foundational basis

[37] ibid.
[38] ibid.
[39] ibid.
[40] ibid 8.
[41] Paddy Hillyard and Steve Tombs, 'Beyond Criminology?' in P Hillyard and others (eds), *Beyond Criminology: Taking Harm Seriously* (Pluto Press 2004); Danny Dorling and others, *Criminal Obsessions: Why Harm Matters More than Crime* (Centre for Crime and Justice Studies 2008); See Alex Cobham, 'Benefits and Costs of the IFF Targets for the Post-2015 Development Agenda' (*Copenhagen Consensus Center*, 4 August 2014) <www.copenhagenconsensus.com/sites/default/files/iff_assessment_-_cobham_0.pdf> accessed 2 July 2021.

for responsibilities and rights to be constructed and protected as far as practicable. Therefore, a position against providing such a legal definition due to the varied dynamics of socioeconomic structures appears untenable in the face of the need for progressive development to properly allocate responsibilities, assign liabilities, and safeguard rights in the ecosystem of moving illicit money across borders.

Cobham identified four components of IFF: (i) market/regulatory abuse; (ii) tax abuse; (iii) abuse of power, which includes stealing of funds and assets belonging to the state; and (iv) proceeds of crime.[42] Essentially, Cobham has added the first component while highlighting tax abuse as also an important element, which has not been explicit in the classification by Baker.

Limiting the definition of IMFs to only include illicit flows is a narrow approach since statistical studies that have been conducted to date do illustrate that 'it is empirically challenging to separate some practices, such as evasion (illegal) and borderline practices, including aggressive tax avoidance (generally legal, but often considered illicit in the academic literature)'. As was found in the case studies of PROTAX,[43] determining the zone where lawful tax planning turns into aggressive or harmful is usually not straightforward. There is a thin line between these zones.[44] The lack of a common definition of IMFs hinders not only policy action but also law enforcement action to counter IMFs.[45]

Whatever the classifications and dimensions of IMFs, it is clear from outputs of PROTAX[46] and the foregoing analysis that tax crimes or offences are not only components of IMFs but also, they are affected by other IMFs such as money laundering and corruption.

2.4 Comparative Case Studies on Tax Crimes

This section provides a comparative analysis of certain salient aspects of understanding and approaching the problem of tax crimes in eleven European States based on selected case studies.[47]

[42] Cobham (n 41).

[43] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[44] UNCTAD and UNODC, 'Conceptual Framework for the Statistical Measurement of Illicit Financial Flows' (October 2020) 7 <www.unodc.org/documents/data-and-analysis/statistics/IFF/IFF_Conceptual_Framework_for_publication_15Oct.pdf> accessed 2 July 2021.

[45] ibid.

[46] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018); Franz Reger and others, 'Report on Comparative Legal and Institutional Analysis' (787098 PROTAX EU H2020 Project D3.1, 2020).

[47] ibid.

2.4.1 Estonia

2.4.1.1 General Context Factors

Legal framework of tax

The legal framework on tax crimes in Estonia is not consolidated as such. Relevant provisions can be found in the Estonian Penal Code 2001(PC) and the Taxation Act 2002.

Estonia holds a principle of legality: proceedings will be commenced when there is an act with criminal elements. Criminal offences are delinquencies in the first and in the second degree. Tax crime is an offence in the second degree in Estonia. A criminal offence in the first degree is an offence for which the maximum punishment prescribed in this Code for a natural person is imprisonment for a term of more than five years or life imprisonment.[48]

Defining tax crimes

The Estonian Penal Code defines a tax offence as 'Failure to submit information or submission of incorrect information to tax authorities' for the purpose of reduction of an obligation to pay a tax or obligation to withhold, or increase a claim for refund, if a tax liability or obligation to withhold is thereby concealed or a claim for return is unfoundedly increased by an amount corresponding to or exceeding major damage is punishable by a pecuniary punishment or up to five years' imprisonment PC § 389.[49]

In addition, the Estonian PC § 389 defines liability of a legal person for particularly high damage, as well as the provisions for the confiscation of property acquired by the crime: If a tax liability or obligation to withhold is thereby concealed or a claim for refund is unfoundedly increased by an amount corresponding to particularly great damage, this is punishable by one to seven years' imprisonment. For criminal offence provided for in subsection (2) of this provision, the court may impose extended confiscation of assets or property acquired by the criminal offence pursuant to the provisions of §83 of the PC.[50]

A major damage of an offence is assessed to be 40,000 euros in Estonia. According to the PC, if causing of proprietary damage is provided for as a necessary element of an offence or the extent of an offence can be determined pecuniarily, the extent of damage or offence are assessed pecuniarily as follows:

[48] ibid.

[49] Estonian PC § 121. Proprietary damage caused by offence or extent of offence.

[50] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

- damage or extent of offence which exceeds 4000 euros is significant damage;
- damage or extent of offence which exceeds 40,000 euros is major damage;
- damage or extent of offence which exceeds 400,000 euros is particularly great damage.[51]

Essentially, all deliberately committed tax offences, with tax losses over 40,000 euros, are considered tax crimes in Estonia.

Under 40,000 euros of tax losses are regulated by Taxation Act 2002 and persons at fault punished for a misdemeanour, and court proceedings take place in Administrative Court.

In Estonia, the most common tax crime is mainly linked to VAT (MTIC-missing trader, carousel fraud etc), corporate income tax, and labour taxes.[52]

Role of LEAs

As stipulated by the Code of Criminal Procedure 2003 Estonia conducts pre-trial proceedings in tax-related crimes through the ETCB.[53] Based on the expediency, the Prosecutor may change the jurisdiction of the investigation, so that in certain cases tax crimes may also be processed by the Police.

For instance, the Police investigates these crimes only if the detected tax crimes are connected to their other criminal proceedings, eg detecting fraud regarding the European Structural Funds. Thus, about ninety-nine per cent of tax crimes are handled by the ETCB. The Prosecutor's Office leads criminal investigations in Estonia and lays down a final prosecution route.

The State Prosecutor's Office has one prosecutor responsible for large-scale cross-border economic crimes, including tax crimes and related proceedings.

As an incentive to commence criminal proceedings regarding a tax crime, the existence of a suspicion on deliberately committed offence, over 40,000 euros worth of damages per tax offence should be present. As previously mentioned, according to Estonian law, commencing criminal proceedings is mandatory when facts relating to the criminal offence occur.

Generally, information on the possible tax offence is obtained from the following:

[51] ibid.
[52] ibid.
[53] Estonian CoCP § 31. Definition of investigative body (1) The Police and Border Guard Board, the Security Police Board, the Tax and Customs Board, the Competition Board, the Military Police, the Environmental Inspectorate, and the Prisons Department of the Ministry of Justice and the prisons that perform the functions of an investigative body directly or through the institutions administrated by them or through their regional offices are investigative bodies within the limits of their competence.

- Data mining by the analysis of the data collected by the ETCB (analysing VAT listings, persons' background, earlier transactions, association with shadow persons etc.) shall be transmitted to the Investigation Department for collecting and analysing additional information and with the presence of the elements of crime, upon negotiating with the prosecutor's office, proceedings will be commenced.
- In the course of tax proceedings potential elements of crime may be identified. Criminal proceedings maybe commenced by the Tax Audit Department (pre-negotiated) on the basis of a message on infringement received.
- During criminal proceedings, information may be identified regarding a new crime. In order to commence criminal proceedings, the investigator shall draw up a thorough report confirming the existence of criminal suspicion.
- Human sources. An investigator of the Investigation Department will collect additional information from the ETCB databases that would confirm the occurrence of the crime (transactions between persons, their math, timeline, links with shadow persons and companies, earlier surveillance information, etc.). To commence criminal proceedings, investigator may draw up a detailed statement confirming the existence of a suspicion on an offence.
- Information from other law enforcement agencies (Police, Prosecutor's Offices, Financial Intelligence Unit, etc.).
- Whistleblowers.[54]

Activities of persons involved in tax fraud, including legal bodies, are monitored consistently by various ETCB departments (eg Tax Audit, Intelligence Department, Investigation), therefore it is customary that if one of these divisions detects a potential crime, other departments receive from them analogous information or suspicious activity reports.

Law enforcement process in Estonia is only satisfied with the result of the criminal procedure, when the fault of all persons involved in committing the crime has been identified and evidenced, as well as substantial circumstances such as their property status and asset locations are determined.[55]

[54] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).
[55] ibid.

Cooperation

Inter-agency domestic cooperation and international cooperation provide the central force for tackling cross-border tax crimes.

In Estonia, the transmission of information of common interest to each other is affected directly through the KAIRI database containing agent's or common surveillance information. The same database will also be used by the Prosecutor's Office. KAIRI is in joint use of several agencies. It is based on cross-use of data and brings together different data from different national databases on natural and legal persons, such as corporate declared turnover, employees, their receipts, persons-related vehicles, addresses, communication devices, accounts, registered weapons, and punishment register.[56]

Type of prosecution (civil or criminal) process used

While the Estonian PC and Code of Criminal Procedure 2003 govern criminal processes, the Taxation Act governs civil or administrative process.

Role of professional enablers

In addition to the regular contributors (accountants, providers of various financial services, tax advisers, lawyers, widely known creators of shadow and off-shore companies), there is widespread provision of corporate liquidation services in Estonia. Such activities function, as a rule, on the verge of illegal and legal activities. Evidence in Estonia indicates that insolvency and/or bankruptcy is generally a part of illegal schemes whereby these are used to eradicate debt (including tax debt from tax fraud) and other obligations.[57]

Criminal corporate liability

An offence of a legal person is a criminal offence in the first degree if imprisonment for a term of more than five years or life imprisonment is prescribed for the same act as maximum punishment for a natural person.[58] The Estonian Penal Code also foresees the liability of legal persons, if the crime has been committed in the interests of a legal person, ie legal person has benefitted from it. There is no punishment stipulated by law in Estonia if a company declares tax liability, but intentionally leaves taxes un-transferred to the state. However, punishment is possible under misdemeanour procedure. In addition, there

[56] ibid.
[57] ibid.
[58] PC § 14.

is a gap in the law regarding cases of non-declaration by companies where a shadow person has been appointed as member of the board. In case of a legal person, the court may impose a pecuniary punishment of 4,000 to 16,000,000 euros.[59]

Role and protection of whistleblowers

In Estonia, whistleblowers are recognized sources of information to initiate criminal investigation into criminal matters. ETCB uses 24-hour free hotline information phone, as well as e-mail address to which the information on circumstances of the related or planned offences and related details can be disclosed. Estonia did not have a stand-alone whistleblower protection law until the EU whistleblower protection directive was introduced which obliges all EU Member States to transpose the Directive by 17 December 2021.[60] The progress of each country's implementation status is monitored by the Whistleblowing Monitor EU.[61]

Types of sentences given to tax criminals

It is possible to impose both pecuniary punishments and custodial sentence for up to seven years for a tax offence. The latter, as a rule, on parole, ie to be enforced if a person intentionally commits a new crime within the prescribed period of time by the court. In addition, it is possible to confiscate the property of both natural and legal persons, including third parties.[62]

As another example, money laundering is also associated with tax crime and is punishable by a pecuniary punishment or up to five years' imprisonment. The same act: by a group or at least twice or on a large-scale basis is punishable by two to ten years' imprisonment. If committed by a legal person, is punishable by a pecuniary sanction.[63] In 2017, the average of sanctions for committing tax crime in Estonia was two years of imprisonment on parole. The average fine imposed was 105,000 euros.[64]

[59] PC § 44. Pecuniary punishment.

[60] Whistleblower Protection Directive (WBPD), art 26(1); For companies with employee size of between 50 and 249 personnel, deadline of transposing the WBPD into internal company structures is 17 December 2023; see WBPD, art 26(2).

[61] Whistleblowing Monitor EU, <https://www.whistleblowingmonitor.eu> accessed 17 January 2022.

[62] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[63] PC § 394. Money laundering.

[64] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

Plea bargaining

The courts may settle certain type of tax crimes by using plea bargaining. Pursuant to the Code of Criminal Procedure 2003,[65] a court may adjudicate a criminal matter by way of settlement proceedings at the request of the accused or the Prosecutor's Office.

In the case of tax crimes, compromise procedures are widely used, at least 80 per cent of the cases that reach the courts. In the case of a compromise procedure, the punishments to the accused shall, as a rule, be reduced by a third.

Asset recovery

The Code of Criminal Procedure 2003 allows for seizure of assets within the criminal proceedings under the proof of claim in public law (PoCiPL).[66] Before the amendment of this law, it was possible to seize only criminal proceeds/assets by the court. The new regulation allows for seizing the property of all persons suspected in the crime under investigation under the proof of claim in public law.[67]

2.4.1.2 Case Analysis: AS Spratfil Case

AS Spratfil, a fish processing company, was registered in Tallinn, Estonia and had a residence in Latvia as the board member. The acting manager assisted by persons from Estonia and Latvia submitted incorrect information in their VAT returns through accounting and bookkeeping of the AS Spratfil for the taxable period of November 2013 to May 2014 to tax authorities via e-Tax—the Estonian online tax reporting/collection platform. Practically, talks with Norwegian companies concerning deliveries and prices were agreed by AS Spratfil.[68]

The fish ordered from Norway was transported to Latvia and the consignment of fish moved from there directly to the AS Spratfil in Estonia. There were no real transactions between OÜ Trigendi and AS Spratfil, and AS Spratfil had no right to include the invoices of OÜ Trigendi in their accounting and tax returns. These fictional transactions were eventually deemed to be fraudulent as AS Spratfil received tax refund at a total amount of 5,388,353.78 euros during the period from 21 January 2013 until 21 January 2014.[69]

[65] CoCP § 239.
[66] CoCP § 154, Proof of claim in public law.
[67] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).
[68] ibid.
[69] ibid.

In compiling the evidence, the information from bank accounts were utilized to identify the execution of transactions, the volume of transactions, the nature of the transactions ie; whether these resemble normal economic activities of an enterprise or rather a missing trader that performed fictional (online or otherwise) transactions and where from (via IP address queries). Itemized phone bills of the persons involved in the crime were also acquired from telecommunication providers.

On 14 March 2017, the prosecutor brought the matter to the court[70] for the approval of the compromise agreement regarding three persons (including AS Spratfil). The Prosecutor's Office allocated the materials into two separate cases, the executive company and its leaders on one and the accessories of the tax offence on the other hand.

Two top level managers were convicted and both sentenced to punishment for two years and six months of imprisonment, which was left unenforced on condition that they would not commit a new deliberate crime during the specified two years and eight months' probation period. AS Spratfil was found guilty pursuant to PCe § 382(2), 3 (from 01.01.2015 Penal Code § 389 subsection 2, 3) and to be punished by a fine of EUR 300,000.[71]

There was a modest media interest in the case. With respect to ground level operations, two investigators of the Western Division of the Investigation Department of ETCB were in charge of criminal proceedings, including personnel from other relevant departments.

In order to understand the Estonian legal space, it is worth noting that the State Court has explained two important aspects of admissible evidence: credibility and general knowledge. In the case of a tax fraud, a reasonable suspicion is sufficient.

2.4.2 Italy

2.4.2.1 General Context Factors

Legal framework of tax

The Italian Penal Code does not directly cover tax crimes. Nevertheless, the tax enforcement regime is provided by the Legislative Decree No 74 of 2000,[72] and Legislative Decree No 231 of 2001 (for legal persons).[73] The related provisions

[70] Court case No 1-17-2732.

[71] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[72] See *Gazzetta Ufficiale della Repubblica Italiana*, Decreto Legislativo 10 Marzo 2000, n 74.

[73] Legislative Decree No 231 of 8 June 2001 (Italy).

of Legislative Decree No 74 of 2000 were reformed with the adoption of the Legislative Decree No 158 of 2015,[74] which significantly raised tax offence thresholds reducing in such a way the scope of application of the various tax crime offences. The Legislative Decree No 75 on 15 July 2020 has also strengthened criminal corporate liability in Italy.[75]

Defining tax crimes

The types of tax offences in the Italian Law include the following: fraudulent declaration through invoices or documents related to non-existent business operations, fraudulent declaration through other artifices, false tax declaration, failure to declare, issuance of invoices or other documents related to non-existent business operations, concealment or destruction of accounting records, failure to pay retention taxes, failure to pay value-added tax, undue tax deduction, fraudulent dissipation of assets to avoid paying taxes, filing false VAT tax returns, and undue VAT offsetting.[76]

Role of LEAs

The Guardia di Finanza (GdF), a LEA, and related tax authorities such as Italian Revenue Agency (*Agenzia delle Entrate*) are responsible for the investigation and prosecution of tax crimes in Italy. Frequently the GdF is introduced as a good practice for the prosecution of tax crimes, as they combine different tasks and competences in one organizational context.

Role of professional enablers

The investigation in the case of Verbatim (examined below) showed that the feasibility of the criminal plan was strictly related to the participation of accountants and financial advisors. These professionals, who worked closely with the prominent members of the criminal organization, offered services that were fundamental to the functioning of the criminal scheme.

Type of prosecution (civil or criminal) process used

Criminal investigations on suspects conducted by the public prosecutors are subject to rules of criminal procedures. Administrative proceedings are conducted along with criminal proceedings under Italian Law usually based on the

[74] See *Gazzetta Ufficiale della Repubblica Italiana*, Decreto Legislativo 24 Settembre 2015, n 158.

[75] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[76] ibid.

threshold requirements and the seriousness attached to the material facts of a conduct.

Criminal corporate liability

The Legislative Decree No 75 on 15 July 2020 was introduced to transpose the EU Directive 2017/1371 (the PIF Directive), which largely seeks to harmonize criminal laws of EU Member States relating to financial matters. The above decree has brought in new criminal offences[77] on corporate liability pursuant to Legislative Decree No 231, 8 June 2001, Decree 231.

Courts' treatment of tax crimes

Tax crimes are treated as serious offences and this trend is evidenced by the sentencing of tax crimes by the courts.

Cooperation

The Guardia di Finanza (GdF), an LEA, regularly meets colleagues from overseas to exchange information in order to understand at what point the investigations are in the other countries, assess any difficulties and decide how to go forward. These contacts are usually personal and are always coordinated by a judicial authority. Investigative and judicial authorities are obliged to collaborate when the case has transnational dimensions.

Role and protection of whistleblowers

Italy has a standalone whistleblower protection regime,[78] which allows reporting on matters relating to certain tax offences. However, transposing the EU whistleblower protection directive will further enhance not only the role of whistleblowers to report tax crimes but also for whistleblowers to be appropriately protected.[79]

Types of sentences given to tax criminals

Imprisonment, fines, and secondary sanctions are applied. For fines and secondary sanctions, they are not imposed by the judiciary. Tax administration

[77] The offences include the fact that criminal conduct by legal representatives, directors, or executives (whether formal or *de facto*) or employees of a company, if proven to advantage or is in the interest of a company, will occasion or attract criminal liability for the representative and the entity at the same time.

[78] Law No 179 of 30 November 2017 Provisions for the protection of whistleblowers who report crimes or misconduct of which they become aware in the context of private or public employment (17G00193) (Italy).

[79] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

is responsible for collecting the tax according to a special administrative procedure. The defendant can appeal the decision of administrative bodies before the tax commissions[80] or, if these have no jurisdiction on the particular tax concerned, before administrative courts.

Asset recovery

Article 322-*ter* of Italian Penal Code has introduced the likelihood, for certain offences, to confiscate assets in possession of the offender for an equivalent amount to the proceeds of crime, when the material identification and the confiscation of the proceeds themselves is not possible. This form of confiscation is known as 'confiscation by equivalence' (*confisca per equivalente*). The possibility of ordering such confiscation has been extended to cases of tax offences by Law 244/2007 (Article 1, para 143).

2.4.2.2 Case Analysis: The Verbatim Case

The Verbatim case came to light in the context of the commercialization of digital optical disc storage products (blank CDs and DVDs) in Italy and the perpetration of a complex carousel fraud scheme aimed at avoiding the payment of VAT.[81]

The applicable legislation on matters of VAT includes the Presidential Decree no 633 of 1972. With respect to intra-Community trade, Article 38 of Legislative Decree no 331 of 1993 applies. Pursuant to these laws, the importation of digital optical disc storage products obliges the importer comply with the following two main obligations:

- the obligation to pay the VAT to the Italian tax authorities;
- the obligation to pay a copyright tax to SIAE, which is the Italian copyright collecting agency.[82]

With respect to the Verbatim case, Verbatim Italia spa, many other minor companies and sixty individuals were involved. It is alleged that, through

[80] Tax commissions are part of the so-called system of fiscal justice.

[81] The VAT is a general tax that applies, in principle, to all commercial activities involving the production and distribution of goods and the provision of services. The VAT due on any sale is a percentage of the sale price but to avoid double taxation, from this the taxable person is entitled to deduct all the tax already paid at the preceding trading stage. See the European Commission, 'Taxation and Custom Union' <https://ec.europa.eu/taxation_customs/business/vat/what-is-vat_en> accessed 9 June 2021.

[82] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

a complex carousel fraud scheme, the perpetrators did not pay the Italian tax authorities the VAT for the amount of €48,814,538.20, in relation to the sale of goods mainly consisting in blank CDs and DVDs occurred from 2006 to 2011.

The legal analysis will focus on Decision No 46162 of 14 October 2015,[83] which having been issued by the Italian Supreme Court is definitive and cannot be subject to any further judicial review. As a matter of fact, in such decision the Court offered a judicial solution for dealing with the inherent limits of the current Italian regime of corporate liability.

The fraudulent scheme was structured as follows. A company from the UK acquired digital optical disc storage products—rigorously branded Verbatim—from a non-EU producer located in Asia. Then, the English company sold the CDs and DVDs to paper companies located in several European countries including Austria, San Marino, and Italy, which in turn sold the goods to other paper companies. Only after those redundant steps the CDs and DVDs were sold by some real Italian companies to the intended purchasers.

It emerged that the goods were introduced in Europe through the port of Rotterdam to be sent to the European Verbatim's logistics department located in Duisburg, Germany, then the CDs and DVDs were delivered directly to their final destination in Italy. As a result, the goods were never delivered to the paper companies located in the UK, Austria, or the other EU states nor were they transited through such countries. To make the scheme credible and deceive the tax authorities, the criminals used falsified transportation documents applying transit stamps so that, only on paper, the CDs and DVDs appeared delivered also to the various paper companies participating in the carousel fraud.[84]

The fictitious business operations between the various paper companies did create interposing layers to neutralize the imposition of the VAT on the real firms that had to sell the products in the Italian market. Such a result was obtained transferring, in economic terms, the obligation to pay VAT on the interposed paper companies.

[83] The Decision 46162 of 2015 has been preceded by other relevant decisions of the Italian Supreme Court.

[84] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

2.4.3 United Kingdom

2.4.3.1 General Context Factors

Legal framework of tax

The tax law of the UK is not consolidated, as the law does not exist in a single code. Rather, it exists in an array of statutes, secondary legislation, non-statutory 'soft law', and the common law.

Defining tax crimes

Generally, punitive sanctions in the UK's tax code fall into three categories: Non-criminal sanctions; criminal offences provided for in statute; and criminal offences derived from the common law.

Non-criminal sanctions typically take the form of cumulative penalty charges, ranging from a charge of £100 for failing to meet a filing deadline, to a penalty of 100 per cent of tax due (or £300, whichever is greater) for deliberate and concealed withholding of information that would enable HMRC to assess a taxpayer's liability.

The second category of offences are those criminal offences provided for in statutory law. The UK's tax evasion offences can be grouped into several categories:

- Tax offences that are of a general application. These offences relate to the conduct of the individual, as opposed to the particular tax evaded.
- Statutory tax offences, which are restricted in application to the evasion of a particular type of tax. For instance, the UK has offences of fraudulent evasion of income tax, fraudulent evasion of VAT, and fraudulent evasion of duty.
- Offences which are not tax evasion offences *per se*, but which criminalize conduct relating to the commission of the offence (eg falsification etc. of documents).
- From 1993, the UK has included tax evasion as a predicate offence for money laundering purposes in line with its 'all crimes approach' to anti-money laundering regulation.[85]
- The UK has recently enacted offences, which aim to facilitate the prosecution of certain types of offender/offending. These offences include a new

[85] Criminal Justice Act 1988, s 93A (7) (as amended by Criminal Justice Act 1993, ss 29–31); the current statute is the Proceeds of Crime Act 2002.

strict liability offshore tax evasion offence and a corporate failure to prevent the facilitation of tax evasion offence.[86]

The final category, common law offences, is of particular relevance to this case study—in particular, the offences of conspiracy to defraud, and of cheating the public revenue. The offence with which the below case is concerned is cheating the public revenue. This offence is embedded in the Theft Act 1968.[87]

Role of professional enablers

Many of the tax evasion offences in the UK apply to the enablers of tax offences, as well as the individuals who evade their tax liabilities. For example, the UK has several offences of being 'knowingly concerned' in the evasion of a specific type of tax 'by that or *any other person*'.[88] Here, the wording of the statute enables the prosecution of anyone who had actual involvement in, and knowledge of the fraud, including those who enable the offence.[89]

Type of prosecution (civil or criminal) process used

Both civil or administrative and criminal prosecution processes are utilized for tax offences in the UK.

Criminal corporate liability

The concept of corporate liability for criminal offences, including tax offences, exists in the UK (Criminal Finances Act 2017). However, there are a number of difficulties in attributing liability to corporate offenders. The Ministry of Justice has highlighted these difficulties in a recent call for evidence on corporate liability for economic crime.[90]

Courts' treatment of tax crimes

Pre-trial guilty pleas, deferred prosecution agreements,[91] and sweetheart deals[92] for tax offences are used in the UK. With regards to pre-trial guilty

[86] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[87] s 32 (1) (a).

[88] See, for instance, the offence of fraudulent evasion of income tax contained in Taxes Management Act 1970, s 106A.

[89] HC Deb, Standing Committee H, 29 June 2000, col 1010 cited in David Salter, 'Some Thoughts on the Fraudulent Evasion of Income Tax' (2002) 6 British Tax Review 189, 491–2.

[90] Ministry of Justice, 'Corporate liability for economic crime: call for evidence' (Consultation, 31 January 2018) <www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence> accessed 20 July 2021.

[91] Crime and Courts Act 2013, sch 17.

[92] See, for instance, Ben Chu Davos, 'Google £130m tax "Sweetheart Deal" Should Be Audited, Says Labour' (*The Independent*, 23 January 2016) <www.independent.co.uk/news/business/news/

pleas, the ability of a defendant to plead guilty at an early stage in criminal proceedings and thereby gain a reduction in his or her sentence, has long been a principle of common law; the practice having existed for centuries.[93]

Cooperation

The UK has the Joint Money Laundering Intelligence Taskforce (JMLIT), which provides a common platform for law enforcement and other agencies to cooperate in fighting financial crime. Liaison officers from various LEAs are also strategically located in foreign jurisdictions to enhance cooperation and joint investigations as well as to disrupt serious organized crime before it impacts on the UK.

Role and protection of whistleblowers

The UK has a standalone whistleblower legislation to protect the whistleblowers who make a disclosure on tax offences.

Types of sentences given to tax criminals

As a snapshot, the statistics available indicate that out of 1,288 prosecutions brought in 2014/15, thirty-two per cent resulted in a custodial sentence, sixteen per cent resulted in a suspended sentence and forty-one per cent resulted in a non-custodial sentence.[94] The average custodial sentence was 29 months, with a range of between 1.5 and 240 months' imprisonment.[95] Many of the most substantial sentences imposed in the UK are for VAT fraud.[96]

Asset recovery

The confiscation regime in England and Wales has been there since 1986 when the Drug Trafficking Offences Act was introduced to confiscate the proceeds of drug trafficking. Ever since, subsequent legislation has been enacted including the Criminal Justice Act 1988, which extended confiscation regime to cover the

google-130m-tax-sweetheart-deal-should-be-audited-says-labour-a6830346.html> accessed 20 July 2020.

[93] Jacqueline Beard, 'Reduction in Sentence for a Guilty Plea' (House of Commons Briefing Paper No 5974, 15 November 2017) 4 <http://researchbriefings.files.parliament.uk/documents/SN05974/SN05974.pdf> accessed 20 July 2021.

[94] National Audit Office, 'Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks' (December 2015) 35 <https://www.nao.org.uk/wp-content/uploads/2015/12/Tackling-tax-fraud-how-HMRC-responds-to-tax-evasion-the-hidden-economy-and-criminal-attacks.pdf> accessed 15 January 2022.

[95] ibid.

[96] See, for instance, *R v Ravjani (Dilawar)* [2012] EWCA Crim 2519 where a seventeen-year sentence was not regarded as excessive for the ringleader of a MTIC fraud which had caused loss of over £100 million.

proceeds of non-drug crimes, the Proceeds of Crime Act 2002, and the Serious Organised Crime and Police Act 2005.

2.4.3.2 Case Analysis: *R v Lunn* [2017] EWCA Crim 34, [2017] All ER (D) 136 (Feb)

This concerns Christopher Jonathan (Jon) Lunn, who worked as a tax advisor to over 7,000 clients without any legal, accounting, or financial advisory qualifications. Lunn dishonestly sent false invoices to HMRC to cover up an increase in the amount charged for accountancy fees on behalf of his employers' clients. This meant that the firms' clients paid less tax than they owed, as their fees were inflated to such an extent—sometimes by thousands of pounds—that the tax benefit was equal to the true cost of the accountancy service. On 3 December 2015 in the Crown Court at Southwark, Lunn was convicted of six counts of misrepresentation under the Fraud Act 2006.

In the course of the investigation into Lunn, it transpired that this was only the tip of the iceberg. Lunn's father, Denis Christopher Lunn, ran the tax advisory firm in question, where dishonesty was rife.

Criminal prosecutions for tax evasion, though increasing, remain rare in the UK. In 2014–15, there were 1,135 prosecutions for tax crimes—almost double the previous period.[97] However, seen in the context of approximately 1.6 million prosecutions in the same period in England and Wales alone, HMRC's preference for dealing with such matters by administrative and civil processes, rather than through the criminal courts, is apparent. Challenges for prosecuting tax offences in the UK include proving the requisite mental state of the accused, obtaining requisite evidence, and the dual role of the HMRC as a revenue collector and prosecutor.[98]

2.4.4 Spain

2.4.4.1 General Context Factors

Legal framework of tax

Tax crimes in Spain are addressed by two main laws: The Criminal Code of 2015 and the Criminal Procedure or Prosecution Code of 2015. They are

[97] Vanessa Houlder, 'HMRC Steps up Prosecutions for Tax Cheating' (*Financial Times*, 29 September 2017) <https://www.ft.com/content/ba2155fe-a44c-11e7-9e4f-7f5e6a7c98a2> accessed 20 July 2021.

[98] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

operationalized within the civil law jurisdiction of: The Spain's Constitution of 2011, The Spanish Civil Code 2017, and The General Tax Law 2015. The tax legal system in Spain encourages the use of social, administrative, and civil procedures to addressing tax infractions.[99]

Role of professional enablers

In the enforcement of tax laws and prosecuting tax crimes, the services of professionals such as bankers, accountants, and auditors are always needed to support law enforcement actions in Spain. They can be prosecuted if they knowingly facilitate the committing of tax crimes.

Type of prosecution (civil or criminal) process used

Civil or administrative and criminal prosecution processes are both utilized in Spain.

Criminal corporate liability

Corporate liability exists in Spain. Article 31(1) *bis*, provides that 'legal entities shall be criminally liable for offences committed in their name or on their behalf, and for their benefit, by their legal representatives and administrators, whether *de facto* or *de jure*'. Article 31 *bis* (2) provides enforceability of criminal liability of legal entities.

Cooperation

Tax law enforcement is the primary responsibility of the Spanish Tax Agency (*Agencia Estatal de Administración Tributaria (AEAT)*). AEAT collaborates with other national LEAs such the General Commissariat of Judiciary Police, Customs Surveillance Directorate (*Dirección Adjunta de Vigilancia Aduanera*), National Police (*Cuerpo Nacional de Policía*), and the Civil Guard (*Cuerpo de la Guardia Civil*).[100] At the regional[101] and municipal[102] levels, there are local

[99] ibid.

[100] Europol, 'Spain' <www.europol.europa.eu/partners-agreements/member-states/spain> accessed 10 July 2021.

[101] At the regional level, LEAs in Spain include: General Police Corps of the Canary Islands (*Policía Canaria*) under 'Law of the General Police Corps of the Canary Islands), passed on 28 May 2008 by the Parliament of the Canary Islands; People's Guard Ertzaintza (*Ertzaintza)*; Chartered Police of Navarre (*Policía Foral de Navarra Nafarroako Foruzaingoa*); and Police of the Generalitat of Catalonia (*Mossos d'Esquadra*).

[102] At the municipal level, LEAs in Spain include *Guàrdia Urbana de Barcelona*; Madrid Municipal Police (*Policía Municipal de Madrid*), as well as Special Security Brigades for the Autonomous Community of Madrid (*Brigadas Especiales de Seguridad de la Comunidad Autónoma de Madrid*).

LEA units that collaborate with the Tax Agency, mainly from the police force with remit concerning security, crime prevention, law and order.[103]

Role and protection of whistleblowers

Whistleblowers are allowed to disclose information that can support tax authorities to recover tax debt. In 2014, Spain established a whistleblower e-mail hotline that permit whistleblowers to anonymously report misconduct to LEAs. However, there is no standalone whistleblower protection law in Spain. It is hoped that Spain will transpose the EU whistleblower protection directive by the 17 December 2021 transposition deadline.

Types of sentences given to tax criminals

Fines, imprisonment, and other sanctions are established in the Spanish Criminal Code 2015[104] and the General Tax Law.

Asset recovery

Conviction and non-conviction-based recovery of assets is allowed in Spain. The Criminal Code 2015[105] and Criminal Procedure Code[106] are particularly applicable.

2.4.4.2 Case Analysis: Constantino Geronimo and Marcos Benjamin Case

It was an appeal case by Mr. Constantino Geronimo ('Geronimo') and Mr. Marcos Benjamin ('Benjamin'), with an appeal cassation number 1729/2016 against the judgment that was delivered by Section 8 of the Provincial Court of Barcelona on 5th July 2016. The Supreme Court Criminal Chamber ('the Court') heard the case and issued judgment (No 374/2017) on 24 May 2017 upholding the original decision by the Provincial Court of Barcelona which had convicted and sentenced them on three counts of offenses each with a penalty of twenty-one months each imprisonment. In addition, Geronimo was fined a total of 2,092,819.55 euros for the three counts of offenses of fraud while Benjamin was fined a total amount of 1,596,939.93 euros for the three offenses of fraud against the Public Treasury.[107]

[103] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[104] Arts 305 and 305 bis Criminal Code 2015 (Spain).

[105] Art 127.

[106] Art 367.

[107] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

Geronimo's appeal was regarded as entirely without merits and subsequently dismissed by the Court. Laws and provisions applied in this case included the Criminal Code of 2015, the Criminal Procedure or Prosecution Code of 2015, the Spain's Constitution of 2011, the Spanish Civil Code 2017, and the General Tax Law 2015.

Five jurisdictions[108] were involved in this case. As evidence, prosecutors used documents and data on the illicit financial flows of the convicts across the jurisdictions in which convicts staged their smart enterprise to exploit the image rights of Geronimo. The proceedings of the case took place from 2013 to 2017 and attracted huge media coverage as it involved a football star. The ground level investigations were carried out by the Tax Agency, and supported by prosecutors and financial intelligence units.[109]

This case was a straightforward one with Article 305 and 305 *bis* of the Spanish Criminal Code 2015 as basis for establishing liability for criminal conduct—thus, tax fraud. What was in contention was the issue of criminal continuity. Footballers' engagement in tax offences is a recurring enterprise in Spain with popular players such as Cristiano Ronaldo and Diego Costa involved in these offences.

2.4.5 Portugal

The case study of Portugal presents a descriptive analysis of the tax enforcement environment and does not provide an analysis of a court judgment in comparison to the earlier studies provided in this chapter as no criminal case meeting the requirements of the case study guideline could be identified in Portugal.

2.4.5.1 General Context Factors

Legal framework of tax

The CIRC—(Corporate Income Tax Code)—Decree-Law no 442-B/88 regulates the so-called IRC (Corporate Income Tax). The Value Added Tax Code—Decree-Law no 394-B/84 regulates VAT.

Law 15/2001 of 5 June concerning the General Regime of Tax Infringements is used in prosecuting tax crimes. This law is used along with other laws such

[108] UK, Switzerland, Uruguay, Belize, and Spain.

[109] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

as the Criminal Code, Civil Code, Criminal Process Code, and Tax Procedure and Process Code.

Defining tax crimes

The criminal tax offences commonly committed in Portugal include tax fraud[110] and misappropriation of funds, which becomes an offence if the tax debts are more than 7,500 euros. Law 15/2001 of 5 June concerning the General Regime of Tax Infringements is the principal legal instrument.[111] Types of crimes are tax fraud,[112] qualified tax fraud,[113] and abuse of trust.[114]

Role of professional enablers

Professional enablers such as accountants and lawyers are vital source of information on business operations of companies. While they can assist with information, they have also sometimes used their expertise to advise their clients on, for instance, creation of shell companies. There was an instance where an accountant was involved in false billing and a lawyer involved in advising clients in creation of missing traders and offshore companies, with a view to laundering money and evading tax.[115]

Corporate liability

Representatives of entities such as directors and the entities can both be criminally held liable under the Portuguese Criminal Code and as established in the Companies Code. The Companies Code provide for offences such as giving false information, illegally refusing to provide information, and hindering auditing processes, all of which can facilitate tax crimes.

Type of prosecution (civil or criminal) process used

Civil or administrative and criminal prosecution processes are used in Portugal. The use of administrative or criminal process is dependent on the threshold of the decrease in tax liability.

[110] This usually becomes an offence if the reduction of tax liability does exceed 15,000 euros.
[111] See arts 87 to 105.
[112] Art 103.
[113] Art 104.
[114] Art 105.
[115] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

Courts treatment of tax crimes

Empirically, it seems that Courts in Portugal, as far as tax crime is concerned, have so far seen it in a rather severe way.

Cooperation

Article 41(4) of General Regime of Tax Infringements fosters cooperation of enforcement agencies in Portugal. Investigation is conducted by the Criminal Police in collaboration with Tax and Customs Authority.

Role and protection of whistleblowers

Portugal has drafted a whistleblower protection law[116] towards transposing the EU whistleblower protection directive. It is hoped that Portugal will transpose the directive by the December 2021 transposition deadline.

Types of sentences given to tax criminals

Fines, imprisonment, and other sanctions are applied in Portugal. Up to eight years' imprisonment can be issued by the courts against individuals.[117] Tax offences of administrative nature are sanctioned with administrative sanctions of up to 165,000 euros based on intentionality and up to 45,000 euros based on negligence.

Asset recovery

There is a specialized asset agency (*Gabinete de Recuperação de Activos—GAR*)) for asset recovery. The GAR identifies, traces, and seizes property or proceeds drawn from criminal activity. The agency cooperates with asset recovery offices (AROs) of other countries and can access national tax database, customs database and so on, which assist in recovery of assets relating to tax crimes.[118]

[116] Transparency International Nederland, 'Mapping the EU on Legal Whistleblower Protection: Assessment before the Implementation of the EU Whistleblowing Directive' (April 2019) 60 <www.transparency.nl/wp-content/uploads/2020/06/Mapping-the-EU-on-Whistleblower-Protection-TI-NL.pdf> accessed 11 May 2021; Ida Nowers, 'Progress Update: Are EU Governments Taking Whistleblowing Protection Seriously?' (*Whistleblowing International Network* 2021) <whistleblowingnetwork.org/Our-Work/Spotlight/Stories/Progress-update-Are-EU-Governments-taking-whistle> accessed 20 June 2021.

[117] Arts 103, 104, and 105 of General Regime of Tax Infringements Law (Portugal).

[118] OECD, 'Assessment and Review of Asset Recovery Institutional Arrangements in Greece' (Greece—OECD Project: Technical Support on Anti-Corruption, 2018) <https://search.oecd.org/daf/anti-bribery/OECD-Greece-Asset-Recovery-Institutional-Analysis-ENG.pdf> accessed 15 July 2021.

2.4.6 Austria

2.4.6.1 General context factors

Legal framework of tax

The Fiscal Penal Code (FPC) provides the key legal provision for prosecuting tax crimes. It is a full-range criminal law that aims to meet the specific demands of prosecuting tax and customs crimes. Concerning cases that are subjects to the jurisdiction of the ordinary courts, the FPC refers to the Criminal Procedure Code (CPC), providing specific amendments, especially regarding the investigating powers of the Fiscal Enforcement Authorities. In such cases, the Fiscal Enforcement Authorities act instead of the Criminal Investigation Police (Article 195 ff FPC).[119]

Defining tax crimes

The Austrian legislation comprises specific provisions to define and prosecute fiscal offences. They are laid down in the FPC, BGBl No 129/1958, last amended by Federal Acts BGBl I No 28/2018 and BGBl I No 32/2018. Tax evasion as defined in Article 33 FPC is the fundamental offence that constitutes tax crime.

Role of professional enablers

It seems that tax- and law-advisors in general tend to stay on the right side of the law. Nevertheless, they are crucial to perpetrators as they are usually in need of legal and tax-expertise to organize their criminal behaviour. According to the Austrian legislation, not only the one who commits the crime but also the instigator and the accessory are punishable (Article 11 FPC and Article 12 Criminal Code [CC]).

Criminal corporate liability

Legal entities are subject to criminal liability pursuant to the 'Legal Entities Liability Act (LELA)' (BGBl I No 151/2005, last amended by Federal Act BGBl I No 26/2016. The LELA has been implemented into the FPC by Federal Act BGBl I No 161/2005 and entered into force on 1 January 2006.

[119] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

Role and protection of whistleblowers

There is not a specific legal instrument that protects whistleblowing in Austria[120] despite some provisions of the CPC in relation to key-witnesses (Article 209a CPC). It is hoped that by the December 2021 transposition deadline of the EU whistleblowing directive, Austria will transpose the directive into national law.

Types of sentences given to tax criminals

'Tax fraud' is punishable with imprisonment up to ten years and a fine up to 2.5 million euros (Article 39 para 3 FPC). Tax evasion carries a sentence of a fine up to twofold of the evaded amount. In addition, a custodial sentence of up to two years can be imposed if it is necessary for preventive reasons (Article 33 para 5 FPC and Article 20 FPC).

Asset recovery

Conviction-based confiscation and non-conviction-based confiscations are used in Austria. The country applies freezing and confiscation orders for all crimes[121] including tax crimes.

2.4.6.2 Case Analysis: Missing Trader Case

The case shows an operation of a Missing Trader VAT-Fraud scheme organized in an international context with relation to EU Member States as well as third countries. The focus of the criminal investigation was the tax evasion committed in Austria. One company acted as the missing trader (MT). It had been acquired as a shell-company only a few months before starting the fraudulent actions. A second company was designed to purchase the goods from the MT and to re-sell them to a third company who exported them ('buffer'). As the management of the second company had obviously been the organizer of the Austrian fraud scheme, it will subsequently be described as the conduit company.[122]

Two persons acted as intermediaries between the conduit company and the buffer. They initiated the contact with the buffer and managed its trading

[120] See Shahanaz M S Müller, 'Providing an Alternative to Silence: Towards Greater Protection and Support for Whistleblowers in the EU—Country Report: Austria' (2014) <www.asktheeu.org/en/request/994/response/5855/attach/2/Country%20report%20Austria%20Redacted.pdf?cookie_passthrough=1> accessed 14 May 2021.

[121] European Commission, 'Asset Recovery and Confiscation: Ensuring That Crime Does Not Pay' (June 2020) <https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-security/20200602_com-2020-217-commission-report_en.pdf> accessed 15 July 2021.

[122] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

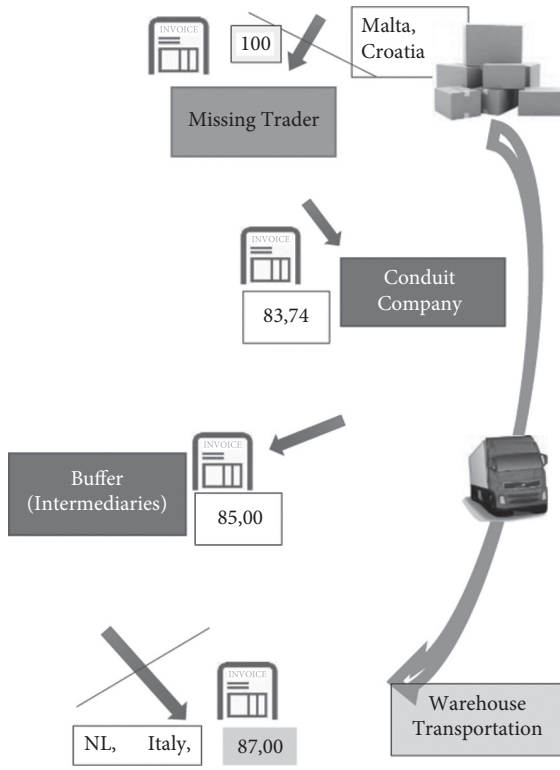

Figure 2.1 Structure of Austrian scheme

business. They shared the trading's profit with the buffer company. In all detected trading cases, the involved companies were the same. The warehouses differed depending on the origin of the imported goods. The process of the scheme is shown in the Figure 2.1.

The whole trading-process was pre-arranged. The overall damage to the Austrian treasury was about 1.5 million euros in VAT. However, this amount could not be recollected due to insolvency of all participants.

The legal basis of tax audits is Article 147 FTC. The findings of this chain-audit substantiated the suspicion of tax evasion in a commercial way (Article 33 para 2 and Article 38 FPC) and a preliminary criminal investigation was initiated. The most important evidence in this case included the commercial books, and documents, and bank accounts. The case lasted from August 2007 to June 2015.[123]

[123] ibid.

The manager of the conduit company was convicted and sentenced with a fine of 900.000 euros (imprisonment in lieu of payment: eight months) and fifteen months' imprisonment. Because of the conviction, he is also personally liable for the evaded taxes according to Article 11 FTC.

The timely reaction of the tax and legal enforcement authorities prevented the Austrian treasury from a much greater loss in VAT.

2.4.7 France

2.4.7.1 General Context Factors

Legal framework of tax

The main legislation on tax in France is the '*Code Général des Impôts*' (CGI) 2018.

Defining tax crimes

Article 1741 of the CGI[124] provides the definition of tax crime. Essentially, it provides that anyone who fraudulently and intentionally subverted, or tried to evade fraudulently and intentionally the payment of tax is considered guilty regardless of the means used to this end.[125]

Role of professional enablers

The enablers[126] who were involved in putting together the sophisticated tax fraud scheme to conceal assets in trusts in the selected case here include Guy Wildenstein's co-defendants, namely: a notary, two lawyers, and two offshore trusts.

Criminal corporate liability

Pursuant to Article 121/2 French Penal Code, entities may be made to account for their criminal actions. From 2005, corporate criminal liability can arise for any criminal infringement of the French law.

[124] Art 1741 of General Tax Code (*CGI—Code Général des Impôts*) 2018 (France).

[125] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[126] Please refer to the *Modus Operandi* section below for more details about the roles played by each enabler.

Role and protection of whistleblowers

France has a standalone law[127] for protecting whistleblowers. It is hoped that France will transpose the whistleblower protection directive of the EU by the transposition deadline. Whistleblowers have been involved in exposing tax crime. For instance, Cahuzak's case was first disclosed[128] by a whistleblower action.[129]

Types of sentences given to tax criminals

Tax crime is sanctioned with a fine of up to 500,000 euros and a jail sentence of up to five years. These sanctions can reach 3 million euros along with a seven-year jail sentence if the crime was committed as a part of an organized gang or carried out using one of the means laid out by Article 1741 of the CGI.[130]

Asset recovery

The French law provides for confiscation and recovery of assets relating to tax crimes. The general provisions of the Criminal Procedure Code 2006[131] establish recovery procedures. Non-conviction and conviction-based confiscations are applied.[132]

2.4.7.2 Case Analysis: The Wildenstein Case

The case involved Guy Wildenstein,[133] heir of an art dealing family, his nephew Alec Junior and other co-defendants (a notary, two lawyers, and two

[127] See the whistleblower provisions of Law No 2016–1691 on Transparency, Fighting Corruption and Modernising Economic Life (Sapin II Law) 2016 (France); European Commission, 'Horizontal or Further Sectorial EU Action on Whistleblower Protection—List of Annexes: Annex 6—Member States' Legislative Framework' (2017) <https://ec.europa.eu/smart-regulation/roadmaps/docs/plan_2016_241_whistleblower_protection_en.pdf> and <https://ec.europa.eu/info/sites/info/files/1-11_annexes.pdf> accessed 13 May 2021.

[128] Kramer Levin, 'The French Prosecutor Office Has Entered Into the First French DPA in History With HSBC Private Bank Suisse' (*Kramer Levin*, 9 January 2018) <www.kramerlevin.com/en/perspectives-search/white-collar-defense-and-investigations-alert-the-french-prosecutor-office-has-entered-into-the-first-french-dpa-in-history-with-hsbc-private-bank-suisse.html?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> accessed 13 May 2021.

[129] Kramer Levin, 'The French Prosecutor Office Has Entered Into the First French DPA in History With HSBC Private Bank Suisse' (*mondaq*, 15 January 2018) <www.mondaq.com/france/x/663868/White+Collar+Crime+Fraud/The+French+Prosecutor+Office+Has+Entered+Into+The+First+French+DPA+In+History+With+HSBC+Private+Bank+Suisse> accessed 13 May 2021; Julia Kollewe and Jill Treanor, 'French Prosecutor Calls for HSBC to Stand Trial for Alleged Tax Fraud' (*The Guardian*, 3 November 2016) <https://www.theguardian.com/business/2016/nov/03/hsbc-bank-french-prosecutor-calls-stand-trial-alleged-tax-swiss-subsidiary> accessed 7 July 2021.

[130] Art 1741 of General Tax Code (*CGI—Code Général des Impôts*) 2018 (France).

[131] See arts 4, 627-16.

[132] Ministère de la Justice, 'Guide for Asset Recovery in France' <https://star.worldbank.org/sites/star/files/Guide-for-Asset-Recovery-in-France.pdf> accessed 13 May 2021.

[133] Tribunal de Grande Instance Paris- 32éme chambre correctionnelle, Decision No 11203092066 of 12 January 2017.

offshore trusts). The Wildenstein heirs were accused of under-declaring the value of the inheritance following the death of Daniel Wildenstein in 2001. Guy Wildenstein and his co-defendants were accused of tax fraud and money laundering through the use of secretive and opaque trusts in tax havens to conceal various assets, mostly paintings. The prosecutor requested that the family be sentenced to two years in prison and given a 250,000,000 euros m fine. On 14 January 2017, Wildenstein and co-defendants were cleared of tax fraud charges[134] at the High Court of Paris on a trial that had started on 6 January 2016. Shortcomings in the French law at the time and the investigation led to this verdict.[135]

The legal provisions underpinning the Wildenstein case are governed by two different types of laws: tax law and criminal law. The Wildensteins were brought to trial on the legal basis of Article 1741 of the CGI.

The Wildenstein defence requested that an appeal court should determine whether a case can be subject to a criminal and fiscal trial simultaneously, fearing double jeopardy. The High Court of Paris accepted the argument presented by the defence whereby an appeal court (Cour de Cassation) should address the constitutional issue[136] relating to having a case treated simultaneously by a criminal and a fiscal court. The appeal court decided to transfer the decision to the constitutional board (Conseil Constitutionnel). The decision of the constitutional board in June 2016[137] conveys a degree of ambiguity because while it states that the application of two procedures leading to two different sanctions is not against the Constitution, it spells out 'the principle is only applicable in view of Article 1741 to the most serious cases of fraudulent concealment'.[138] Hence, what is considered to be a 'serious case' of concealment is left without a definition.

The criminal judge refused to condition his decision upon the decision of the fiscal judge. By refusing to wait for the decision of the fiscal judge who is the expert in tax matters, the criminal court was conscious of the risk of contrariety of decisions.[139]

[134] In March 2018, the prosecutor appealed the verdict. The trial is continuing at the time of writing this report. However, this case study report focuses on the first decision of the High Court of Paris of 12 January 2017: Ref: The High Court of Paris (Tribunal de Grande Instance Paris-32éme chambre correctionnelle) Decision No 11203092066 of 12 January 2017.

[135] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[136] Please refer to CPC definition in section 1.

[137] Constitutional Council (France), 'Décision no 2016-546 QPC du 24 juin 2016: M Jérôme C [Pénalités fiscales pour insuffisance de déclaration et sanctions pénales pour fraude fiscale] <https://www.conseil-constitutionnel.fr/decision/2016/2016546QPC.htm> accessed 7 July 2021.

[138] Emmanuel Daoud and Victoire de Tonquedec, 'L'affaire Wildenstein, un cas d'école du traitement de la fraude fiscale par le juge pénal' (2017) AJ Pénal 178.

[139] ibid.

2.4.8 Ireland

2.4.8.1 General Context Factors

Legal framework of tax

The tax law in Ireland is consolidated particularly in the light of the Taxes Consolidation Act 1997, s 1078, which addresses tax crimes.

Defining tax crimes

Tax Crimes in Ireland are mainly defined in the Taxes Consolidation Act 1997, as amended. Tax Crimes in Ireland are referred to as 'Revenue Offences' and their definition is contained in of the Taxes Consolidation Act 1997, s 1078 which was most recently amended by the Finance Act 2017. The section defines a 'General Revenue Offence' and a number of Specific Revenue Offences.

Persons engaging in tax crimes may also be prosecuted under the common law for conspiracy to commit the specified offence, conspiracy to defraud, and for attempts to commit the offence, even where the offence is not completed. Tax criminals may also be prosecuted for fraud offences such as deception, false accounting, use of a false instrument or money laundering depending on the nature of their offending. The fraud offences mainly originate from the Criminal Justice (Theft and Fraud Offences) Act 2001, some of which attract more severe offences than the revenue offences. Money Laundering offences are outlined in the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. Tax crimes committed outside Ireland are predicate offences for tax crime.[140]

Role of professional enablers

The main enablers affecting the financial sector include accountants, tax planners, legal profession, and property profession. Since the enactment of the Criminal Justice Act 2011, s 19, it is an offence for a person not to disclose information that may assist *An Garda Síochána* in preventing, detecting, apprehending, or securing the prosecution of a person for a relevant offence.

Type of prosecution (civil or criminal) process used

Both criminal and civil or administrative prosecutions are permitted by the legal framework in Ireland.

[140] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

Criminal corporate liability
Companies are liable for prosecution for criminal offences committed on their behalf, if it can be shown that the company management were aware of the crime.

Cooperation
The Revenue Commissioners and *An Garda Síochána* are the only two law enforcement agencies in Ireland with the power to investigate tax crimes. Both agencies co-operate closely and work together as members of the Criminal Assets Bureau. The Garda National Economic Crime Bureau ('GNECB') also has a close working relationship with the Investigations and Prosecutions Division of the Revenue Commissioners.

Role and protection of whistleblowers
Ireland has a standalone legislation[141] to protect whistleblowers. Intelligence is the lifeblood of any criminal investigation and is valued very highly in *An Garda Síochána*.

Types of sentences given to tax criminals
On summary conviction, a fine not exceeding 5,000 euros—which may be mitigated to not less than one fourth part of such fine—or at the discretion of the court, a term of imprisonment not exceeding twelve months, or both, and on conviction on indictment, a fine not exceeding 126,970 euros or at the discretion of the court, a term of imprisonment not exceeding five years, or both.

Sentencing on guilty pleas
A court will consider a plea of guilty in sentencing for the crime and this usually results in a reduced sentence. Plea-bargains do not exist in Irish law. It is a function for the Judiciary to decide on the appropriate sentencing of a convicted person. Cooperation with law enforcement agencies will usually result in a reduced sentence.

2.4.8.2 Case Analysis: *Director of Public Prosecutions v Cashell* (2014)
This case came to light following the 'Swiss Leaks' documents, copies of which were supplied to the Irish Revenue Commissioners by the French Authorities.

[141] See Protected Disclosures Act 2014 (Ireland), pt 3.

News reports claimed that 'Irish clients among €3.1bn Swiss bank account holders'.[142]

The 'Swiss Leaks' files were supplied to the French Tax Authority by Hervé Falciani, a former HSBC employee turned whistleblower.[143]

This case dated 16 July 2014, is one of thirty-three cases that the Irish Revenue Commissioners investigated following the release of the 'Swiss Leaks' files.[144]

John Cashell, a director of Radley Cashell Business Systems, Tralee, Co Kerry, Ireland, had an account with HSBC (Hong Kong and Shanghai Banking Corporation) Private Banking in Geneva, Switzerland. Mr Cashell had funds of almost €800,000 in accounts at HSBC. He had not declared the existence of this account to the Revenue Commissioners.

The Director of Public Prosecutions directed that Mr Cashell face trial on Indictment at the Circuit Criminal Court. Mr Cashell was charged with three separate counts of filing incorrect tax returns contrary the Taxes Consolidation Act 1997, s 1078(2)(a) as amended, in respect of the tax years 2001, 2002, and 2003. Mr Cashell subsequently pleaded guilty at Tralee Circuit Criminal Court in July 2014 and was sentenced in December 2014 by Judge Carroll Moran to a fine of 25,000 euros, he also made a 102,000 euros tax settlement.[145] The maximum penalty for this crime is five year's imprisonment or a fine of 126,970 euros, or both.

There were a number of corporate enablers who assisted Mr Cashell to commit his crimes, including financial institutions and accountancy firms.[146] The primary evidence in this case, was the files obtained from the French Authorities via the 'Swiss Leaks' case. The case demonstrates that convictions for tax crimes can be obtained despite the fact that the

[142] Mark O'Regan, 'Irish Clients Among €3.1bn Swiss Bank Account Holders' (*Independent.ie*, 9 February 2015) <www.herald.ie/news/irish-clients-among-31bn-swiss-bank-account-holders-30976555.html> accessed 7 July 2021.

[143] ICIJ, 'About This Project' <https://projects.icij.org/swiss-leaks/about> accessed 7 July 2021.

[144] Niall Cody, 'Public Accounts Committee: Revenue Commissioners Investigation of HSBC Offshore Accounts' (*KildareStreet*, 12 March 2015) <https://www.kildarestreet.com/committees/?id=2015-03-12a.66> accessed 7 July 2021.

[145] Phelan S., 'SwissLeaks: Irish businessman fined by Revenue after bank account details leaked' *Independent* (9 February 2015) <www.independent.ie/business/irish/swissleaks-irish-businessman-fined-by-revenue-after-bank-account-details-leaked-30975555.html> accessed 7 July 2021.

[146] Shane Phelan, 'SwissLeaks: Irish Businessman Fined by Revenue After Bank Account Details Leaked' (*Independent.ie*, 9 February 2015) <https://www.independent.ie/business/irish/swissleaks-irish-businessman-fined-by-revenue-after-bank-account-details-leaked-30975555.html> accessed 7 July 2021.

crime involved other jurisdictions and when the evidence is sourced from a whistleblower.[147]

2.4.9 Germany

2.4.9.1 General context factors

Legal framework of tax
The German Fiscal Code 2002[148] ('*Abgabenordnung*' AO) is the main tax legislation in Germany that addresses tax crimes.

Defining tax crimes
Section 369 of the Fiscal Code states that tax crimes include the following: Acts which are punishable under the tax laws; the illegal import, export or transit of goods; the forging of revenue stamps or acts preparatory thereto, insofar as the act relates to tax stamps; and aiding and abetting a person who has committed an act under the first and third offences above. The principal tax crime is tax evasion as enshrined in AO, s 370.[149]

Type of prosecution (civil or criminal) process used
Prosecutors in Germany apply civil and criminal prosecution processes.

Role and protection of whistleblowers
Whistleblowers have an important standing in Germany as one of the main sources of initial investigations. The tax investigation body is obliged to detect and investigate unknown tax cases.[150] Whistleblowers remain anonymous, though if the allegation is false, the name of the whistleblower has to be disclosed.[151] Yet, Germany[152] does not have standalone whistleblower protection. Hopefully, the country will transpose the directive by the December deadline for transposition.

[147] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).
[148] See Bundesamt für Justiz, 'Gesetze im Internet' <www.gesetze-im-internet.de> accessed 7 July 2021.
[149] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).
[150] Section 208 AO.
[151] BFH, *Az v B* 163/05.
[152] Transparency International Nederland, 'Mapping the EU on Legal Whistleblower Protection: Assessment before the Implementation of the EU Whistleblowing Directive' (April 2019) 37 <www.transparency.nl/wp-content/uploads/2020/06/Mapping-the-EU-on-Whistleblower-Protection-TI-NL.pdf> accessed 11 May 2021.

Criminal corporate liability

The legal concept of corporate liability does not exist in Germany.[153] The most important administrative sanction is a financial penalty under OWiG, s 30, which enables the State to impose a financial penalty on a legal person if it committed a crime or an administrative offence.[154]

Types of sentences given to tax criminals

According to the AO, anyone guilty of tax evasion shall be liable to a 'penalty of up to five years' imprisonment or a monetary fine shall be imposed on any person.'

2.4.9.2 Case Analysis: The Hoeness Case

This case represents one of the most famous German tax evasion cases due to the status[155] of the defendant, Uli Hoeness and the large amount of money involved.

Hoeness opened a bank account at the Swiss Bank 'A' in 1975. He used the money in the account with 'A' bank for risky foreign exchange transactions. He made profits amounting to several million euros. Hoeness never asked for bank statements or an income statement. In addition to hiding the profits, Hoeness's tax returns contained losses carried forward which were too high.

Hoeness was aware that, due to the failure of the tax treaty[156] and the existence of the tax CDs, a voluntary disclosure would be the only possibility to avoid penalties. The accountant indicated to Hoeness that due to the limited and inconclusive nature of documents, a voluntary disclosure would be the 'worst case scenario.'[157]

On 18 January 2013 the prosecution opened proceedings against Hoeness for tax evasion under AO, s 370 (1). The court proceedings started on 10 March 2014 and on 13 March 2014, Hoeness was sentenced to three and a half years' imprisonment for tax evasion amounting to 28.5 million euros under AO, s 369.[158] Hoeness did not contest the tax evasion. Hoeness was not successful

[153] Section 73 ff, 29a OWiG; for other examples see Luise Warmuth, 'Zur Strafbarkeit von Unternehmen "No body to kick, no soul to damn?" 1—Das Beduerfnis einer echten Ungterenehmensstrafbarkeit in Deutschland' <https://iurratio.de/journal/zur-strafbarkeit-von-unternehmen/> accessed 4 August 2021.

[154] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[155] The defendant was a football player and a football manager for FC Bayern Munich and was seen as a charismatic personality in Germany.

[156] In 2010, a German-Swiss tax treaty was discussed with the aim of providing taxable income from capital gains from financial investments of German tax payers in Switzerland for past taxable periods but failed to conclude it.

[157] LG Muenchen II, 13.03.2014—W5 KLs 68 Js 3284/13.

[158] S 369 Abs 1 Nr 1, Abs 2, 370 Abs 1 Nr 1 AO, 53 StGB.

with his voluntary disclosure. However, the fact that Hoeness applied a voluntary disclosure was a mitigating factor.[159]

2.4.10 Malta

2.4.10.1 General Context Factors

Similar to the case study from Portugal, the Maltese case study provides brief responses to some of the questions from the case study design as there are no recorded convictions of tax crimes in Malta.[160]

Legal framework of tax

The Income Tax Acts including the Income Tax Management Act 1994 [ch 372 of the Laws of Malta] and the VAT Act 1999 are the key legal instruments that form the legal framework of Malta. The framework does not appear to be consolidated.

Defining tax crimes

Any person who failed to comply with the provisions of the Income Tax Acts [chs 123, 372 of the Laws of Malta] is, upon conviction, guilty of an offence. Part IX [arts 49–52 of ch 372 of the Laws of Malta] outlines what constitutes an offence liable to prosecution.

Although there is no uniform legal definition of what is a tax crime in Malta there are many provisions that prohibit infringements, which are clearly defined in the law. Articles 76[161] and 77 of the VAT Act specify a long list of these infringements, which infringements cover essentially all forms of crimes connected with VAT. In practice, few people are prosecuted under Articles 76 and 77 because the Commissioner for Revenue rather seeks the civil (administrative) remedies for failing to comply with fiscal obligations.[162]

[159] See for example: Petja Posor, *Der Fall Hoeneß als Skandal in den Medien: Anschlusskommunikation, Authentisierung und Systemstabilisierung* (Master's Thesis, Friedrich Alexander University 2017) <www.halem-verlag.de/wp-content/uploads/2015/04/9783744509145_le.pdf> accessed 7 July 2021.

[160] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[161] Offenses include failure to register for VAT purposes; keep proper records, documents, and accounts as required by VAT law; furnish a return; any additional return, statement, or information or to produce any books, records, documents, and accounts, or failure to pay any tax or administrative penalty due.

[162] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

Role of professional enablers

Some enablers help taxpayers to keep distorted records and advise on withholding information from tax authorities, which information is crucial to an investigation. Relevant authorities in Malta rarely encounter professionals who fail to comply with the Revenue Department's requests.

Type of prosecution (civil or criminal) process used

Civil and criminal prosecutions are feasible but the administrative/civil prosecutions are highly patronized than the criminal ones.

Criminal corporate liability

In Malta, the concept of corporate liability does not exist. The individuals behind the company such as the directors are criminally responsible where a tax crime is carried out by an entity.

Cooperation

The Commissioner for Revenue forwards a list of individuals to be prosecuted to the Commissioner for Police. The Revenue Department also set up a joint enforcement task force. This unit is a combined 'action' between the various departments and the Commissioner for Revenue's office. This unit carries out cross-border investigations and holds local inspections.

Role and protection of whistleblowers

Information received from whistleblowers is used to initiate an administrative investigation in Malta. In 2013, Malta enacted a standalone Whistleblower's Act[163] to provide how whistleblowers can be protected appropriately.

Types of sentences given to tax criminals

Fines and imprisonment are applied by the courts in Malta. Convicted person may be fined between 116 and 10,000 euros, and/or imprisonment for a maximum period of six months.[164]

[163] Protection of the Whistleblower Act 2013 (Malta); European Commission, 'Horizontal or Further Sectorial EU Action on Whistleblower Protection—List of Annexes: Annex 6—Member States' Legislative Framework' (2017) 165 <https://ec.europa.eu/smart-regulation/roadmaps/docs/plan_2016_241_whistleblower_protection_en.pdf> and <https://ec.europa.eu/info/sites/info/files/1-11_annexes.pdf> accessed 13 May 2021.

[164] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

2.4.11 Other Countries

2.4.11.1 Brief Analysis of Luxembourg and Switzerland Cases Involving Falciani and Deltour

Although Luxembourg and Switzerland were not represented as partners in the PROTAX consortium, both countries are important for an understanding of tax crimes in Europe. Also, the cases presented here shed light on some of the central problems that frequently emerge in the prosecution of tax-related criminal activities. Hence, we integrated a brief description of the cases of Falciani and Deltour in our case study analysis as they highlight the shortcomings of legal regulations for whistleblower protection.

Falciani's data revealed that HSBC opened accounts for all kinds of people including those who engaged in illegal activities that will not be subject to taxes in practice.[165] At the same time, Antoine Deltour and Raphael Halet disclosed to the International Consortium of Journalists more than 300 secret multimillion tax deals with Luxembourg and multinational enterprises. These actions exposed Falciani and Deltour to prosecution instead of commendation from the national authorities.

The case in Faciani and Deltour have shown that, piercing the veil of offshore secrecy in tax havens such as Switzerland and Luxembourg, is an extremely difficult and dangerous task. Whistleblowers such as Falciani and Deltour encountered reprisals, harassment, and isolation when they blew the whistle on tax evasion. To date, whistleblowers in the financial industry in tax havens still receive little protection compared to other industries and countries.

Are the means or the ends more important in achieving tax transparency and combatting financial crime? The answer to this depends on a country's values, culture, and history, which shape the legislation, enforcement authorities, and the judiciary. It is regrettable that even in the twenty-first century, whistleblowers are still portrayed as bad even when they disclose information in the interest of the public. Whilst multinational enterprises can take advantage of regulatory and international tax arbitrage, whistleblowers do not benefit from *whistleblowing arbitrage*. Despite some jurisdictions being more sympathetic and protective of whistleblowers such as Ireland, Italy, and Malta, whistleblowers are rather vulnerable and often used as political bargaining

[165] Maciej Walkowski, 'The Problem of Mounting Income Inequalities in the World vis-a-vis the Phenomenon of Harmful Tax Competition. The ICIJ Tracking Down the Greatest Financial Scandals of the 21st Century' (2016) Przegląd Politologiczny 137.

tools. To this end, the culture of protecting bank secrecy must change in these jurisdictions.[166]

Otherwise, tax crimes will continue to be inspired by the lack of transparency and the adverse consequences thereof on societal security will be upon the jurisdictions in question.

2.5 Summary of Key Findings on Case Studies of Tax Crimes

This section summarizes the key findings of the case studies.

2.5.1 Cross-border Cooperation Issues

The cross-border dimensions of tax crimes—including the establishment of trusts and shell companies in various jurisdictions, or the cooperation amongst criminal actors in different countries—calls for stronger cross-border cooperation of LEAs. However, cross-border cooperation is confronted with many challenges. The case studies suggest that these challenges particularly include the following: the incompatible organizational structures of LEAs and the diverse legal frameworks; the lack of trust and resources; the lack of structures in place for cross-border cooperation; as well as jurisdictions with favourable legislation concerning secrecy and agreements to avoid double taxation. Findings from PROTAX suggest that communication and language problems as well as data protection provisions and incompatible legal frameworks, concepts, and definitions can play a significant role in hampering cross-border cooperation in tax matters.[167]

Although sixteen case studies across eleven jurisdictions[168] were conducted during the PROTAX research, this chapter has only carefully chosen eleven case studies representing all the eleven European States in which the individual case studies were selected. The table below summarizes some of the key issues raised in the case studies.[169]

[166] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[167] ibid.

[168] This number includes the fact that Luxembourg and Switzerland are combined as a single case study based on their concentration on the protection of whistleblowers.

[169] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

Table 2.1 Summary of issues as they can be found in eleven case studies

	VAT Carousel	Fraud	Shell Companies	Trusts	Profit Shifting	Enabler	Tax Havens	Whistle blower	Criminal case
Spain		✓	✓			✓	✓	~	✓
Germany						✓	✓		✓
UK		✓			✓	✓			✓
France		✓	✓	✓		✓	✓	✓	✓
Ireland						✓	✓	✓	✓
Austria	✓		✓			✓			✓
Estonia	✓		✓			~			✓
Malta		✓				~			
Portugal			✓			✓	✓		
Italy	✓		✓			✓	✓		✓
Luxembourg					✓	✓		✓	✓
Switzerland		✓	✓			✓		✓	✓

In order to engage in productive prosecution of complex cross-border tax-fraud schemes, it is imperative for national authorities to effectively coordinate their activities over a longer period. In doing so, appropriate evidence will be gathered undercover, and there can be joint collection, analysis, and sharing of information from public registers or tax declarations. Joint investigation teams such as JMLIT in UK will be a potent tool to be used as a platform for such coordination activities whereby there can be certainty and predictability of engagement processes. The existing cross-border cooperation networks in EU and internationally requires continued strengthening exercises.

Tax havens and secrecy jurisdictions represent a worrying feature of jurisdictional recalcitrance in subscribing to a mutually collective rulebook that best serves the interests of all stakeholders. A number of case studies including Germany (*Hoeness*) and Luxembourg/Swiss (*Deltour/Falciani*) show how bank secrecy can facilitate tax crimes. There are obviously many more non-tax haven/non-secretive jurisdictions than tax haven/secretive jurisdictions. The majority countries should agree to use a collective force such as hard-hitting sanctions against secrecy jurisdictions. However, trust and low-capacity issues (promoted by resource constraints) sometimes challenge even those in non-tax haven/non-secretive jurisdictions.

Greater transparency in all engagements and severe punishment against partners that breach trust could be reliable mitigating factors to promote healthy cross-border cooperation. At the same time, means can be found to give targeting financial leveraging for those that genuinely have not been able to build their capacity in, for instance, secure transmittal of information or hiring of the needed experts in the prevention, investigation, and prosecution of tax crimes. An equally important issue worthy of consideration is the inter-agency domestic cooperation issues whereby internal organizational arrangements make it difficult to achieve effective domestic cooperation. When domestic cooperation fails, it is hardly possible for any meaningful cross-border engagement.[170]

2.5.2 Diversity and Complexity of Forensic and Juridical Methods

Complex and diverse methods and structures significantly hinder the efforts to tackle tax crimes across all the European States, as criminals continue to

[170] ibid.

complicate and broaden their scope of operations. However, law enforcement is lagging behind in developing sophisticated systems to confront the sophistication by the criminals. This is partly due to limited resources (human, financial, technology) at the disposal of law enforcement and partly due to ineffective cross-border cooperation. For instance, six of the individual case studies show complex methods such as shell companies and trusts. Four of the case studies involve a VAT Carousel. In fact, Missing Trader VAT-Fraud Schemes have been a great concern to most jurisdictions in Europe as they can cost national treasuries greatly.[171]

2.5.2.1 Other Key Findings

- Tax evasion is considered in different criminal codes. However, there is no universal or a common EU definition. We agree with the OECD[172] that common approaches in criminalizing and defining tax offences can facilitate cooperation in areas such as information exchange and mutual legal assistance. Consolidation of legal frameworks is also imperative in this direction.
- Technological innovation that makes development, processing, tracking/monitoring, and delivery of both digital assets and connected-digital assets will generate better outcomes for counter-tax crime measures.[173] The case study in Estonia has, for instance, shown how the country is pioneering electronic solutions to tax fraud—which generate considerable successes.
  - Weak whistleblower protection regime. One of the key findings is that many jurisdictions still do not have comprehensive standalone whistleblower protection regime, and that tax crimes would suffer a significant blow when there is greater whistleblower protection.
  - The thin line between tax crime and tax avoidance as well as (aggressive) tax planning finds its way into the difficulty in differentiating between administrative jurisdiction and criminal jurisdiction even during trial process, as reflected in the case study of France (Wildenstein). More proactive efforts should be made by stakeholders to clearly demarcate these zones of confusion.

[171] ibid.

[172] OECD, *Fighting Tax Crime: The Ten Global Principles* (OECD Publishing 2017); OECD, *Fighting Tax Crime: The Ten Global Principles: Country Chapters* (2nd edn, OECD Publishing 2021).

[173] See OECD, *Artificial Intelligence in Society* (OECD Publishing 2019).

- The criminal burden of proof is often difficult to satisfy during prosecution. This situation makes civil action a more attractive option for law enforcement action. Associated with the burden of proof is the difficulty to demonstrate an intention to evade tax payment in order to meet the threshold of evidential value for proving an accused taxpayer guilty.
- Systematic tax evasion carried out over a number of years can prove more difficult to prosecute than a single fraudulent arrangement or transaction. Therefore, it is best to arrest the evasion situation early than later in order to gain relatively easy access to the right information and evidence for prosecution.
- Enablers such as accountants and lawyers have confusing roles—to help their clients (who might want to do unlawful things) and to share information on unlawful acts (confided to them by their clients) to law enforcement for public interest or in compliance with the legal obligation to share such information. It is, therefore, imperative to define clearly the role and legal responsibility of professional enablers in prosecuting tax crimes.[174]

2.6 Approaches to Tax Crimes: Voices of Stakeholders

Focus groups[175] conducted by PROTAX[176] revealed the following views. Some of these views confirm the findings from the case studies.

2.6.1 Perception

The perception of tax crimes by the public and LEAs requires a change in the sentencing culture of the judiciary. There should also be more transparency regarding the underlying data of cases to convey the seriousness of this type of crime. The media is a useful forum to push for such changes through adoption of a more informed reporting style about tax crimes as opposed to sharing more of cases that only have a scandal associated thereof.

[174] Umut Turksen and others, 'Case Studies of Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D1.2, October 2018).

[175] The focus groups were drawn from ten European States, involving about 100 experts from relevant national stakeholder groups. The countries were Austria, Czech Republic, Estonia, Finland, Germany, Ireland, Italy, Malta, Portugal, and the United Kingdom.

[176] Fanou Rasmouki and others, 'Approaches to Tax Crimes in the European Union' (787098 PROTAX EU H2020 Project D2.3, October 2019).

2.6.2 Prosecution Procedures

LEAs are often faced with practical difficulties associated with prosecution procedures. Prosecution procedures, therefore, need to be made much clearer and usable during prosecution.

2.6.3 Enforcement Powers

Certain legal powers of LEAs should be strengthened or fine-tuned to allow the LEAs to effectively deploy these powers.

2.6.4 Resources

Anything without enabling resources can easily turn to nothing. Authorities need to devote more resources to tax evasion perpetuated by high net worth individuals without undue reliance on pursuing smaller tax fraud cases or large corporations. LEAs across Europe face various types of resource constraints that prevent them from pursuing cases. In addition to the need for increased capabilities, a strategy defining priorities would help lessen the effect of these constraints.

2.6.5 Technology

New technologies with competence to dismantle the sophistication by tax criminals must be sought for and deployed. For instance, technologies such as artificial intelligence and data analytics tools can hugely empower investigators to procure more accurate and credible information and evidence for successful prosecution.

2.6.6 Cooperation

Both inter-agency domestic cooperation and international cooperation are needed in tackling tax crimes, and must therefore be improved. Domestic inter-agency cooperation can be enhanced by providing adequate oversight and partnerships with the private sector. There is a need to move away from a mere box-ticking compliance approach. International collaboration would

greatly benefit from opportunities for LEAs to attend common trainings at the EU level and the creation of a platform where experience and expertise can be exchanged.[177]

2.7 Conclusion

Case studies are critical to the analysis of how tax experts and other stakeholders engaged in working on cases within and across institutional boundaries do grapple with their toolkit of regulations under given constraints of time, information, and communication, human and other resources. The sixteen cases from eleven European States[178] involving diverse forms of tax offences and stakeholders revealed the involvement of shell companies, VAT-fraud, VAT-carousels and trusts. Different forms of fraud are also found as well as profit shifting across the sectors of the economy. Tax havens were found in most of the cases while almost all of the cases engaged professional enablers in committing the crimes. Whistleblowers played a role in initiating some of the cases. However, in most of the cases where whistleblowers were involved, the needed legal protection was not available to them. The cases studies gave special attention to the diversity and complexity of inter-agency and transnational cooperation in tackling tax crimes and IMFs. The LEA frameworks in various jurisdictions have presented weaknesses, strengths, and potentials as well as opportunities with the counter-crime ecosystem. Although many jurisdictions analysed provide appropriate frameworks for cooperation to combat tax crimes and IMFs, other jurisdictions do not have such organizational structures. This dynamic applies to the legal frameworks for corporate liability in the different European States.

Cooperation and information sharing are key determinants of success in cross-border counter crime framework. In order to tackle tax crimes as a cross-border phenomenon, one of the most crucial measures is to ensure that jurisdictions foster and enhance effective information exchange among themselves. Therefore, all stakeholders must promote effective domestic and international cooperation in approaches towards mitigating tax crimes and IMFs as a continual exercise.

[177] ibid.
[178] Eleven case studies have instead been covered in this chapter (and briefly discussed).